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IMPLEMENTING THE MOBILITY DIRECTIVE IN EU MEMBER STATES

Perspectives from Italy, France, the Netherlands, Germany, UK, Portugal and Spain

This guide is a joint product of leading independent law firms in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom.

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Important note

This guide is intended to provide a summary overview of implementation law and practice related to the Mobility Directive.

The information contained in this guide is not intended to be, and should not be used as a substitute for, independent legal advice in respect of any matter, including but not limited to general questions regarding law on Cross-border transactions and specific questions relating to a particular transaction.

It should be noted in particular that there are a number of areas of detail relating to the law presented in this guide where there is uncertainty as to how the law of the various Member States should apply. In addition, to date there have been limited instances of these laws being used to effect Cross-border transactions. This guide therefore provides an overview of the law as it stands and our current views on its interpretation. The areas of uncertainty may be subject to further interpretation as the law is applied to future transactions.

Upon request, the firms listed at the front of this guide would be pleased to provide advice on general queries concerning the Mobility Directive and its transposition in the Member States governed by this guide, as well as on specific transactions.

The information contained in this guide is given as at 1 October 2024. Updates to the information contained in this guide may be requested from the relevant firms; however, the firms are under no obligation, and have no responsibility, to provide updates to any such information in the absence of a specific and agreed request.

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1. INTRODUCTION

The Mobility Directive (Directive (EU) 2019/2121) establishes the legal framework that applies to Cross-border conversions, mergers and divisions of limited liability companies governed by the laws of the Member States. The Mobility Directive was introduced to promote the freedom of establishment of these companies within the internal market, while also strengthening the rights of the company's stakeholders, such as members, creditors and employees.

This guide aims to provide an overview of the legal requirements included in the transposition laws of (i) Italy, (ii) France, (iii) the Netherlands, (iv) Germany, (v) Spain, and (vi) Portugal, and to highlight certain key issues that we foresee will arise in practice in applying such transposition laws. We also provide certain considerations from a United Kingdom perspective.

The guide is jointly produced by our Best Friends firms, consisting of BonelliErede in Italy, Bredin Prat in France, De Brauw Blackstone Westbroek in the Netherlands, Hengeler Mueller in Germany, Slaughter and May in the United Kingdom, and Uría Menéndez in Spain and Portugal. All are market leaders in their respective jurisdictions. We regularly work together, including on Cross-border transactions such as those covered by this guide.

If you would like to discuss any of the information contained in this guide, or require further information, please get in touch with your usual contact person at the relevant firm.

2. EXECUTIVE SUMMARY AND KEY ISSUES IN PRACTICE

The Mobility Directive establishes a common framework for conversions, mergers and divisions between limited liability companies in the Member States. Naturally, the Mobility Directive allows that, in certain respects, each Member State may opt for different alternatives in its transposition laws. As will be further described for each Member State (see section 3 below) the main elements which, following the entry into force of the Mobility Directive, must be taken into consideration when carrying out a conversion, merger or division between limited liability companies of the Member States are as follows.

A - Scope of the Mobility Directive

Mandatory provisions on this matter

The Mobility Directive **applies to:**

- **Conversions, mergers and divisions** of limited liability companies incorporated under the law of a Member State and having their registered office, central administration or principal place of business within the European Union (a) into limited liability companies governed by the law of another Member State, in the case of conversions; and (b) provided that at least two of them are governed by the laws of different Member States, in the case of mergers and divisions.

The Mobility Directive **is not applicable** in the following cases or circumstances:

- Cross-border transactions involving **a company the object of which is the collective investment of capital provided by the public**, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed out of the assets of that company.
- Companies **in liquidation** which have **begun to distribute assets** to its members.
- Companies subject **to resolution tools, powers and mechanisms** provided for in Title V of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23.

A - Scope of the Mobility Directive (cont.)

Optional provisions on this matter

Member States may **decide not to apply** the Mobility Directive in the following cases or circumstances:

- Companies which are the subject of insolvency proceedings or subject to preventive restructuring frameworks.
- Companies which are the subject of liquidation proceedings (provided that they have not begun the distribution of assets).
- Companies which are the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU or in point (48) of Article 2 of Regulation (EU) 2021/23.

A - Scope of the Mobility Directive (cont.)

Main particularities of the Implementation Acts (by country)

ITALY	In principle, the Italian Implementation Act **does not allow** Cross-border transactions involving companies in pre-crisis or insolvency proceedings; and Cross-border transactions involving companies under voluntary liquidation procedures (as long as the liquidation activities are initiated).
FRANCE	Companies that are in insolvency proceedings, restructuring frameworks, or other liquidation processes **are not expressly excluded** from the scope of Cross-border transactions **except for** companies in liquidation if the distribution of their assets has begun. Generally, reasons for initiating insolvency proceedings may lead to a separate assessment as part of the anti-abuse test.
THE NETHERLANDS	Cross-border transactions involving companies in insolvency proceedings (i.e., specifically concerning a company in bankruptcy or in suspension of payments) are in principle **not allowed**. An exception is the case where the company being divided in an insolvency procedure becomes sole member (shareholder) of the acquiring companies.
GERMANY	Companies that are in insolvency proceedings, restructuring frameworks, or other liquidation processes **are not categorically excluded** from the scope of Cross-border transactions. However, the reasons for initiating insolvency proceedings may lead to a separate assessment as part of the anti-abuse-test.
SPAIN	Cross-border transactions involving companies in liquidation (save for those cases in which the equity distribution has started) or subject to insolvency proceedings or a restructuring plan **are allowed,** provided that the legislation of the other participating companies so permit. However, there is an exception as Cross-border conversions cannot be carried out by companies in liquidation affected by insolvency proceedings (*liquidación concursal*).

A - Scope of the Mobility Directive (cont.)

Main particularities of the Implementation Acts (by country)

PORTUGAL	The rules of the Portuguese Implementation Act concerning Cross-border conversions **do not apply** to companies which are the subject of: (i) insolvency proceedings or subject to preventive restructuring frameworks; and (ii) crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.

B - Corporate process for Cross-border transactions

Mandatory provisions on this matter

Preparatory Phase	The administrative or management body of each of the companies involved in the Cross-border transaction shall draw up: (i) The **common draft terms** of such transaction. The specific contents of the common draft terms will depend on the specific transaction to be implemented (i.e., merger, division or conversion). (ii) A **report for members and employees** explaining and justifying the legal and economic aspects of the transaction, as well as explaining its implications for the employees. The section of the report for members shall **not be required** where **all the members of the company have agreed to waive** that requirement. The sector of the report for employees shall **not be required** where a company and its subsidiaries, if any, **have no employees** other than those who form part of the administrative or management body. An independent expert report intended for members shall be drawn up for each company involved in the Cross-border transaction (in case of joint request a single written report may suffice). The report shall in case **include the expert's opinion on whether the cash compensation and the share exchange ratio are adequate**. The independent expert report **shall not be required** if **all the members** of each of the companies involved in the Cross-border transaction **have so agreed.**
Disclosures	**Not less than six weeks before** the date of the general meeting convened to approve the relevant transaction, **the report or reports** (i.e., those to be issued by the administrative or management bodies) shall be made **available electronically**. **At least one month before** the date of the general meeting convened to approve the relevant transaction, the following documents must be disclosed and made publicly available **in the register** of the Member State: **the common draft terms;** and a **notice informing** the **members, creditors and representatives of the employees**.
Decision-making and implementation	• *Decision-making*. As a general rule, the Cross-border transaction must be approved by the **general members meeting** of each of the companies involved. However, the Mobility Directive does not require the approval by the general members meeting in certain intra-group scenarios. • *Implementation*. Once the Cross-border transaction is approved: – Within **three months** from the relevant filing, the designated public authority of the departure Member State shall issue a pre-transaction certificate attesting to compliance with all relevant procedures and formalities in such state. – Once the pre-transaction certificate is issued, the relevant public authority of the destination Member State shall register the transaction.

Optional provisions on this matter

Preparatory Phase	Member States **may exclude** single-member companies from the: • preparation of the **report of the administrative or management body** on the Cross-border transaction; and • examination and **report to be issued by an independent expert** on certain aspects of the Cross-border transaction.
Disclosures	Member States **may require** that **the independent expert report be disclosed** and made **publicly available**. Member States **may exempt** companies involved in the Cross-border transaction from **disclosing the relevant information in the register**, where, for a continuous period beginning at least one month before the date fixed for the general members meeting, those companies **make the relevant documents available on their websites** free of charge to the public. Member States **may require**, in addition to other due disclosures, that the **relevant documents** of the transaction be **published** in their **national gazette or through a central electronic platform**.
Decision-making and implementation	• *Decision-making*. As a general rule, Member States **shall ensure** that the approval of the Cross-border transaction by the general members' meeting requires a majority of **not less than two-thirds but not more than 90% of the votes**. • *Implementation*. – Member States **shall designate** the court, notary or other public authority competent to scrutinise the legality of the Cross-border transaction and to issue the pre-transaction certificate. – Member States **may include** the satisfaction or securing of pecuniary or non-pecuniary obligation due to public bodies among the obligation to be scrutinised in the context of the issuance of the pre-transaction certificate.

B - Corporate process for Cross-border transactions (cont.)

Main particularities of the Implementation Acts (by country)

ITALY	• The Italian Implementation Act exempts companies from the obligation to prepare the administrative or management body report if all members decide so. However, **the independent expert report is still required**. • The public notary is the relevant Italian authority to scrutinise and issue (within a **30-day period** from the receipt of the filing) the **pre-transaction certificate**.
FRANCE	• In addition to the disclosures with the commercial court (i.e., register for the purposes of the Mobility Directive), the notice of publication of the relevant documents will be forwarded to the **Official Bulletin of Civil and Commercial Announcements** (*BODACC*) and to the Bulletin of Mandatory Legal Notices (*BALO*) if the shares are admitted to trading on a regulated market. • In French joint stock companies (SA), the **decision-making** authority **could be delegated** by the extraordinary general meeting to the board of directors as appropriate, in merger and division Cross-border transactions. However, this delegation of authority is excluded in case of Cross-border transformation. • In French joint stock companies (SA), the legal representative **must execute a "declaration of compliance"** regarding the transaction, mentioning all the relevant steps and indicating that the transaction has been implemented in compliance with the laws and regulations. • The clerk of the commercial court is the competent authority in France to scrutinise the transaction and issue the pre-transaction certificate. In principle, the certificate will be issued **within a three-month period** by the clerk, which could be extended for additional periods for a total maximum assessment period of **eight months as from the filing date. The clerk can request additional information to be provided.**

B - Corporate process for Cross-border transactions (cont.)

Main particularities of the Implementation Acts (by country)

THE NETHERLANDS	• The Implementation Act **does not include the Member State option to exempt companies from disclosure requirements** in respect of (i) the common draft terms; and (ii) the company's notification to members, creditors and representatives of the employees**, when the company makes these documents available free of charge on its website**. • The **civil-law notary** is the relevant Dutch authority to scrutinise and issue the pre-transaction certificate. In addition to the mandatory information required under the Mobility Directive, **additional information must be provided**, including on (i) the number of employees at the time of the preparation of the common draft terms, (ii) the existence of subsidiaries and the domicile of these subsidiaries, and (iii) the fulfilment of commitments to public authorities.
GERMANY	• The **common draft terms must be notarised** by a German notary public if a German company is involved or if Germany is the departure state (i.e., in case of conversions). • The Implementation Act **does not include the Member State option to exempt companies from disclosure requirements** in respect of (i) the common draft terms and (ii) the company's notification to members, creditors and representatives of employees, when the company **makes these documents available free of charge on its website**. • The **competent authority to scrutinise** the legality of the transaction is the **register court** of the respective German entity.

B - Corporate process for Cross-border transactions (cont.)

Main particularities of the Implementation Acts (by country)

SPAIN	• The **common draft terms must include proof that the Spanish company is up to date on its tax and social security obligations** by virtue of a valid certificate issued by the corresponding authority. • The common draft terms, the report of the independent expert and the notice to members, employees and creditors about the Cross-border transaction shall be made **available on the corporate website or, in the absence of it, filed with the Commercial Registry**. The report of the administrative or management body shall be made available at least six weeks in advance **on the corporate website or, in the absence of it, electronically**. • Spanish Commercial Registries are the Spanish authority to entrusted with scrutinising the legality of the transaction. The Commercial Registry must issue the pre-transaction certificate within **three months** of receiving the complete application. Note that **this period may be extended at the Commercial Registry's discretion in the event the transaction is considered complex**.
PORTUGAL	• The common draft terms shall be registered with the Portuguese Commercial Registry Office and immediately **disclosed through the corresponding online platform**. • The Portuguese Commercial Registry Office is the Portuguese authority entrusted with scrutinising the legality of the transaction. The Commercial Registry must issue the pre-transaction certificate within **three months** of receiving the complete application.

- To this end, the Portuguese Commercial Registry Office may consult other competent authorities, including those of the Member State of the company which will result from the Cross-border transaction (if it is not Portugal), obtain the necessary information and documents from those authorities and from the involved companies, and call in an independent expert.
- The abovementioned 3-month period **may be extended at the** Portuguese Commercial Registry Office**'s discretion if it is necessary to review additional information or to carry out other investigative measures.**

C- Protection of members

	Mandatory provisions on this matter
Disposal right	• *Basic features of the cash compensation*. Member States **shall ensure** that **at least the members of the companies who voted against** the approval of the common draft terms have the **right to dispose of their shares for adequate cash compensation**, provided that, as a result of the transaction, **they become members of a company governed by the law of a Member State other than the Member State of their respective company**. • *Terms*. (A) Exercising the right. Member States shall establish the period within which the legitimate members have to declare their decision to exercise the right to dispose of their shares. The period shall not exceed **one month** after the general members meeting. (B) Payment. Member States shall also establish the period within which the cash compensation is to be paid. That period shall not end later than **two months** after the Cross-border transaction takes effect. • *Potential claims*. Member States shall ensure that any members who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered has not been adequately set**, are entitled to claim addition cash compensation before the competent authorities**. Member States shall establish a time limit for such claims. Member States **shall ensure** that such claims are settled under the local law and jurisdiction of the claimant.
Exchange ratio	• *Basic features of potential challenges with respect to the exchange ratio*. Member States **shall ensure** that members of the companies who did not have or did not exercise the right to dispose of their shares, but **who consider that the share exchange ratio set out in the common draft terms is inadequate**, may dispute that ratio and **claim a cash payment**. Member States **shall ensure** that such claims are settled under the local law and jurisdiction of the claimant. The limit for these proceedings will be the one provided for in the relevant national law, and **such proceedings shall not prevent the registration of the transaction**. The decision shall be binding on the company resulting from the transaction.

C - Protection of members (cont.)

Optional provisions on this matter

Disposal right	• *Legitimate members*. Member States **may also provide** for **members other than those who voted against the transaction to have the right** to dispose of their shares. • *Formalisation*. Member States **may require** the express opposition to the common draft terms, the intention of the members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general members meeting. • *Potential claims*. Member States **may provide** that the final decision adopted by a court (i.e., pursuant to a specific claim) to provide additional cash compensation **is valid for all members** of the company concerned who have declared their decision to exercise the right to dispose of their shares.
Exchange ratio	*Basic features of potential challenges with respect to the exchange ratio* Member States **may provide** that the share exchange ratio established by a court (i.e., pursuant to a specific claim) is **valid for any members** of the company concerned who did not have or did not exercise the right to dispose of their shares.
Payment in kind	The Mobility Directive establishes that Member States **may also provide** that the company resulting from the Cross-border transaction can provide shares or other compensation instead of a cash payment. It is unclear whether this rule applies only to the cash compensation arising from the disposal of the shares or also in cases of claims relating to the exchange ratio.

C - Protection of members (cont.)

Main particularities of the Implementation Acts (by country)

ITALY	• *Disposal right*. – The request by the members shall be submitted to the company within **15 days** of filing date with the companies register of the members meeting decision and in any case within **one month** of the date of the members meeting resolution. – The deadline for the payment of the compensation is no later than **two months** after the Cross-border transaction takes effect. – Members may challenge the compensation, asking the local Court to appoint another independent expert (the initial compensation must be supported by an independent expert), that will issue a fairness opinion within 60 days of the appointment. **Only the members that challenged the initial compensation** would be entitled to the potential additional compensation. • *Exchange ratio*. Members that did not vote in favour of the Cross-border transaction can: *(i)* bring a judicial claim against the company and the independent expert, based on the general provisions of Italian law; or *(ii)* make a claim under the special procedure set forth in the Italian Implementation Act, by asking the combined entity (within **90 days of the effective date** of the Cross-border transaction) to pay an indemnification to compensate for the alleged unfair exchange ratio.
FRANCE	*Disposal right*. – The disposal right benefits also **members without voting rights and members whose voting rights have been temporarily suspended.** – The members requesting application of their disposal right shall give notice to the company within **10 days** following the general members meeting. The company shall make an offer within **10 days of the receipt of the notice** to buy-back their shares. The members shall have a minimum period of **10 days for acceptance of the offer**.

C - Protection of members (cont.)

Main particularities of the Implementation Acts (by country)

FRANCE (cont.)	– The payment of the cash compensation shall be made within the **two months** following the date that the transaction becomes effective. – The members have the right to object to the amount of compensation before the Commercial Court of the registered office of the company, within the period fixed by the company to accept the offer (minimum **10 days** from the day of the receipt of the offer). The Court will designate an expert to determine the additional compensation. Such decision is definitive. Only the members that challenged the initial compensation would be entitled to the potential additional compensation. • *Exchange ratio*. – The right to challenge the exchange ratio is **not applicable in Cross-border transformations**. – It is **not provided that additional share/capital contribution could be requested instead of cash** compensation. – The right to contest the exchange ratio **is available to shareholders who have not exercised a withdrawal right** (i.e., whether they have approved the transaction or not). Following initiation, all shareholders, not just those contesting the exchange ratio, must be involved in the proceedings. – The judicial request for cash compensation must be made within **10 days** from (i) the date of the receipt of the buy-out offer for the members who have not exercised their disposal right, or (ii) the decision of approval of the Cross-border transaction by the general meeting for the members without the disposal right.
THE NETHERLANDS	• *Disposal right*. – The right to request (additional) cash compensation **is also open to holders of non-voting shares and to holders of listed depositary receipts** for shares in a public limited liability company. – The request by the members shall be submitted electronically to the company within **one month** of the decision on the Cross-border transaction.

C - Protection of members (cont.)

Main particularities of the Implementation Acts (by country)

THE NETHERLANDS (cont.)	– The deadline for the payment of the compensation is no later than **two months** after the Cross-border transaction takes effect if the common draft terms determine the compensation can be paid after the Cross-border transaction takes effect. – Members may challenge the compensation, submitting a request to the Enterprise Chamber of the Amsterdam Court of Appeal for additional cash compensation, to be determined by one or more independent experts. The determination made by such experts will be applicable to all holders of shares of the same class who have exercised the right of disposal. • *Exchange ratio*. – The members must submit the request to have the exchange ratio amended within **one month** after a decision has been taken on the common draft terms. This request cannot result in an adjustment of the exchange ratio to the detriment of the requesting member. – The determination made by the independent experts will be applicable all holders of shares of the same class who do not have the right of disposal or have not exercised the disposal right.
GERMANY	• *Disposal right*. – The members shall (i) notify the company of their intention to sell their shares no later than **one month** after the day of the general members meeting approving the transaction; and (ii) convey a binding declaration of acceptance of the cash compensation offer no later than **two months after** the day of the general members meeting approving the transaction. – The deadline for the payment of the compensation is no later than **two weeks** after the Cross-border transaction takes effect. • *Exchange ratio*. Germany has made use of the option for **the company to grant additional shares instead of the additional cash payment**. However, this option is limited to German stock corporations (*Aktiengesellschaft* (*AG*) and *Kommanditgesellschaft auf Aktien* (*KGaA*)) and European stock corporations with registered office in Germany (*Societas Europaea* (*SE*)).

C - Protection of members (cont.)

Main particularities of the Implementation Acts (by country)

SPAIN	• *Disposal right*. – Members with **non-voting shares may also exercise the disposal rights and request compensation**. – These disposal rights may be exercised by the members within a **20-day period** starting on the date the Cross-border transaction was approved at the general meeting. – The payment of the compensation shall be made no later than **two months** after the Cross-border transaction takes effect. – If a member is dissatisfied with the compensation received or offered in the common draft terms, that member may challenge it and request additional cash compensation before the Spanish Commercial Courts within **two months** of the date on which it received – or should have received – the compensation. • *Exchange ratio*. If a member considers the exchange ratio inadequate, such member is entitled, within **two months** of publication of the transaction's approval, file a claim in the corresponding Commercial Court requesting a cash payment, provided that the member did not vote in favour of the Cross-border transaction or holds non-voting shares.
PORTUGAL	• *Disposal right*. – If a member has voted against the proposed Cross-border merger or division, in the context of transactions under which shareholdings are attributed to members in companies governed by the law of another Member State, may demand that the company acquires or causes to be acquired the respective shareholding for an appropriate consideration. – The procedure mentioned above must be carried out within **one month** from the date of the respective resolution approving the transaction.

- *Exchange ratio.*
  - If a member considers the exchange ratio inadequate and votes against it, such member is entitled to apply to the Courts to have said exchange ratio fixed within **six months** from the date of the respective resolution approving the transaction.

D - Protection of creditors

Mandatory provisions on this matter

Member States shall provide for an **adequate system of protection of creditors whose claims antedate the disclosure of the common draft terms** of the Cross-border transaction and have **not fallen due at the time of such disclosure**.

- The common draft terms of the Cross-border transaction **shall indicate** the **safeguards offered** for those creditors, such as **guarantees** or **pledges**.
- Creditors **shall be informed** of (i) the **measures** taken by the respective companies for the exercise of creditors' rights; and (ii) **their right to submit their comments to the common draft terms** prior to the date they are decided upon at the general members meeting.
- Member States **shall ensure** that **creditors who are not satisfied with the safeguards provided in the draft terms of the Cross-border transaction may apply to the relevant administrative or judicial authority for adequate guarantees within 3 months of the disclosure of the common draft terms**.
- **Creditors** shall **credibly demonstrate** that the satisfaction of their rights is at stake due to the Cross-border transaction and that adequate safeguards have not been obtained from the relevant companies.
- Member States **shall ensure** that the **guarantees are made conditional upon the Cross-border transaction being effective** in accordance with the provisions of the Mobility Directive.

D - Protection of creditors (cont.)

Optional provisions on this matter

- Member States may require that the administrative or management body of the relevant company to make a **declaration accurately reflecting their current financial position** at a date not earlier than one month before the disclosure of such statement.
- The statement shall state that, on the basis of the information available to the administrative or management body, and after having made reasonable inquiries, such administrative or management body does not know of any reason why the company would be unable to meet its obligations at the maturity thereof after the effectiveness of the Cross-border transaction.
- The **relevant** regulations **of the Member States** relative to the **fulfilment or guarantee of pecuniary or non-pecuniary obligations owed to public bodies** shall apply to the extent applicable.

D - Protection of creditors (cont.)

Main particularities of the Implementation Acts (by country)

ITALY	The Italian Implementation Act establishes that the **Cross-border transaction cannot be executed before the expiration of a 90-day term for creditors to object the transaction.**
FRANCE	Where applicable, **non-bondholder creditors** (holders of claims arising prior to disclosure of the common draft terms) **and/or representatives of the general body of bondholders may file an opposition to the transaction within three months** as from the date the Cross-border transaction draft terms are made available to the public. If the claim is upheld, the judge orders either the repayment of the debts or the provision of guarantees. In the absence of debt repayment or provision of the ordered guarantees, the Cross-border transaction **is unenforceable against such creditors**. The opposition filed by the creditors does not prevent the continuation of operations. **In addition, they could file an action** in France **against the company before the court in whose jurisdiction the company had its registered office prior to the Cross-border transaction**, no later than **two years** after the implementation of the transaction.
THE NETHERLANDS	It remains unclear whether the **Dutch civil law notary is allowed to issue the pre-transaction certificate before the end of the three-month period for creditors** to oppose the proposed Cross-border transaction.
GERMANY	The **Cross-border transaction cannot be completed before the expiration of the 3-month period for creditors to apply for adequate guarantees**. If a **creditor disputes the guarantees offered and files a claim**, the **Cross-border transaction cannot be completed** before the decision rejecting the application is final, the security specified in the decision has been provided, or the decision partially rejecting the application is final and the security specified in the decision has been provided.

SPAIN	If a **creditor of a Spanish company disputes the guarantees offered and files a claim**, it is **noted in the pre-transaction certificate** from the Commercial Registry. **This does not necessarily hinder Cross-border transactions** but serves as a **caution** to the resulting company, which might need to offer extra guarantees. In Cross-border conversions, **jurisdictional forum is maintained in the previous company's corporate address** (i.e., if Spain is the Member State of origin) **for the two years** following the transaction that was carried out **for the benefit of creditors.**
PORTUGAL	The Portuguese Implementation Act stipulates that, prior to the execution of the transaction, an independent expert's report must be prepared to assess the impact of the transaction on the creditors' rights and to ensure that adequate protective measures are in place. Within three months following the publication of the registration of the common draft terms, creditors are also granted the right to oppose to the operation, provided their claims predate the publication of the merger or division project and have not yet matured, unless they obtain adequate guarantees. Additionally, the Portuguese Implementation Act sets forth the conditions under which companies must offer guarantees to creditors who oppose the Cross-border transaction, establishing that the company may be required to provide guarantees if the creditors can demonstrate that the transaction puts their claims at risk.

E - Employee information rights and employee participation

Mandatory provisions on this matter

A) ***Information and consultation***

- Member States shall ensure that employee's rights to information and consultation are respected in relation to the Cross-border transaction and are exercised pursuant to EU Directives 2001/23/CE, 2002/14/CE and 2009/38/CE.
- Without prejudice to general regime in connection with disclosures (see section 2 above), Member States shall ensure that employees' rights to information and consultation are respected, **at least before the common draft terms of the Cross-border transaction** or the **report of the administrative or management body** are decided upon, whichever is earlier, in such a way that a reasoned response is given to the employees before the general members meeting.

B) Employee participation

- As a general rule, the company resulting from the Cross-border transaction shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office. In a nutshell, this rule does not apply when: (i) the company has an average number of employees in the six months prior to filing of four-fifths of the employee participation threshold applicable under national law; (ii) the destination Member State has a lower level of employee participation; or (iii) the participation of the destination Member State 'favours' domestic employees.
- If one of these exemptions occurs, a Special Negotiating Body (SNB) must be established, with which an agreement on the involvement of employees will be negotiated. The company is not allowed to perform the Cross-border transaction without first entering into negotiations. Negotiations start as soon as the SNB is established and may continue for six months. If no agreement is reached certain standard rules will apply.
- To protect the agreed solution or application of the standard rules, the company is not allowed to remove the participation rights through carrying out a subsequent (Cross-border or domestic) conversion, merger or division within four years. Furthermore, where the company is to be governed by an employee participation regime, it is obliged to take a legal form allowing for the exercise of participation rights.

Optional provisions on this matter

Member States may decide that employee's information and consultation rights apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC.

E - Employee information rights and employee participation (cont.)

Main particularities of the Implementation Act (by country)

ITALY	The Italian Implementation Act **does not provide for a mandatory employee participation regime**, except for certain cases where a Cross-border transaction involves a company that already has such a regime or that employs a certain number of employees.
FRANCE	The **employees' representative body must be informed and consulted prior to the establishment of the report from the management** addressed to the shareholders. The timeline must therefore take into account the time granted to the employee representative bodies. Depending on the social context and number of employees in the French company or if certain exceptions apply (see below), it may be required to establish a Special Negotiating Body (SNB) to determine employee participation rights in the company resulting from the cross-border operation. The French Implementation Act provides that the form of the **surviving company must allow for an application of the rules on employee participation in force** in the Member State where the registered office of the relevant company was established (with exceptions). In the context of its analysis of the compliance of the transaction, the clerk will ensure that the transaction does not aim to deprive employees of their rights regarding "participation" (i.e., the "influence" of employee representatives on corporate affairs).
THE NETHERLANDS	For Dutch companies, a **mandatory employee participation regime** is applicable if the relevant company has a "structure regime", which depends on certain criteria related to the issued capital, the existence of a works council, and the number of employees in the Netherlands and in dependent companies. However, for purposes of Cross-border transactions only the number of employees at the company is relevant.
GERMANY	German limited liability companies or stock corporations **surpassing certain thresholds of employees** in Germany (employees within groups of companies are generally attributed up the chain) must follow a **mandatory employee participation regime.**

SPAIN	**Employee participation in management bodies is alien** to Spanish law, with the exception of European Companies. As in the case of Italy, the Spanish Implementation Act **does not provide for a mandatory employee participation regime**, except for certain cases where a Cross-border transaction involves a company that already has such a regime or that employs a certain number of employees.
PORTUGAL	Participation by the employees of the companies involved in Cross-border transactions is **mandatory** for every company within the scope of applicability of the Mobility Directive. In addition, the general employment rules on employee participation in the event of transfers of undertakings, businesses or parts of undertakings of businesses, notably those resulting from the transposition of Council Directive 2001/23/EC of 12 March 2001, shall be applicable (with exceptions).

F - Anti-abuse test

Mandatory provisions on this matter

- Within the scrutiny process relating to the issuance of the pre-transaction certificate (see section 2 above), Member States **shall ensure** that the competent authority does not issue the pre-transaction certificate where it is determined in compliance with national law that a Cross-border transaction is set up for **abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of European Union or national law, or for criminal purposes**.
- To carry out this assessment the competent authority shall take into consideration relevant facts and circumstances, such as, where relevant and not considered in isolation, indicative factors of which the competent authority has become aware, including through consultation of relevant authorities. The assessment shall be conducted on a case-by-case basis, through a procedure governed by national law.
- As a general rule, the **anti-abuse test will be carried out in three months** (i.e., as part of the issuance of the pre-transaction certificate). However, this period may be extended for a maximum of 3 additional months (or more in case of exceptions in certain Member States apply), if required to complete the anti-abuse assessment.

Optional provisions on this matter

There is a catalogue of additional information that Member States may optionally require to accompany the application for the pre-transaction certificate.

F - Anti-abuse test (cont.)

Main particularities of the Implementation Acts (by country)

ITALY	**Competent authority**: public notary. The criteria for the anti-abuse test **are not clearly defined**, but it is assumed that the general "anti-abuse" rule for tax purposes under Italian law should play a role.
FRANCE	**Competent authority:** clerk of the commercial court. The **scope of the anti-abuse test is not limited to specific scenarios**, but it is implied that **tax evasion is no longer a general presumption of fraud or abuse** against companies considering relocation, unless there is no valid economic reason for the transaction.
THE NETHERLANDS	**Competent authority:** civil-law notary. The scope of the anti-abuse test **is not restricted to particular situations**, but it is stated that the anti-abuse test does not extend to forms of tax planning, i.e., circumventing taxes, although there is debate about this given that the preamble of the Mobility Directive seems to suggest that rationale for the anti-abuse test is also limiting empty shell companies.
GERMANY	**Competent authority:** register court. The scope of the anti-abuse test **includes three default examples that may indicate an abusive purpose and oblige the register court to apply the anti-abuse test**: (i) the negotiation procedure to be conducted pursuant to the Amended Directive has been initiated only at the request of the court; (ii) the number of employees is at least four-fifths of the relevant threshold for company co-determination, no value is created in the target country and the administrative headquarter remains in Germany; or (iii) a foreign company becomes the debtor of occupational pensions or entitlements as a result of the Cross-border transaction and this company has no other operating business.

SPAIN	**Competent authority**: commercial registry. **It remains unclear how this test will be carried out in practice in Spain**, although the Spanish Implementation Act reminds Spanish Commercial Registries that, when interpreting the law, **they must take into account that the freedom of establishment is a fundamental principle of European Union law**.
PORTUGAL	**Competent authority:** commercial registry. **It remains unclear how this test will be carried out in practice in Portugal**, as no additional guidance has yet been issued regarding this test by Portuguese authorities**.**

G - Key expected issues (by country)

ITALY	***Use of the disposal right*** • The **right to request compensation for the shares by exercising the right of disposal may have unintended consequences for listed companies, as members could effectively use such right as a put option**. Namely, members could decide to vote against the Cross-border transaction only to keep the option "open" to liquidate the investment should the stock price fall below the predetermined disposal value (i.e., the six-month average of the stock market price of the shares). • In case of listed shares, for which the calculation of the disposal value pursuant to the Italian Civil Code (equal to the 6-month average of the stock market price) does not require any assessment or third-party valuation whatsoever, the Italian Implementation Act stipulates instead that such value must be accompanied with the fairness opinion of an independent expert to be appointed by the local Court. This inconsistency of the Italian Implementation Act *vis-à-vis* the relevant Italian Civil Code provisions is problematic to the extent that the expert may feel entitled to depart from the legal criteria indicated above. In addition, both such appointment by the local Court and the delivery of the fairness opinion by the independent expert may require an unpredictable amount of time.

G - Key expected issues (by country) (cont.)

FRANCE	***Notion of fraud and employees' consultation rights*** • There are no guidelines describing the notion of "fraud" in the context of the implementation of a Cross-border transaction for the purpose of the anti-fraud/anti-abuse test. Hence, in order to obtain a certificate of compliance by the clerk, the parties shall be particularly attentive to the economic rationale provided. • The information and consultation of the employees' representative body shall be anticipated as its opinion will be required early in the process.
THE NETHERLANDS	***Use of the disposal right*** • The right to request compensation may have adverse consequences for listed companies. **Members of listed companies could effectively use the right to request compensation as a "put option"**. They could decide to vote against the Cross-border merger to keep the option open to withdraw if the stock price would fall below the predetermined compensation.
GERMANY	***Compensation in shares*** • While compensation claims and the accompanying appraisal proceedings have been a well-established component of German transformation law, **courts and companies will face additional challenges when it comes to compensation in the form of additional shares instead of cash**. • The right to choose between cash and shares will have to be exercised already in the common draft terms of the transformation and cannot be made at a later point in time.

G - Key expected issues (by country) (cont.)

SPAIN	***Anti-abuse test and public liabilities*** • Spanish Commercial Registries are entrusted with enforcing the anti-abuse test. Although allocating this task to the Commercial Registries is natural (the registries are also in charge of issuing pre-transaction certificates and scrutinising structural modifications), **Spanish Commercial Registries tend to be highly formalistic in terms of legal interpretations and are not accustomed to this type of open-ended and subjective analyses**; as such, there exists uncertainty as to the methodology they will follow to perform this test. Furthermore, as the stipulated term to perform the review may **exceed six months**, mergers involving Spanish companies might face delays and difficulties as a result. • Spanish companies involved in Cross-border transactions **must also apply for – and obtain – certificates attesting to the company being current on tax and social security obligations** (a new requirement under the Spanish Implementation Act). Therefore, distressed companies might face difficulties when carrying out Cross-border transactions subject to the Spanish Implementation Act.
PORTUGAL	***Anti-abuse test*** • There is no guidance on the application of the anti-abuse test and on those elements that indicate that the transaction is being carried out for abusive or fraudulent purposes or for criminal purposes. In light of this, **we expect a certain degree of discretion by the Portuguese authorities.**

3. COMPARISON OF MAIN PROVISIONS IMPLEMENTING THE MOBILITY DIRECTIVE IN BEST FRIENDS JURISDICTIONS

3.1. Introduction

The below table provides a more detailed overview of how the Mobility Directive is, or will be, implemented in each of the Best Friends' jurisdictions in relation to several main elements.

3.2. Scope of the Implementation Acts

List of companies concerned by the Implementation Acts	
ITALY	The Italian Implementation Act applies to: *(i)* companies characterised by a limited-liability regime for its stockholders organised and incorporated under: *(a)* Italian law, i.e., *società per azioni*, *società in accomandita per azioni, società a responsabilità limitata*, *società cooperative* (as long as *a mutualità non prevalente*, i.e., with non-prevailing mutual purpose), European Companies (SE), and European Cooperative Society (SCE); or *(b)* the law of one of the Member States, provided that the registered office, the central management, or the core business of these companies is located within the EU; and *(ii)* companies characterised by a limited-liability regime for its stockholders with registered office, central management, or core business located outside EU as long as the implementing acts of the Mobility Directive apply to Cross-border transactions involving said companies. SICAVs (*società di investimento a capitale variabile,* investment companies with "non-fixed" share capital) are not covered by the Italian Implementation Act.

FRANCE	The French rules on Cross-border transactions apply to joint stock companies (*société anonyme (SA), société en commandite par actions (SCA) and société par actions simplifiée (SAS)*) and limited liability companies (*société à responsabilité limitée (SARL)*) having their registered office in France in case of Cross-border transactions. The Cross-border transactions are defined as follows: Merger A Cross-border merger is an transaction whereby one or more joint stock companies (SA, SCA, SAS) or limited liability companies (SARLs) with their registered office in France merge with one or more capital companies having one of the forms listed in Annex II of EU Directive 2017/1132 and governed by the law of one or more other EEA Member States. Transformation Cross-border transformation is the transaction whereby a joint stock company (SA, SCA, SAS) or a limited liability company (SARL) registered in France, without being dissolved or liquidated or put into liquidation, transforms into a company with a legal form governed by the law of another Member State listed in Annex II of EU Directive 2017/1132 and transfers at least its registered office to that other Member State, while retaining its legal personality. Division A Cross-border division is an transaction whereby a joint stock company (SA, SCA, SAS) or a limited liability company (SARL) with its registered office in France takes part in a division with one or more capital companies from another Member State with a legal form listed in Annex II of EU Directive 2017/1132.
THE NETHERLANDS	The Dutch rules on Cross-border transactions apply to Dutch public limited liability companies (*naamloze vennootschap*), private limited liability companies (*besloten vennootschap met beperkte aansprakelijkheid)* and to a certain extent to European stock corporations (SE) with registered office in the Netherlands. In addition, capital companies involved in the Cross-border transaction must be incorporated under the law of another EU Member State or the European Economic Area.

GERMANY	The German rules on Cross-border mergers apply to German stock corporations (*Aktiengesellschaft* (*AG*) and *Kommanditgesellschaft auf Aktien* (*KGaA*)), to a certain extent to European stock corporations with registered office in Germany (*Societas Europaea* (*SE*)) and to private limited liability companies (*Gesellschaft mit beschränkter Haftung* (*GmbH*) and *Unternehmergesellschaft* (*UG (haftungsbeschränkt)*)) as transferring or acquiring entities and to German limited partnerships (*Kommanditgesellschaft* (*KG*) or *Offene Handelsgesellschaft* (*OHG*) with up to 500 employees as acquiring entities. The German rules on Cross-border divisions and conversions apply to German stock corporations (AG, KGaA, SE) or limited liability companies (GmbH, UG) as acquiring, transferring or newly formed entities.
SPAIN	The Spanish rules on Cross-border transactions apply only to Spanish public limited liability companies (*sociedades anónimas*), limited partnerships (*sociedades comanditarias por acciones*), which are very rare, and private limited liability companies (*sociedades de responsabilidad limitada)*.
PORTUGAL	The Portuguese rules on Cross-border transactions apply only to public limited liability companies (*sociedades anónimas cotadas*), private limited liability companies (*sociedades anónimas não cotadas* and *sociedades por quotas*) and to limited partnerships with share capital (*sociedades em comandita por ações*).

Specific considerations related to the scope of the Implementation Acts	
ITALY	Under the Italian Implementation Act, Cross-border transactions involving companies in pre-crisis or insolvency proceedings or under voluntary liquidation procedure (as long as the liquidation activities are initiated) are generally not allowed.
FRANCE	The French Implementation Act expands the scope of application which existed prior to the reform in order to authorise mergers/divisions with a cash balancing payment (*soulte*) representing more than 10% of the nominal value or the par value of the shares or capital subscription if permitted by the laws of one or more companies involved in the transaction (this mechanism is not authorised in purely internal transactions). In the case of division, it appears from the wording of the French Implementation Act that it includes the situations where the recipient company is an existing company as well as when the company is newly formed. Extending the scope of application to the existing company in case of a division broadens the scope beyond that of the Directive (Article L. 236-46 of the Commercial Code). The changes made by the French Implementation Act also complete and modernise the regime for mergers, divisions, partial contributions of assets and transfers of registered offices of commercial companies carried out at the domestic level, introducing in particular the partial division regime in a purely national context.
THE NETHERLANDS	Regarding Cross-border divisions, we note that under the Dutch Implementation Act, divisions are only permitted for acquiring companies formed on the occasion of the division. This means that a Cross-border division to an existing company is not possible. The Dutch Implementation Act includes certain exemptions for single-member companies in the preparatory phase of the Cross-border transaction, meaning that these companies are not required to prepare the written explanation for the company's members (the written explanation for employees is, however, still mandatory) and are not subject to mandatory auditor oversight. Cross-border transactions involving companies in insolvency proceedings (which, in the Netherlands, specifically concerns a company in bankruptcy or in suspension of payments) are generally not allowed. An exception is in place in case the company being divided in an insolvency procedure becomes sole member of the acquiring companies.

GERMANY	While the Mobility Directive only covers divisions for the purpose of new formation, the German Implementation Act also covers demergers for the purpose of absorption, provided that all companies involved have fewer employees in the six months prior to the announcement of the draft terms of the demerger than four-fifths of the applicable co-determination thresholds under the law of the transferring company. Companies that are in insolvency proceedings, restructuring frameworks, or other liquidation processes are not expressly excluded from the scope of Cross-border transactions. However, reasons for initiating insolvency proceedings may lead to a separate assessment as part of the anti-abuse test.
SPAIN	Cross-border transactions involving companies in liquidation (save for those cases in which the equity distribution has started) or subject to insolvency proceedings or a restructuring plan are allowed, provided that the legislation governing the other participating companies so permit. However, there is an exception, as Cross-border conversions cannot be carried out by companies in liquidation affected by insolvency proceedings (*liquidación concursal*). The Spanish Implementation Act establishes the possibility of carrying-out specific structural modifications not addressed by the Mobility Directive, such as a spin-off in favour of a newly-incorporated company (i.e., by formation of a new company, or companies) and the global assignment of assets and liabilities (under which the assignor receives cash consideration for the transferred business). Moreover, the Spanish Implementation Act also regulates Cross-border structural modifications with companies outside of the EEA based on a similar approach as those carried out within the EEA. The laws and regulations of the non-EEA jurisdiction will, naturally, need to be reviewed and reconciled to the extent possible with the Spanish rules to allow such transactions in practice. Finally, Spanish law establishes specific simplifications for Cross-border transactions.

PORTUGAL	Pursuant to the Portuguese Implementation Act, its scope of application depends on the type of transaction: (i) Exemption from the application of the rules provided for in the Portuguese Implementation Act: • Companies undergoing liquidation that have begun distributing assets to their members; and • Companies subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014, and in national legislation transposing said Directive into domestic law. (ii) Exemption from the application of the rules concerning Cross-border demergers and Cross-border conversions: • Companies whose object is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. (iii) Exemption from the application of the rules concerning Cross-border conversions: • Companies which are the subject of insolvency proceedings or subject to preventive restructuring frameworks; and • Companies which are the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014.

3.3. Corporate process

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

ITALY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	Cross-border transaction draft terms The board of directors of the companies involved in a Cross-border transaction shall prepare: *(i)* a report (*relazione*), in which the whole transaction and its legal and economic rationale are described; and *(ii)* the draft terms (*progetto*), stating the main terms of the transaction, the impacts on the employees' relationships, and, as the case may be, the amendments to the by-laws. Also, such draft terms shall indicate whether the company has benefited public funding over the last five years. Disclosure obligations A whole set of documents including the directors report, the draft terms, the independent expert report on the exchange ratio/disposal value (as the case may be), and	The decision to implement the Cross-border transaction is to be taken by the members' meeting. This decision requires a majority of at least two-thirds of the votes cast. The articles of association may require a super-majority or that more than two-thirds of the issued capital is represented at the meeting, provided that this super-majority cannot be greater than the 90% of the votes cast.	The Cross-border transaction cannot be executed before the expiration of a 90-day term for the creditors to object the transaction. The public notary is the relevant Italian authority to verify the legality of the Cross-border transaction within a 30-day period after the receipt of the application for the pre-transaction certificate and the relevant documents and information. The degree of scrutiny of the public notary is quite broad in certifying that the Cross-border transaction, based on the information and documents received or acquired, is not carried out for manifestly abusive or fraudulent purposes resulting in the violation or circumvention of a mandatory rule under EU law or Italian law, and that it is not aimed at committing a criminal offense under Italian law.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

ITALY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	the notification to members, employees, and creditors shall be filed with the competent companies' register or published on the company's website ahead of the members' meeting convened to approve the Cross-border transaction. If the employees' opinion on the Cross-border transaction is issued at least 5 days before the members meeting, such opinion must be attached to and published with the directors' report. The Italian Implementation Act exempts companies from the obligation to prepare the directors report if all members decide so. Even so, the draft terms and the independent expert report on the exchange ratio are still required. <u>Employee participation</u> Consultations regarding employee participation must take place in companies		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

ITALY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	with a number of employees above a given threshold in the six months before the disclosure of the draft terms of the Cross-border transaction. For further details, see below the answer specifically related to the employee participation regime.		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	(*NB: the following steps do not describe the process regarding simplified Cross-border transactions, where the remaining company is the sole member of the absorbed company or where the share capital of both companies is owned by the same member or members owning the same proportions of the two companies*) Preliminary Phase A statutory auditor/independent expert responsible for giving an opinion on the transaction (*commissaire à la fusion/ commissaire à la transformation*) shall be appointed by court decision upon the joint request of the relevant companies (the auditor report must be made available at least 30 days before the general meeting). Such person, which shall be chosen on a list of statutory auditors or courts independent experts, must be different from the statutory	Decision-making In principle, the decision shall be adopted at the general meeting in the conditions applicable to amendments of the articles of association (in principle: two-thirds majority). The decision-making authority could be delegated by the extraordinary general meeting to the management body as appropriate, in Cross-border mergers and divisions. However, this delegation of authority is excluded in case of Cross-border transformations. Declaration of compliance. If the French company is a joint stock company (SA), the legal representative must sign a "declaration of compliance" regarding the transaction, mentioning all the relevant steps and indicating that the transaction	Formal filing of the required documents to the commercial court After the approval of the transaction by the general meeting, all the required documents shall be filed with the clerk of the court (incl. the draft terms of the transaction, bylaws of the future company, opinion from statutory auditor, observations by members, creditors, employees, declaration of compliance (for SA only). Control of the documents by the commercial court (certificate of compliance) The clerk of the commercial court is the competent authority in France to verify the legality and conformity of the Cross-border transaction. The clerk takes into account all the facts and circumstances of which it is aware in the course of his control transactions. The clerk may request any information it deems

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	auditors auditing the financial accounts of the company. The employee representative bodies shall be informed and consulted and will be asked to issue an opinion on the transaction. This step shall be anticipated in advance as the opinion must be included in the public disclosures regarding the transaction (it must be made available at least one month before the general meeting). Common draft terms of the cross-border transaction (*projet de fusion/scission transfrontalière*) The management or administrative body of the companies participating in a Cross-border transaction must prepare common draft terms for the said transaction. The common draft terms shall be approved in the same terms by the bodies of all the	has been implemented in compliance with the laws and regulations.	necessary from other competent authorities, including the authority responsible for monitoring the legality of the transaction in the Member State of destination, or request the appointment of an independent expert, whose remuneration is paid by the company. In principle, the certificate of conformity will be issued within 3 months by the clerk, which could be extended for additional periods for a total maximum assessment period of 8 months as from the filing date. At the end of the assessment, the clerk will decide whether to issue a certificate of conformity of the transaction or to refuse to do so. If it considers that the conditions and procedures have not been complied with, it may authorise the company to regularise the situation, if possible, within a reasonable period.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	concerned companies (translations must be provided for filings in the Member States concerned and must specify in the draft which language prevails between the parties). The French company involved in the transaction shall file the common draft terms with the clerk of the commercial court of its registered office one month before the date of the general meeting called to approve the common draft terms of the Cross-border (see below). Disclosures Report to the members and employees (at least six weeks before the general meeting). The managing body shall prepare a report (or 2 separate reports) to the members and to the employees (unless the company and its subsidiaries does not have any		Additional information Where applicable, non-bondholder creditors (holders of claims arising prior to publication of the common draft terms of merger) and/or representatives of the general body of bondholders of the acquiring company could file an opposition to the transaction within 3 months as from the date the cross-border transaction plan is made available to the public. If the claim is upheld, the judge orders either the repayment of the debts or the provision of guarantees. In the absence of debt repayment or provision of the ordered guarantees, the Cross-border transaction is unenforceable against such creditors. The opposition filed by the creditors does not prevent the continuation of operations. In addition, they may file an action in France against the company before the court in whose jurisdiction the company had its registered

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	employee). The economic rationale of the transaction will be particularly important as it will be taken in consideration by the clerk of the court when examining the legality of the transaction with a view to issuing the certificate of compliance. In principle, the report(s) must specify: regarding members: (i) the share exchange ratio and the valuation methods used, which must be consistent for the companies involved in the transaction; (ii) the buyback offer to the members (in application of the disposal mechanism) and the method used to determine it; and (iii) the rights and remedies available to members. - regarding employees: (i) the implications of the transaction on		office prior to the Cross-border merger, no later than two years after the implementation of the transaction.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	employment relations and, where applicable, the measures to be taken to preserve these relations; (ii) any significant changes in the applicable conditions of employment or in the company's locations; and (iii) how the said factors affect the company's subsidiaries. The opinion of the employee representative body (as mentioned in the preliminary phase), if available, shall also be included in the report(s). Notice to the commercial court (at least one month before the general meeting). A notice including certain information about the companies and the transaction, as well as the following documents, shall be filed with the clerk of the commercial court at least		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	one month before the members meeting approving the transaction: - the draft terms of the Cross-border transaction; and - the notice informing members, creditors, and employee representatives that they may submit observations up to 5 working days before the general meeting (such observations will be included in the documents submitted to the commercial court in the context of its compliance control). The court clerk forwards the notice for publication in the Official Bulletin of Civil and Commercial Announcements (*BODACC*) and to the Bulletin of Mandatory Legal Notices (*BALO*) if the shares are admitted to trading on a regulated market. These		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

FRANCE	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	publications must take place after the employee representative body has issued its opinion as mentioned in the preliminary phase. Other disclosures. The report of the statutory auditor, save for the case that all the participating members have waived the reporting requirement, the three last audited financial accounts (and as the case may be, an interim financial statement), shall be made available to the members at the registered office of the company or on its website at least 30 days before the general meeting. Employee participation Employees of the French company shall have rights to participate in the corporate affairs of the company (see section 3.5 on employee participation).		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

THE NETHERLANDS	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	Draft terms of the Cross-border transaction In case a Dutch company is (i) involved with a Cross-border merger, (ii) the company being divided or (iii) converted into a company governed by the law of another Member State, the draft terms that must be prepared by the board(s) of the company or companies involved and, where applicable, an amendment of the articles of association, must in any case be drawn up in Dutch. Disclosure obligations The draft terms, the report of the accountant and the notification to members, employees and creditors must be filed with the trade register and made digitally available. The same documents, including the explanatory statement, the report of the auditor, and any comments submitted by the works council or employee representatives must be filed at	Decision-making The decision to implement the Cross-border transaction will normally be made at the general meeting. This decision requires a majority of at least two-thirds of the votes cast. The articles of association may require a greater majority or that more than two-thirds of the issued capital is represented at the general meeting, provided that (i) it is not required that this majority exceeds 90% of the votes cast and (ii) it is not required that more than 90% of the issued capital is represented at the meeting.	Pre-transaction certificate The civil-law notary is the relevant Dutch authority to examine the legality of the transaction, within three months after the civil-law notary received the application for the pre-transaction certificate and the relevant documents and information. In the case of a Cross-border merger where the acquiring company is a Dutch company, a Cross-border division where a Dutch company is the company being divided or a Cross-border conversion where the Dutch company is converted, the civil-law notary must issue the pre-transaction certificate. To this end, in addition to the information that is required to be supplied under the Mobility Directive, additional information must be provided to the Dutch civil-law notary, including on (i) the number of employees at the time of the

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

THE NETHERLANDS	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	the offices of the company or must be made accessible by electronic means. The Dutch Implementation Act does *not* include the member state option to exempt companies from disclosure requirements in respect of (i) the draft terms and (ii) the company's notification to members, creditors and works councils, when the company makes these documents available free of charge on its website for a certain continuous period. <u>Employee participation</u> If, in the six months preceding the disclosure of the draft terms the company has an average of 80 employees, negotiations should in principle take place. The company must negotiate with employees via a special negotiating body on the applicable employee participation regime (see section 3.5 on employee participation).		preparation of the draft terms, (ii) the existence of subsidiaries and the domicile of these subsidiaries, and (iii) the fulfilment of commitments to public authorities. The Royal Dutch Association of Civil-law Notaries issued its view for the notarial practice on timing of issuing the pre-merger certificate, the pre-conversion certificate and the execution of the merger deed during the opposition period for creditors in certain Cross-border mergers and conversions. Its view is that the Dutch civil law notary is allowed to issue the pre-transaction certificate before the end of the three-month period for creditors to oppose the proposed Cross-border transaction. The Royal Dutch Association of Civil-law Notaries emphasises however that this is not a formal advice to the notarial practice and that notaries are and remain responsible for their own analyses in their cases.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

GERMANY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	Notarisation The draft terms for Cross-border mergers and divisions must be notarised by a German notary public if a German company is involved (for necessary content of the draft term see section 307 para. 2 and 3 German Transformation Act (*UmwG*)). The obligation to notarise applies not only if an existing German company is involved in the merger, but also in the case of a merger to form a new German company. In the case of a conversion the draft terms have to be notarised if Germany is the departure state. The members' declarations of waiver of the report must also be notarised.	Decision-making The resolution to carry out the Cross-border transaction is usually adopted at the members' meeting/general meeting. Subject to stricter provisions in the Articles of Association, the general resolution majorities of the German Transformation Act apply, i.e., for example, a majority of three quarters of the votes cast in case of a limited liability company or a majority of at least three quarters of the capital represented when the resolution is adopted as well as a simple majority of the votes cast in case of a German stock corporation.	The competent authority to examine the legality of the transaction is the register court of the respective German entity.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

GERMANY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	Disclosure obligations Six weeks before the meeting at which the draft terms are to be resolved, the merger report (and if ready, the draft terms) must be made available to the members and employees electronically (section 310 para. 1 UmwG). The Implementation Act does *not* include the Member State option to exempt companies from disclosure requirements in respect of (i) the draft terms and (ii) the company's notification to members, creditors and works councils, when the company makes these documents available free of charge on its website for a certain continuous period. Company pensions and company pension entitlements in the draft terms In addition to the requirements of the Directive, the German Implementation Act		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

GERMANY	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	also requires information to be provided in the draft terms on the effects of the conversion measure on occupational pensions and occupational pension entitlements. The German legislator does not consider it sufficient if information on company pensions and company pension entitlements is only provided in the employee-specific section of the conversion report, as third parties who are not active employees of the company (e.g., pension guarantee associations (*Pensions-Sicherungsvereine*)) may also be interested in this information.		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	Cross-border transaction draft terms The draft terms of the transaction must include proof that the Spanish company is up to date on its tax and social security obligations by virtue of a valid certificates issued by the corresponding authority. Also, the draft terms shall be drafted in Spanish (or a double column format) or subject to a sworn translation (as eventually would need to be filed with the Commercial Registry). The details of the price offered to dissenting members of the Spanish company who vote against the Cross-border transaction and are entitled to the put option must be included in the draft terms. It is unclear whether such price, as set out in the draft terms, must be quantified or merely quantifiable at that point in time (see section 3.4.1 below for further analysis on the put option right). If quantified at the outset, there might be	Decision-making The decision to implement the Cross-border transaction will normally be made member approval at a general meeting (specific exceptions are set out for simplified intragroup transactions). This decision requires a majority of: – at least two-thirds of the share capital in case of limited liability companies (*sociedades de responsabilidad limitada*), – at least an absolute majority if the capital present or represented exceeds 50% of the share capital or at least two-thirds of the capital present or represented if, on second call, at least 25% – but less than 50% – of the subscribed share capital with voting rights is	Pre-transaction certificate Spanish Commercial Registries are the Spanish authority to entrusted with scrutinizing the legality of the transaction. In this regard, the Commercial Registry corresponding to the Spanish company's corporate address must issue the pre-transaction certificate within a three-month period of the Commercial Registry receiving the complete application. Note that this period may be extended at the Commercial Registry's discretion in the event the transaction is considered complex. In addition, the three-month period may be extended for another three months as a result of the abuse test (see section 3.6 below). The pre-transaction certificate will remain valid for a six-month period, which may be extended for another six months.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	scope for arbitrage: if the market price falls below the option price, members would have an incentive to vote against the transaction and exercise the put option. The report of the independent expert must include its opinion on the compensation offered to dissenting members with the put option right. Disclosure obligations The draft terms of the transaction, the report of the independent expert and the notice to members, employees and creditors about the Cross-border transaction shall be made available on the corporate website or, in the absence of it, filed with the Commercial Registry at least one month prior to the date of the general meeting of the Spanish company. Consequently, at that same time, the Spanish company must submit the information set out in article 123.3 or 160g. 3	present, in case of public limited liability companies (*sociedades anónimas*). The articles of association may require a greater majority, provided that (i) the required majority does not exceed 90% of the votes cast and (ii) it is not required that more than 90% of the issued capital be represented at the meeting.	Notarial deed The companies shall notarise the transaction documents before a notary public in Spain. The deed must be executed by the representatives of all merging companies (which would require notarised and apostilled powers of attorney). Note that the Spanish requirements for the notarial deed must be satisfied only with respect to the Spanish company. This would normally require that two different public deeds be granted – one for each jurisdiction – in the event the other Member State also requires a public deed. Legal scrutiny. In case the company resulting from the transaction is governed by Spanish law (e.g., the absorbing company in a Cross-border merger), the Commercial Registry shall, prior to registering the transaction, examine its legality.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	of the Mobility Directive to the relevant Commercial Registry. However, the report of directors shall be made available at least six weeks in advance on the corporate website or, in the absence of it, electronically, which would generally imply that – by that time – the draft terms of the transaction have also already been drawn-up and published. Finally, employee information and participation rights are stricter in Cross-border transactions than in internal transactions. See section 3.5 below for further information. <u>Protection of creditors</u> In Spain, creditors have a three-month period from the publication of the Cross-border transaction draft terms to express their disagreement with the guarantees		<u>Effective date</u> The Cross-border transaction will be effective as of (i) the date it is registered with the relevant Commercial Registry if the resulting company is Spanish (in fact, the effective date is in face the date on which the deed is filed, therefore having retroactive effects upon registration); or (ii) the date determined by the law applicable to the resulting company if the company is not Spanish.

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	offered in the draft terms of the transaction (or lack thereof) and request additional ones. This right is only available for creditors whose right, although it exists, is not due and payable at the time the Cross-border transaction draft terms is published, and provided that they can credibly demonstrate that, as a consequence of the Cross-border transaction, the satisfaction of their claims is at stake (therefore adopting the minimum under the Mobility Directive). Directors are entitled – but not required – to include a declaration in the draft terms of the transaction regarding the lack of necessity to provide guarantees to creditors based on a declaration that accurately reflects the current financial status of the relevant entity as at a date falling no earlier than one month before the disclosure of that declaration; such a declaration would in		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	practice make it harder for creditors to argue that they have right to receive additional safeguards as it would create a more robust presumption that is. If any creditor of the Spanish company has expressed its disagreement with the guarantees offered and eventually has filed a claim, that circumstance will be recorded in the pre-transaction certificate to be issued by the relevant Commercial Registry. This need not necessarily hinder Cross-border transactions; it is merely a mere warning for the resulting company, which may eventually have to grant additional guarantees. In Cross-border conversions, jurisdictional forum is maintained in the previous company's corporate address (i.e., if Spain is the member state of origin) for the two years following the transaction that was carried		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

SPAIN	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	out for the benefit of creditors. However, choice of court agreements and arbitration agreements take precedence over this rule in accordance with their respective provisions. Although the reasoning behind the difference is unclear, this rule is only applicable to Cross-border conversions and not to other transactions (e.g., Cross-border mergers) which makes it even more questionable.		

High-level description of significant items in the corporate process and particularities to implement a Cross-border transaction under the Implementation Acts

PORTUGAL	*PREPARATORY PHASE*	*DECISION-MAKING PHASE*	*EXECUTIVE PHASE*
	I. Drafting of the Cross-Border Transaction Project and of the Reports for Members and Employees The process begins with the boards of directors of the companies involved in the Cross-border transaction collaboratively drafting comprehensive draft terms. These draft terms encompass various elements, including the modalities, motivations, conditions and objectives of the merger. Detailed information about the participating companies, their balance sheets, exchange ratio of the shareholdings (and the evaluation criteria used as a basis) and protective measures shall be outlined in the draft terms. The balance sheets for these purposes may be (a) the balance sheet for the last financial year, provided that it was closed within six months prior to the date of the proposed merger; (b) a	**V. Members' Approval** Members play a pivotal role in the process, as the Cross-border transaction project must be submitted to the members' general meeting of each of the participating companies. The convening notice of such meeting shall be disclosed at least one month prior to the meeting and contain at least the following elements: a) A statement that the project and the attached documentation may be consulted, at the registered office of each participating company, by the respective members and company creditors, as well as by the representatives of the employees or, where there are no such representatives, by the employees of the same participating company;	VI. Registration Procedure The authority responsible for monitoring the legality of cross-border mergers is the Portuguese Commercial Registry. This legality control involves two separate acts: a) The issue of a prior certificate regarding each of the participating companies with registered offices in Portugal, at their request, proving that the acts and formalities prior to the transaction have been complied with; and b) The supervision of the legality of the Cross-border transaction within the scope of its registration, provided that the company resulting from the merger has its registered office in Portugal, which corresponds to the approval of the common Cross-border transaction draft terms and the establishment of the provisions relating to employee participation (if applicable).

	balance sheet as at a date no earlier than the quarter preceding the date of the proposed merger; or (c) the balance sheet for the first six months of the financial year in progress on the date of the proposed merger, if the company is obliged to disclose half-yearly accounts (*i.e.* if it is a public limited company). Additionally, two reports addressed to different stakeholders (which can be prepared as a single report with separate sections) shall be made available setting out the legal and economic grounds for the Cross-border transaction, as well as explaining its implications for the employees and for the future business of each of the companies involved: a) Report for the members, which shall include at least the following elements: • The consideration for the acquisition of the shareholdings to be allocated to the members and the method used to determine it; • The exchange ratio of the holdings	b) Notice to the members and company creditors of the respective participating company, as well as to the employees' representatives or, where there are no such representatives, to the employees of the same participating company, that they may submit comments on the Cross-border transaction project to the company up to five working days before the date set for the general meeting; and c) The date set for the general meeting. The members' general meeting of each of the companies involved in the Cross-border transaction may not resolve on such transaction unless it has been duly informed of (i) the reports for the members and for the employees' representatives or employees (mentioned in **I. to the left**); (ii) the report prepared by the Statutory Auditor or Statutory Auditors Company (mentioned in **II.** to the left); and (iii) the	This control is carried out within a maximum of three months from receipt of the respective request, which is accompanied by all the documents required by law. Once all the legal requirements have been met, the Portuguese Commercial Registry office issues the prior certificate, which is taken as proof that the pre-merger procedures and formalities applicable to the participating company in the respective Member State have been properly carried out, without which the cross-border merger cannot be approved. Once this legality control has been carried out, the application for registration of the cross-border merger must be submitted to the Portuguese Commercial Registry, along with the prior certificate and the common cross-border transaction draft terms approved by the general meeting, within six months of the certificate being issued.

	and, where applicable, the method or methods used to determine it; • The implications of the Cross-border transaction for the members; and • The rights available to members. The board of directors shall be exempted from preparing this report if all members and holders of other securities conferring voting rights of all the companies participating in the Cross-border transaction waive it. b) Report for the employees' representatives (or, if there are none, the employees themselves), which shall include at least the following elements: • The implications of the Cross-border transaction for labour relations and, where appropriate, measures to safeguard such relations; • Any significant changes to the applicable working conditions or to the locations where the company operates; and	comments from the employees' representatives or employees to the Cross-border transaction project, if any (mentioned in c) immediately above).	

	• How the factors set out in the preceding paragraphs affect the company's subsidiaries, if any. The board of directors shall be exempted from preparing this report if the company participating in the Cross-border transaction, together with its subsidiaries, if any, does not have more employees than the members of its board of directors. If until the date of the members' general meeting for approval of the Cross-border transaction the company's board of directors receives a written opinion by the employees' representatives-- or by the employees themselves-- on the matters detailed above, it shall inform the members accordingly and attach such written opinion to the report mentioned in b) above. In this case, and until the same date, the board of directors shall send a reasoned reply to the opinion of the employees' representatives or the employees of the respective participating company.		

	II. Scrutiny by Supervisory Body and Statutory Auditor The board of directors of each company participating in the Cross-border transaction that has a supervisory body shall communicate the draft terms of merger and its annexes to it for its opinion. In addition to, or instead of, in the case of a company that does not have a supervisory board, the communication referred to in the preceding paragraph, the board of directors of each company participating in the Cross-border transaction shall have the corresponding project examined by a Statutory Auditor (*Revisor Oficial de Contas*) or by a Statutory Auditors Company (*Sociedade de Revisores Oficiais de Contas*) independent of all the companies involved in the Cross-border transaction. If all or some of the companies participating in the Cross-border transaction so desire, the examinations referred to in the previous paragraph may be carried out by the same		

	Statutory Auditor or Statutory Auditors Company for all of them or for those that have agreed to this; in this case, the Statutory Auditor or Statutory Auditors Company must be appointed, at the joint request of the companies concerned, by the Portuguese Chamber of Statutory Auditors (*Ordem dos Revisores Oficiais de Contas*). The auditors shall draw up reports containing their reasoned opinion on the adequacy and reasonableness of the exchange ratio of the shareholdings, indicating at least: a) The methods used to define the proposed exchange ratio; and b) The justification for the application to the specific case of the methods used by the boards of directors of the companies or by the auditors themselves, the values found through each of these methods, the relative importance given to them in determining the proposed values and the particular difficulties they have		

	encountered in the valuations they have carried out. The examination of the draft terms of the Cross-border transaction and the reports referred to above shall not be required if all members and holders of other securities conferring voting rights of all the companies participating in the merger waive them. **III. Registration and Disclosure** Upon completion of the scrutiny process, the project of the Cross-border transaction is registered with the Portuguese Commercial Registry Office and immediately disclosed to the public through the corresponding online platform.		

3.4. Protection of members

3.4.1 Members' disposal right and compensation right

The members' disposal right and the members' right to compensation in the Implementation Acts

ITALY	The members that did not vote in favour of the Cross-border transaction may request cash compensation for the shares by exercising their disposal right. This request shall be submitted to the company within 15 days of the filing date with the companies register of the members meeting decision and in any case within one month of the date of the members meeting resolution. The deadline for the payment of the compensation is no later than two months after the Cross-border transaction takes effect. The criteria to determine the compensation for the disposal right (i.e., fair value in case of non-listed shares and 6-month average of the stock market price in case of listed shares) are set forth in the Italian Civil Code (to which the Italian Implementation Act refers). Such determination lies with the directors and is to be made with the advice of both the board of statutory auditors and the auditing firm. In addition, such determination must be accompanied with the fairness opinion of an independent expert (to be appointed by the local Court if the company is a joint stock company—which may take an unpredictable amount of time). Members can challenge the determination of the compensation made by the directors, asking the local Court to appoint another independent expert, who shall issue a fairness opinion on the compensation within 60 days of his/her appointment. Should the Court-appointed independent expert determine a higher compensation, then only the members that challenged the initial determination would be entitled to it.
FRANCE	The disposal right benefits to the members who have voted against the approval of the Cross-border transaction, or the members without voting rights or the members whose voting rights have been temporarily suspended. The members who wish to exercise their disposal right shall give notice to the company within ten days following the general meeting approving the transaction. The company shall make an offer within ten days of the receipt of the notice to buy-back their shares indicating

	the price and the payment method. The intended members shall have a minimum period of ten days for acceptance of the offer. The payment of the cash compensation shall be made within the two months following the date that the transaction becomes effective. It is not standard practice for French companies to include a formula in the articles of association on the basis of which the compensation will be determined. The members have the right to object to the amount of compensation before the commercial court of the registered office of the company, within ten days from the day of the receipt of the offer. The court will designate an expert to determine the additional compensation. The decision is definitive and unappealable.
THE NETHERLANDS	The member that voted against the Cross-border transaction may request, via an electronic address that is provided by the company, cash compensation for the shares (the indemnification). This request must be submitted to the company within one month of the date of the decision on the Cross-border transaction. The deadline for the payment of the compensation is no later than two months after the Cross-border transaction takes effect. Prior to the transposition of the Mobility directive in Dutch law, it was standing practice to including a formula in the articles of association of listed companies on the basis of which the compensation would be determined, aligning the compensation per share with the stock price immediately prior to the Cross-border merger. It is to be expected that this practice will continue under the new regime in a similar fashion. The Dutch legislator has explicitly considered this past practice, and included specific provisions in Dutch law that facilitate the continuation of this Dutch market practice. If the member is of the opinion that the indemnification as proposed is not reasonable, it is allowed to submit a request to the president of the Enterprise Chamber of the Amsterdam Court of Appeal for additional cash compensation, to be determined by one or more independent experts. The determination of the amount of compensation by the independent experts will be applicable to (i) all holders of shares of the same class or designation in the company who have exercised the right of disposal (in the case of indemnification) and (ii) all holders of shares of the

	same class or designation in the company who do not have the right of disposal or have not exercised the right of disposal (in the case of the exchange ratio in the Cross-border merger and division, see section 3.4.2). The Dutch Implementation Act includes that the right to request (additional) cash compensation is also open to holders of non-voting shares and to holders of listed depositary receipts for shares in a public limited liability company.
GERMANY	Members who wish to accept the cash compensation offer must notify the company of their intention no later than one month after the day on which the members of the transferring German legal entity have resolved to approve the Cross-border transaction. If the intention is not communicated in time, the offer cannot be accepted. In addition to the (timely) notification, the binding declaration of acceptance of the cash compensation offer is required. The acceptance must be made no later than two months after the day on which the members of the transferring German legal entity have resolved to approve the draft terms of the merger. A prerequisite for this is that the relevant member has given notice in due time of their intention to accept the cash compensation offer, otherwise he is precluded from the possibility of acceptance. The notification of the intention to accept the offer is not necessary if the member already declares its binding acceptance within one month after the day on which the members of the transferring German legal entity have resolved to approve the Cross-border transaction. The deadline for payment of compensation is only two weeks after the measure takes effect, thus much shorter than the Directive would have allowed. If a member claims that a cash settlement specified in the merger agreement or in its draft is not appropriate, a court will determine the appropriate amount of the settlement upon application. The same applies if the cash compensation has not been offered or has not been offered properly. The appraisal procedure does not prevent the completion of the conversion. The valuation must take place in accordance with the principles of proper business valuation. In this respect, the capitalised earnings method (*Ertragswertmethode*) as laid down in the German auditing standard IDW S 1 has become established in German court rulings. In general, listed companies must be valued at least at their stock market price (3-month VWAP prior to announcement of the transaction) and there is a

	certain amount of debate to what extent companies are entitled to solely rely on stock market price valuation methodologies. Capitalised earnings methods can create challenges if it is not known or accepted in the other country.
SPAIN	Members who voted against the Cross-border transaction or hold non-voting shares may request cash compensation for the shares held (or the shares that voted against the transaction if additional shares are acquired subsequently) if, as a result of the transaction, the company of which they hold shares ceases to be governed by Spanish law. This right may be exercised by the members within a 20-day period starting on the date the Cross-border transaction was approved at the general meeting. The payment of the compensation shall be made no later than two months after the Cross-border transaction takes effect (and no earlier than the effective date of the transaction). Consequently, the resulting foreign company will be obliged to make the payment and there exists some uncertainty as to when the consummation of the sale of the affected shares, and therefore the moment on which the member ceases to be so, occurs (whether immediately before or immediately after consummation of the transaction or even at the time the payment is made). The Spanish Implementation Act establishes that the relevant shares might be acquired by the relevant company itself, the members or third parties proposed by the company. In terms of valuation, the compensation shall be adequate. In issuing its report, the expert must make its assessment isolating the valuation from the impact of the Cross-border transaction itself. With respect to listed companies, the assessment of the compensation by the expert shall be made without taking into account the effects of the transaction on the share price (whether positive or negative). Therefore, these provisions, which relate to the expert's report, might also be seen as a guideline for directors for establishing the compensation. The draft terms of the transaction shall contain the details of the cash compensation offered and the independent expert must give an opinion on it. If a member is dissatisfied with the compensation received or offered in the draft terms of the transaction, that member may challenge it and request additional cash compensation before the Commercial Courts corresponding to the domicile of the Spanish entity within two months of the date on which it received – or should have received – the compensation, even if the resulting company is foreign. Therefore, there is a kind of jurisdictional forum crystallization to resolve on this matter which will bind the foreign resulting entity. It is unclear whether a court

	decision in favour of the challenge will benefit all dissenting members who exercised their put option or only those who actually challenged the exchange ratio before the court.
PORTUGAL	The Portuguese Implementation Act foresees a set of rules aimed to protect the members of the companies participating in a Cross-border transaction: (i) Members who vote against the project of the respective transaction and who consider the amount of the consideration offered for the acquisition of their shares in the project to be inadequate, may apply to the courts to have said consideration fixed within six months from the date of the respective resolution approving the project; (ii) Members who vote against the proposed Cross-border merger or division in the context of transactions under which shareholdings are attributed to members in companies governed by the law of another Member State, may demand that, within one month from the date of the respective resolution approving the project, the company acquires or causes to be acquired the respective shareholding for an appropriate consideration. (iii) Members who vote against the Cross-border transformation project have the right, within one month of the date of the respective resolution approving the project, to sell their shares upon payment of the consideration provided for in the project for the respective transaction. In the context of (i) and (ii) immediately above: • the consideration shall be calculated with reference to the moment of the transaction by a Statutory Auditor appointed for this purpose by mutual agreement or, should it not be possible, by the Chamber of Statutory Auditors (*Ordem dos Revisores Oficiais de Contas*), upon the request of any of the parties. Should any of the parties be unsatisfied with the valuation, it may request a second valuation, in the same terms;

- the right of a member to dispose of a shareholding by any other means shall not be affected by the provisions of the preceding paragraphs, nor shall such disposal, when carried out within the time limit set therein, be subject to the limitations prescribed by the articles of association; and
- the corresponding payment shall occur within six months of the day on which the event giving rise to the payment occurred or took effect.

3.4.2 Exchange ratio	
The right for members to dispute the exchange ratio in the Implementation Acts	
ITALY	In a Cross-border merger, the exchange ratio is subject to the fairness opinion of an independent expert (to be appointed by the local Court if the company is a joint stock company — which, again, may take an unpredictable amount of time). Members that did not vote in favour of the Cross-border merger can: *(i)* bring a judicial claim against the company and the independent expert, based on the general provisions of Italian law on domestic mergers; or *(ii)* make a claim under the special procedure set forth in the Italian Implementation Act, by asking the combined entity (within 90 days of the effective date of the Cross-border merger) to pay an indemnification to compensate for the alleged unfair exchange ratio. Both claims, while pending, do not prevent the Cross-border merger from being consummated and becoming effective. While the judicial claims for unfair merger exchange ratio are common practice under Italian case law, the same is not true for the special claim first introduced with the Italian Implementation Act, whose initial application may thus cause uncertainties, to some degree. For instance, it is not entirely clear on which party lies the burden of proving that the exchange ratio is (or is not) fair.
FRANCE	The members of the French company involved in a Cross-border transaction with issuance of shares/ capital contribution have the right to object to the exchange ratio and request an additional cash compensation if they consider it is insufficient, provided that they have a disposal right or they did not exercise such disposal right. It is not provided that additional share/capital contribution could be requested instead of cash compensation. The request shall be made before the competent court of the registered office of the company in question within 10 days from (i) the date of the receipt of the buy-out offer for the members who have not exercised their disposal right, or (ii) the decision of approval of the Cross-border transaction by the general meeting for the members without the disposal right.

	The right to challenge the exchange ratio only exists for the transactions of Cross-border merger and division and not to transformation nor contribution of assets.
THE NETHERLANDS	The members that have not submitted or did not have the opportunity to submit a request for cash compensation and considers that the proposed share exchange ratio is not reasonable, may request that the exchange ratio is redetermined by one or more independent experts to be appointed by the chairman of the Enterprise Chamber of the Amsterdam Court of Appeal. The member must submit the request to have the exchange ratio amended within one month after a decision has been taken on the draft terms. Both a member of a disappearing company that would acquire shares in the acquiring company in another Member State (but does not wish to exit) and a member of a Dutch acquiring company can submit this request. Same as for the cash compensation for existing members, the opinion of the independent experts will be applicable to (i) all holders of shares of the same class or designation in the company who have exercised the right of disposal (in the case of indemnification, see section 3.4.1) and (ii) all holders of shares of the same class or designation in the company who do not have the right of disposal or have not exercised the right of disposal (in the case of the exchange ratio in the Cross-border merger and division). If the experts have prepared their report in compliance with an agreement to which the company and the relevant members are parties, the determination of the share exchange ratio is only binding on the parties to that agreement. In accordance with the share exchange ratio as determined by the experts, the member will be compensated by additional payment of an amount in cash. This request cannot result in an adjustment of the exchange ratio to the detriment of the requesting member.
GERMANY	The exchange ratio can be challenged in court and an additional cash payment requested. Germany has made use of the possibility for the company to grant additional shares instead of the additional cash payment. However, this option is limited to German stock corporations (*Aktiengesellschaft* (*AG*) and *Kommanditgesellschaft auf Aktien* (*KGaA*)) and European stock corporations with registered office in Germany (*Societas Europaea* (*SE*)). The possibility of granting additional shares must already be declared in the draft terms of the conversion. The procedure does not prevent the completion of the conversion.

	Throughout the appraisal proceedings, members are to be placed in the same position as they would have been in if an appropriate exchange ratio had been applied from the beginning. Based on the originally appropriate exchange ratio, the court must determine the additional amount of new shares to be granted or cash amount, respectively. In the context of this decision, the court has to take into account changes due to subsequent conversion measures as well as capital increases from company funds and capital reductions (section 72a para. 2 UmwG). In practice, appraisal proceedings in Germany tend to last several years and it is to be expected that, even if the appraisal proceedings do not block the entire transaction, they might at least result in certain economic risks which may remain unclear over several years. One additional potential challenge for companies choosing additional shares as compensation is the creation or acquisition of a sufficient amount of shares. There is a certain amount of debate in Germany whether the newly introduced rules in this context (section 72b UmwG) comply with (EU law based) German capital maintenance rules and to what extent these rules will prove to be valid over time.
SPAIN	The exchange ratio must be set based on the fair value of the relevant companies. If a member considers the exchange ratio inadequate, such member is entitled, within two months of publication of the transaction's approval, file a claim in the corresponding Commercial Court – or arbitration tribunal set out in the articles of association – requesting a cash payment, provided that the member did not vote in favour of the Cross-border transaction or holds non-voting shares. The court decision is binding on the resulting company even if it is foreign, although such company may opt to compensate the member making the request with treasury shares (if available) instead of cash. The exchange ratio therefore remains unchanged and the challenge does not interrupt the merger process. We therefore do not expect many issues to arise in connection with potentially diverging decisions. It is unclear whether a challenging being accepted would benefit all members or only those who actually challenged the exchange ratio before the court.

PORTUGAL	In a Cross-border merger, the exchange ratio is subject to a report drawn up by the companies' auditors containing their reasoned opinion on its adequacy and reasonableness, taking into account, when assessing the latter, the possible market price of the shareholdings of the merging companies before the announcement of the transaction draft terms or the value of the companies, excluding the effect of the planned merger, determined according to commonly accepted valuation methods. If a member considers the exchange ratio inadequate and votes against it, such member is entitled to apply to the courts to have said exchange ratio fixed within six months from the date of the respective resolution approving the project. The main challenge foreseen regarding this regime is the lack of certainty in the determination of the value of the shares, as there are no criteria established either in the Portuguese Implementation Act nor in other legal or regulatory instruments (whether hard law or soft law). Therefore, a certain degree of discretion by the Portuguese courts shall be expected when deciding on these situations.

3.5. Employee participation

Employee participation regime applicable to limited liability companies and applicable sanctions if the required negotiation process is not complied with	
ITALY	Italian law does not provide for a mandatory employee participation regime. Nevertheless, the Italian Implementation Act stipulates that Italian companies resulting from a Cross-border transaction must adopt an employee participation regime if one of the companies involved: *(i)* already had an employee participation regime in place; or *(ii)* employed, in the six months before the disclosure of the draft terms of the Cross-border transaction, an average number of employees equivalent to at least four-fifths of the threshold triggering the adoption of an employee participation regime under the applicable law of the relevant Member State. The participation of employees in an Italian company resulting from a Cross-border transaction, and thus their involvement in defining the related rights, must be governed by the procedures and criteria to be agreed upon with the parties stipulating the national collective bargaining agreements applied by the same company. If no agreement is reached regarding such procedures and criteria: • in case of a transfer or a demerger, the regime that applied before the transaction continues to apply; • whereas, in case of a merger, a previous Italian piece of legislation (legislative decree No. 188/2005) vests some specific rights with the employees representatives of the merging companies in relation to the appointment of the board members in the resulting entity. Additionally, for Cross-border mergers, the general rules on employee participation apply in the case of transfers of undertakings, businesses, or parts thereof, i.e., those resulting from the transposition of the Acquired Rights Directive (Council Directive 2001/23/EC of 12 March 2001). <u>Information rights and consultation of employees in Cross-border mergers</u> In addition to the above, an information and consultation procedure must be conducted before the members meeting called to approve the Cross-border transaction, during which employee representatives can submit comments and requests. The procedure lasts up to 45 days and is considered completed at the end of this period even if no agreement is reached.

	Penalties Penalties for breach of an employee participation regime are governed by the previous decree No. 188/2005, according to which, in case of violation of the duty to disclose and/or to conduct a consultation mentioned above, companies are fined up to EUR 18,000 for each breach.
FRANCE	Definition "Participation" under French law means the influence exercised by the body representing the employees (or by the employees' representatives) on the affairs of a company in the following forms: - exercising their right to elect or appoint certain members of the company's supervisory or managing body; or - exercising their right to recommend or oppose the appointment of some or all the members of the company's supervisory or managing body. By allowing this principle to apply automatically, the European legislator has offered a flexible solution for companies while respecting employee participation rights, without having to set up a Special Negotiation Body to negotiate an agreement with employees. Scope of application The rules for participation of employees apply in case of a Cross-border merger, division, and transformation. However, it does not apply to contributions of assets. Regime of employee participation The principle that applies to employee participation in the company resulting from the Cross-border transaction is the mechanism that already applied to Cross-border mergers under French law, i.e., the automatic application of the rules on employee participation in force in the Member State where the registered office of the company resulting from the Cross-border transaction is established.

Exceptions

There are three exceptions to the application of principle above. Article L2372-1 of the French Labor code provides that a Special Negotiating Body, having legal personality, shall be set up as soon as possible after publication of the Cross-border transaction draft terms when one of the following conditions is met:

(a) When at least one of the companies involved in the transaction applies employee participation rules and employs, during the six-month period preceding the publication of the merger draft terms, an average number of employees equivalent to at least four-fifths of the threshold above which the rules on employee participation apply (i.e., 800 employees). (This provision provides a double condition which does not exist in the Directive).

(b) When the company resulting from the Cross-border merger does not guarantee at least the same level of employee participation (assessed according to the proportion of representatives among the members of the board of directors, the supervisory board or in the committee established by the company resulting from the Cross-border transaction) that the level of employee participation which applies to the companies participating in the Cross-border merger. (The provision of the French Implementation Act only applies this exception to the companies resulting from a Cross-border merger. However, the Directive applies this exception to all Cross-border transactions. We understand that it might be a mistake in the French Implementation Act).

(c) When the French company resulting from the Cross-border transaction does not guarantee that the employees of its establishments located in a Member State other than that of destination benefit from the same (participation) rights as those enjoyed by the employees of its establishments located in the Member State of destination. (This provision applies to the cases where the company itself does not offer the required guarantee, while the Directive concerns the cases where it is the national law of the Member State of destination or the national law applicable to each of the beneficiary companies does not offer such a guarantee).

If either of these exceptions apply, a Special Negotiation Body shall be set up. Such body will be responsible to determine, with the corporate officers of the companies involved in the transaction, the condition of employees' participation in the company resulting from the Cross-border transaction.

Procedure for setting up a Special Negotiation Body (SNB)

In case of application of one the exception above, if the company resulting from the Cross-border transaction is French, an SNB having legal personality shall be set up according to the procedure outlined as follows:

(a) Prior notification
The corporate officers of the French company involved in the Cross-border transaction must, within one month of publication of the Cross-border transaction, inform the trade unions or employees of the company, its subsidiaries, and establishments.

(b) Identification of the composition and allocation of the head office on the SNB.
The SNB is made up of representatives of the employees of the companies involved in the Cross-border transaction, and those of their subsidiaries and establishments located in the EEA. The allocation of seats will be made in accordance with French rules.

(c) Election and appointment of SNB members.
Once the number of members has been determined according to the allocation of head offices identified, the employees who will be members of the SNB must be elected or appointed in accordance with the French rules.

French law determines the functioning rules of the SNB.

In the absence of an agreement by the Special Negotiation Body on the choice of the form of employee participation, the corporate officers of the companies participating in the Cross-border transaction determine the form of participation applicable, which will consist either of:

- recommendation for or opposition to the appointment of members of the administrative, managing, or supervisory body,
- election of employee representatives in the administrative, managing, or supervisory body.

Previous examples indicate that the negotiations of the SNB can be implemented relatively quickly and result in an agreement between the SNB and the corporate officers.

Control of the process and sanctions

Employee participation is protected by way of (a) specific right of contestation and sanctions, (b) supervision by the labour inspector, (c) control by the competent authority (d) and protection for the future.

(a) Specific right of contestation and sanctions
- It is possible to object the appointment and election of SNB members before the court.
- Obstructing either the formation of the SNB or the committee of the company resulting from the Cross-border transaction, whether set up by an agreement, or the appointment of their members, is punishable by one year imprisonment and a fine of 7,500 euros.
- Obstructing the transaction of the SNB or the committee aforementioned is punishable by a fine of 7,500 euros. The lawsuit should be filed with the court within 15 days of notification of the appointment to the employer, or within 15 days of being notified of the appointment or election by the employees.

(b) Supervision by the labour inspector

The labour inspector officer must receive the information provided by the company, subsidiary or establishment involved in the Cross-border transaction to certify that the arrangements for employee participation have been determined in accordance with the relevant provisions.

(c) Control by the competent authority

Prior to the execution of the Cross-border transaction, the court clerk responsible for assessing the legality and conformity of acts and formalities must, under his own responsibility, verify that the Cross-border transaction is not being carried out for the purpose of depriving the employees of the French company involved in the Cross-border transaction of their participation rights. Failing which, the clerk may refuse to issue the certificate, thereby preventing the Cross-border transaction from taking place.

(d) Protection for the future

Once the Cross-border transaction has been completed, where an employee participation system exists in the company resulting from the Cross-border transaction, that company is required, for a period of 4 years after the Cross-border transaction, to take the necessary measures to protect employee participation in the event of subsequent national mergers.

THE NETHERLANDS	In principle, the company will be subject to the participation regime of the law of the Member State of the acquiring company or Member State of destination. Structure regime For Dutch companies, a mandatory employee participation regime is applicable if a company has a "structure regime". This will be the case if, during the past three years: 1. the sum of the issued capital of the company and its reserves amounted to at least €16 million; 2. the company has established a works council; and 3. the company and its dependent companies (as defined below) employ at least 100 employees in the Netherlands. For the purposes of the above, "dependent company" means: i. a legal person to which a company or one or more dependent companies, solely or jointly and for its or their own account, contribute(s) at least one half of the issued share capital; or ii. a partnership, a business undertaking of which has been registered in the trade register and for which a company or a dependent company is fully liable as a partner towards third parties for all liabilities. This means that for application of the structure regime, the number of employees is not the only criterion for applicability of employee participation. The European Commission has however confirmed that any other criteria that Member States may have for applying employee participation are not relevant for application of the exemption on the general rule on employee participation as included in the Mobility Directive. Under the structure regime, the works council has a right of enhanced nomination with respect to one-third of the members of the supervisory board and a general right of recommendation for the other two-thirds of the members of the supervisory board. Voluntary structure regime A company that does not fulfil all the aforementioned requirements may choose to have a voluntary structure regime if it has a works council. In such case, the works council has the same enhanced recommendation right as mentioned above.

	Sanctions for non-compliance If a company resulting from the cross-border transaction meets the three aforementioned criteria, the company must register this with the trade register within two months of the adoption of the financial statements by the general meeting. If the company has been registered as such with the trade register for three uninterrupted years, the structure regime is mandatory. Not registering with the trade register while the conditions are met means that the company is committing an economic crime, that can be punished with a fine up to the amount of the fifth category (2023: EUR 90,000). The Works Council and the Chamber of Commerce can also enforce a statement. If the main rule does not apply, negotiations on employee participation in the company resulting from the Cross-border transaction should in principle take place. The company must negotiate with employees via a special negotiating body on the applicable employee participation regime. If this has not taken place, the Dutch civil-law notary cannot implement the transaction.
GERMANY	Scope of application of the German provisions The German regulations on employee participation apply if the resulting converted company has its registered office in Germany. German regulations on employee participation German limited liability companies or stock corporations with (i) more than 500 employees in Germany have to establish a supervisory board with a third of the board being employee representatives and (ii) more than 2,000 employees in Germany have to establish a co-determined supervisory board with equal representation of member and employee representatives. Employees within groups of companies are generally attributed up the chain (with certain limits in case of one-third-co-determination). Thresholds are lower in certain industries (e.g., coal and steel). Sanctions for violations/abuse If the conversion results in an abusive circumvention of employee participation, the Cross-border transaction can be rejected in case of a conversion out of Germany; in case of a conversion into Germany, employee participation can be enforced. A correct composition of the supervisory board can be enforced in court.

SPAIN

Information rights and employee consultation pre-Cross-border transaction

The participation rights of the employees will be determined pursuant to Spanish labour law if the company (or companies) formed by the Cross-border transaction (i) has its registered office in Spain or (ii) provides its services in workplaces located in Spain. Employee participation in management bodies is alien to Spanish law, with the exception of European Companies (*Sociedades anónimas europeas or SE)*.

The Spanish Implementation Act has created a new right to information and consultation pursuant to Spanish labour law.

The most important new right granted to employees is the right to provide comments and opinions regarding the employees' section of the directors' report. At least six weeks before the date of the general meeting at which the transaction is expected to be approved, the directors of the involved company (or companies) shall make the report (or reports) available to members and the (representatives of the) employees, together with the Cross-border draft terms, if available. This information must be made available on the corporate website or, in the absence of it, electronically.

If the directors receive, in due time, an opinion from the (representatives of the) employees, the members shall be informed of that opinion, which shall be attached to the report.

In addition, employees may submit comments on the draft terms of Cross-border transaction no later than five working days before the date of the general meeting at which the transaction is expected to be approved, and members must acknowledge such comments.

Employee participation regime

In the Cross-border merger, the employee participation regime should be accommodated in the resulting company if:

- any company was governed by an employee participation regime, in which case steps must be taken to incorporate the participation regime in the resulting company; or
- in the six months preceding the publication of the common Cross-border merger draft terms, at least one of the companies involved employs an average number of employees equivalent to four-fifths of the applicable threshold for eligibility for an employee participation regime under its internal rules.

PORTUGAL

Participation by the employees of the companies involved in Cross-border transactions in such transactions is mandatory for every company within the scope of applicability of the Mobility Directive. In particular, the Portuguese Implementation Act foresees the following employees' rights in this context, which shall be exercised by the employees' representatives or, if they do not exist, the employees themselves:

a) Consultation of the project: employees shall have the right to consult the Cross-border transaction project, as well as any documentation connected thereto, at the registered office of each participating company;

b) Submission of comments on the project: up to five working days before the date set for the members' general meeting resolving on the Cross-border transaction, employees shall have the right to submit comments on the corresponding project, of which the members are mandatorily informed before such resolution;

c) Consultation of the board of directors' report: employees shall have the right to consult a report prepared by the company's board of directors setting out the legal and economic grounds for the Cross-border transaction, as well as explaining its implications for the employees and for the future business of each of the companies involved, including at least the following elements:

- the implications of the Cross-border transaction for labour relations and, where appropriate, measures to safeguard such relations;
- any significant changes to the applicable working conditions or to the locations where the company operates; and
- how the factors set out in the preceding paragraphs affect the company's subsidiaries, if any.

This requirement is not applicable if the company participating in the Cross-border transaction, together with its subsidiaries, if any, does not have more employees than the members of its board of directors.

d) Drafting a written opinion: until the date of the members' general meeting for approval of the Cross-border transaction and regarding the matters mentioned in c) immediately above, employees shall have the right to draft a written opinion directed at the board of directors, which shall inform the members accordingly and attach such written opinion to its report. In this case, and until the same date, the board of directors shall send a reasoned reply to the aforementioned written opinion.

Additionally, the general employment rules on employee participation in the event of transfers of undertakings, businesses or parts of undertakings of businesses, notably those resulting from the transposition of Council Directive 2001/23/EC of 12 March 2001, in its consolidated version, shall be applicable, unless *(i)* at least one of the participating companies has, during the six months preceding the publication of the

project, an average number of employees exceeding 500 and is managed under a system of employee participation; and *(ii)* the general rules do not provide for the same level of participation as that applicable in the participating companies or do not provide that the employees of the establishments located in the other Member States may exercise the same participation rights as the employees employed in the Member State of the registered office.

In this latter case, a special regime is applicable, whereby after the registration of the Cross-border transaction project and the publication of the relevant notice, the participating companies may take the necessary measures to set up a special negotiating group to negotiate with it the arrangements for employee participation in the company resulting from the transaction. Negotiations shall take place over a maximum period of six months from the date on which the special negotiating body is notified to the participating companies. By agreement between the parties, this period may be extended by up to a further six months.

Should the parties fail to reach an agreement, the employees of the company resulting from the Cross-border transaction have the right to elect, appoint, recommend or oppose the appointment of a number of members of the management or supervisory body of said company equal to the highest of the proportions in force in any of the participating companies prior to the registration of the transaction.

3.6. Anti-abuse test

The anti-abuse test in the Implementation Acts	
ITALY	Under the Italian Implementation Act, in order to release the pre-operational certificate the public notary shall verify, *inter alia*, that, based on the information and documents received or acquired, the Cross-border transaction: *(i)* is not carried out for manifestly abusive or fraudulent purposes, resulting in the violation or circumvention of any mandatory rules under EU law or Italian law; and *(ii)* that it is not aimed at committing a crime under Italian law. The explanatory memorandum (*relazione illustrativa*) and the technical memorandum (*relazione tecnica*) to the Italian Implementation Act refer to the anti-abuse clause in two distinct scenarios: *(i)* in the context of employee participation in the company governance. The clause potentially affects outbound mobility transactions from Member States with employee participation rights, when such rights, even possibly only in the future, appear to be affected; and *(ii)* in the context of payment of public debts accrued by the Italian company participating in a Cross-border merger resulting in a company governed by the law of another Member State. To prevent abuse and fraudulent purposes, therefore, the draft terms of the Cross-border transaction must indicate: the public benefits or localised public benefits received by the company in the five years prior to the publication of the draft terms; the proceedings initiated for revocation or forfeiture of benefits; the revocation or forfeiture measures already taken; and, finally, the amounts to be repaid, including the guarantees enforced and penalties. As of today, no specific guidance has been provided on the exact scope of such provision; however, from a tax point of view, it could be assumed that the Italian general "anti-abuse" rule contained in Law No. 212/2000 should play a role also for Cross-border transactions. In particular, under this Italian tax law, one or more transactions constitute "abuse of law" where they lack economic substance and, even if formally consistent with tax law, they are essentially aimed at obtaining undue tax savings.

	Generally, transactions are deemed to be lacking economic substance where they consist of facts, acts, and contracts, also interconnected, which do not generate significant effects other than tax savings. Undue tax savings consist of tax benefits, even if not immediate, obtained in contrast with the purpose of tax provisions or the principles of the tax system. However, transactions do not constitute abuse of law if justified by valid and non-marginal non-tax reasons, including those aimed at improving the business organization or structure. As the Italian "anti-abuse" test for tax purposes requires specific analysis and high-level expertise that may go beyond that of the public notary, in order to avoid hindering Cross-border transactions, the Italian Association of Joint Stock Companies (*Assonime*) has therefore deemed it sufficient for the public notary to consider and assess the documentation received and/or acquired without imposing further activities since the abusive or fraudulent purpose of the transaction should emerge from the overall factual circumstances and available documentation.
FRANCE	The French legislator has designated the clerk of the commercial court of the French company registered office as the authority in charge of prior control of the validity Cross-border transaction. The clerk, under his responsibility, must: - examine all documents and information submitted by the company taking part in the transaction; - verify that the transaction is not being carried out for abusive or fraudulent purposes, or with the aim of evading or circumventing European Union or French law, or for criminal purposes; and - verify that the transaction is not being carried out for the purpose of depriving employees of their participation rights. As detailed above, the clerk may request any information it deems necessary from other competent authorities, including the authority responsible for monitoring the legality of the transaction in the Member State of destination, or request the appointment of an independent expert, whose remuneration is paid by the company. The clerk may refuse to issue the certificate of conformity for the Cross-border transaction for one or more of the following reasons:

- either because the legal conditions and procedures have not been complied with, and the situation has not been regularised by the company within the given time; or
- because the clerk considers that the transaction has been carried out for abusive or fraudulent purposes, leading to, or aiming to evade or circumvent European Union or French law, or for criminal purposes; or
- because the clerk considers that the transaction deprives employees of their profit-sharing rights.

In this case the clerk must inform the company of the reasons for his refusal. The Cross-border transaction is then blocked and cannot proceed.

There is no clear guideline on what represent an abuse/fraud.

We can however note that in France, since 2017, there is no longer a general presumption of fraud or tax evasion against companies considering relocation: "*fraud or tax evasion are characterised by the main objective of the transaction, fraud remaining presumed in the absence of a valid economic reason, such a reason may result from a restructuring or rationalization of activities.*" As the word "*valid*" used in French law may give rise to subjective assessments, it is often advisable to develop the economic rationale for the Cross-border transaction in detail in the draft terms (as mentioned above).

In principle, the certificate of conformity will be issued within 3 months by the clerk, which could be extended for additional periods for a total maximum assessment period of 8 months as from the filing date.

Any disputes that may arise between the clerk of the court and the company, either in connection with the review of the compliance and legality of the prior formalities, or in connection with the review of the legality of the completion of the Cross-border transaction, will fall within the jurisdiction of the court responsible for supervising the registrar.

THE NETHERLANDS	As mentioned, the civil-law notary is the competent authority to issue the pre-transaction certificates. Before issuing the certificate, the civil-law notary must perform an anti-abuse test. Performing the anti-abuse test will be consistent with the current legal duties of the civil-law notary. The duty can be regarded as a specification of the general duty that the civil-law notary has under Dutch law. The explanatory memorandum to the Dutch Implementation Act explicitly states that by aligning the anti-abuse test with the current duties of the civil-law

notary under Dutch law, the review by the civil-law notary is not more onerous, extensive, or in-depth than the test that was already in place for Cross-border mergers.

The anti-abuse test means that if the civil-law notary has reasonable doubt that the Cross-border transaction is set up for abusive or fraudulent purposes, the civil-law notary must consider the relevant facts and circumstances of which he has become aware as part of the assessment of the issuance of the certificates. The information that the civil-law notary must take into consideration is: (i) the information and documents that the company must submit to him, and (ii) the information that the civil-law notary has obtained by virtue of his already existing role as gatekeeper under Dutch law. The civil-law notary is allowed to conduct further investigation which means that the civil-law notary could request information and documents from the relevant company or the relevant authorities in other Member States with competence in the various fields related to the Cross-border transaction. The civil-law notary is further allowed to engage an independent expert in the investigation. When the assessment requires this, the civil-law notary is allowed to extend the deadline for issuing the pre-transaction certificate by three months.

The civil-law notary will refuse his service and will not issue the pre-transaction certificate if the civil-law notary determines that the Cross-border transaction is set up for abusive or fraudulent purposes. In any case, the notary will not issue the pre-transaction certificate if the reasonable doubt is not eliminated after nine months of receiving the information and documents that were submitted by the application for the pre-transaction certificate.

The Implementation Act allows the Royal Dutch Association of Civil-law Notaries to issue practical guidelines which further specify the investigation that should take place when the civil-law notary has serious doubts that the Cross-border transaction has been set up for abusive or fraudulent purposes.

According to the Dutch explanatory notes to the Implementation Act, the anti-abuse test does not extend to forms of tax planning, i.e., circumventing taxes. However, there is debate about this given that the preamble of the Mobility Directive seems to suggest that rationale for the anti-abuse test is also limiting empty shell companies.

GERMANY	The competent authority that carries out the anti-abuse test is the competent register court responsible for issuing the pre-transaction certificate. An anti-abuse test is only carried out if the court has indications of abuse. The court will in this case carry out an in-depth investigation of the facts. German law lists three default examples that may indicate an abusive purpose and oblige the register court to apply the anti-abuse test: 1. the negotiation procedure to be conducted pursuant to Article 133 para. 2 - 4 of the Amended Directive has been initiated only at the request of the court; 2. the number of employees is at least four-fifths of the relevant threshold for company co-determination, no value is created in the target country and the administrative headquarter remains in Germany; or 3. a foreign company becomes the debtor of occupational pensions (*Betriebsrenten*) or entitlements (*Anwartschaften*) as a result of the Cross-border conversion and this company has no other operating business. If necessary for the purposes of the anti-abuse-test, the register court may extend the audit period of generally three months by a maximum of three months. A further extension is possible if this is exceptionally necessary due to the specific complexity of the procedure. If the register court comes to the conclusion that abuse has occurred, no pre-transaction certificate (certificate of merger, demerger or change of legal form) will be issued.
SPAIN	As mentioned, the Commercial Registry is the authority entrusted with issuing pre-transaction certificates within three months of receiving the request. That term may nevertheless be extended by three additional months if, as a result of the documentation and information submitted, the Commercial Registry has reasonable grounds to suspect that the transaction is carried out for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of European Union or domestic law, or for criminal purposes. Nonetheless, if, due to the transaction's complexity, it is not possible to carry out the valuation within six months, the Commercial Registry shall notify the company of the reasons for any delay before the expiry of that period (which implies that, theoretically, the term might be extended beyond the original six-month period).

	The Commercial Registry shall make an overall assessment of the information and documentation. If it is clear from this overall assessment that the transaction is carried out for abusive or fraudulent purposes or with criminal intent, the Commercial Registry shall not issue the pre-certificate and shall inform the company of the reasons for its decision. The Commercial Registry shall otherwise issue the certificate and notify the company. In Spain, it remains unclear how this control will be carried out in practice. The company may appeal the Commercial Registry's refusal to issue the pre-transaction certificate may to the corresponding Commercial Court within a maximum of two months from the registry's notification of its refusal to issue the certificate. The Spanish Implementation Act, though, reminds Spanish Commercial Registries that, when interpreting the law, they must take into account that the freedom of establishment is a fundamental principle of European Union law.
PORTUGAL	The Commercial Registry Office is the competent authority in charge of enforcing the regime resulting from the Mobility Directive in Portugal, including the anti-abuse test. In particular, for a Cross-border transaction to be valid the Commercial Registry Office shall issue a certificate stating that the Cross-border transaction complies with the applicable rules. The Commercial Registry Office shall not issue the certificate if it detects elements that indicate that the transaction is being carried out for abusive or fraudulent purposes or for criminal purposes, taking into account the relevant facts and circumstances, including, where appropriate and without considering them in isolation, elements that have come to their attention as part of the review of legality or as a result of consultation with other competent authorities. The certificate shall be issued within 3 months counting from the corresponding application. However, if for the purposes of the legality check referred to in the previous paragraph it is necessary to take account of additional information or carry out other investigative measures, the three-month period may be extended by a maximum of three months. If, due to the complexity of the Cross-border procedure, it is not possible to carry out the legality check within the aforementioned time limits, the Commercial Registry Office shall, before the expiry of those time limits, inform the participating companies concerned of the reasons for this impossibility. No additional guidance has been issued in this regard by Portuguese authorities as of this moment.

3.7. Tax considerations

Relevant tax considerations and possible issues	
ITALY	Cross-border transactions are already regulated for tax purposes under Italian law in compliant with EU Directives. Therefore, the Italian Implementation Act does not contain or required the introduction of new tax provisions.
FRANCE	Articles 210 A and 210 B of the General Tax Code contain a preferential tax regime applicable to mergers and similar transactions. When the preferential regime is sought, the Cross-border transaction must result in the creation of a permanent establishment in the State of departure, in order to reconcile the tax neutrality of the Cross-border transaction with the right of the State of departure (France in this case) to tax untaxed profits. If the Cross-border merger or demerger involves the issue of shares to the members of the absorbed or demerging company, with the payment of a cash balance in excess of 10% of the nominal value or, failing that, of the accounting par value of the shares representing the capital of the recipient companies, tax neutrality is not granted, since this is only available for transactions in which the cash balance is less than 10% of the nominal value or accounting par value. Article 115 of the General Tax Code may apply to the French company, including in the context of a Cross-border transaction.
THE NETHERLANDS	Cross-border conversions are currently not regulated for tax purposes under Dutch law. The parliamentary explanation states that a separate legislative proposal with specific tax measures for (among other things) Cross-border conversions will be submitted, with an envisaged effective date of 1 January 2025. In relation to this separate legislative proposal, the draft official commentary referred among others to comments on uncertainty regarding the application of the Dutch incorporation principle to an inbound Cross-border conversion. The Dutch incorporation principle provides that a company incorporated under Dutch corporate law is treated as a Dutch tax resident for Dutch corporate income tax, withholding tax and personal income tax purposes regardless of its place of effective management.

	The official commentary does not give any indications on whether the legislator wishes to make any changes to the incorporation principle. The Company Law Committee (*Commissie Vennootschapsrecht)*, which advises the Dutch legislator on (mainly) corporate legislative proposals), however, recommends that the Dutch incorporation principle in Dutch tax law be revised in such a way that it would apply to legal entities governed by Dutch law (rather than incorporated under Dutch law), i.e. also to a company not incorporated as but converted into a Dutch company. The recommendation is very high level and for instance does not address the question whether existing structures would be respected. For reference, the Dutch legislator is of the opinion that the Mobility Directive does not require implementation of any tax measures but has announced its intention to consider implementation of revised tax rules applicable to conversions, including Cross-border conversions, as per 2025.
GERMANY	The German Implementation Act does not include any tax-related changes. Income tax consequences of certain transformations under corporate law are generally dealt with by the existing German Implementation Tax Act (*UmwStG*). It applies to certain reorganisations as defined in the German Implementation Act, but – as it is partly based on the EU merger directive – it also applies to Cross-border situations as well to the extent that they are "comparable" foreign transformations. From a German tax perspective, there is still uncertainty as regards the determination of the "comparability" of Cross-border transformations. The German Federal Ministry of Finance is currently working on an update of its guidance on the German Implementation Tax Act. In a recently published draft, the Cross-border transformations under corporate law that were newly introduced with the German Implementation Act were qualified as "in principle" comparable, which should result in the applicability of the German Implementation Tax Act. As tax-neutral Cross-border transformations were already possible (under certain conditions), there was arguably no need to amend or expand the tax provisions with respect to Cross-border mergers or demergers. However, it should be noted that with respect to those transformations which would not fall under the German Implementation Tax Act, for instance Cross-border conversions (corporate to corporate), a number of open questions arise as only the general taxation rules apply.

	Furthermore, the German Implementation Tax Act only applies to income tax consequences, whereas for instance German real estate transfer tax consequences would need to be assessed separately.
SPAIN	No tax-related measures have been proposed in this context. Spanish tax law already considers migrations to be transactions that are entitled to benefit from the Neutral Tax Regime, insofar as they are not primarily carried out to obtain a tax advantage. In order to be neutral, the elements of the Spanish company that are located in Spain that migrate to another jurisdiction must be allocated to a branch in Spain. A company not resident in Spain may form part of a Spanish tax group only as parent company; however, it does not include its income and expenses in the tax base of the group, except for those that are allocated to a branch in Spain. A non-Spanish company, or a Spanish branch of a foreign company, can be included in a Spanish tax group if the company, or the branch, is Spanish-resident for tax purposes.
PORTUGAL	No tax-related measures have been adopted in Portugal in the context of the Mobility Directive. According to the applicable rules, whenever there is a registration before the Commercial Registry Office (e.g., merger, demerger, outbound redomiciliation), such event is automatically communicated to the Portuguese Tax Authorities. From a material standpoint, Portuguese Tax Law establishes specific deferral / exemption regimes (i.e., Tax Neutrality and Participation Exemption) which are applicable to inbound and outbound migrations, provided that specific conditions are met. For instance, on Cross-border mergers, Corporate Income Tax Neutrality — technically speaking, a tax deferral — is solely applicable within the context of European Union Member States for entities that are subject, without being exempt, to one of the taxes listed in the Directive 2009/133/EC, of 19 October 2009. In addition, among other relevant conditions, the assets should registered for the same values they were prior the merger and should remain allocated in Portugal (e.g., a Portuguese entity absorbs the Portuguese Permanent Establishment). In any event, the Participation Exemption regime may apply even if there is no tax neutrality, meaning that no tax leakage should arise in Portugal.

In another example, this time regarding outbound redomiciliations, the relevant domestic rules set out an exemption from Portuguese exit taxation, provided that the Participation Exemption conditions are met. These conditions include the Portuguese company holding at least 10% of the share capital of the subsidiary, that the participation is held for a consecutive period of at least a year before the redomiciliation, among other conditions. Moreover, in this scenario, exit taxation could also be avoided if the assets attributable to the Portuguese entity redomiciling become attributable to a Portuguese Permanent Establishment, as long as they are registered for tax purposes to the same values they were prior the transfer of residency.

In any of the above-mentioned examples, migrations should be driven by business and economic sound reasoning, with the possibility of anti-abuse provisions kicking in to disregard the mentioned tax deferral or exemption. However, these considerations are solely tax-related.

As mentioned, the novelty of the Mobility Directive is the introduction of an anti-abuse control within the Commercial Registry Office that may impact the issuance of the relevant certificate. Nonetheless, it is still not clear on what specific standards they should rely on and whether aid will be requested from other competent authorities and to what extent.

3.8. Transitional provisions

Transitional provisions included in the Implementation Acts	
ITALY	The Italian Implementation Act, which does not provide for any transitional regime, applies to all Cross-border conversion/ merger/de-merger transactions whose draft terms have been published after 3 July 2023.
FRANCE	The French Implementation Act applies for transactions for which the draft terms have been filed with the clerk of the commercial court after 1st July 2023. The French Implementation Act does not provide for transitional measures.
THE NETHERLANDS	The Dutch Implementation Act provides for a transitional provision. Pursuant to this transitional provision, the provisions of the Implementation Act do not apply to Cross-border transactions for which, prior to 1 September 2023, draft terms have been filed with the Dutch trade register. This means that the rules governing a Cross-border transaction as were in place prior to 1 September 2023 will continue to apply if the draft terms for such Cross-border transaction have been filed prior to 1 September 2023. This transitional provision only applies to the parts of the Cross-border transaction that would be governed by Dutch law.
GERMANY	A merger, a demerger or a change of legal form can be carried out in accordance with the former provisions of the German Transformation Act if the respective merger/demerger agreement is concluded before 1 March 2023, the merger or demerger draft terms are drawn up before 1 March 2023 or the resolution on the change of legal form is adopted as a conversion resolution before 1 March 2023 and the conversion is filed for registration by 31 December 2023
SPAIN	The Spanish Implementation Act includes a transitional provision pursuant to which the Implementation Act does not apply to transactions (internal or Cross-border) for which the draft terms of the transaction have been approved prior to 29 July 2023 (which appears to refer to draft terms having been drawn up by the corresponding directors prior to said date). This means that the rules governing a transaction that were in

	prior to 29 July 2023 will continue to apply if the draft terms of the transaction for such Cross-border transaction were drawn up prior to 29 July 2023. This transitional provision only applies to the aspects of the Cross-border transaction that would be governed by Spanish law.
PORTUGAL	The Portuguese Implementation Act merely stipulates that the changes will come into effect 30 days after the publication of the relevant Decree-Law.

4. UNITED KINGDOM PERSPECTIVE

Since the UK is no longer part of the European Union, the Mobility Directive, finalised in 2019, was not incorporated into UK legislation by 31 January 2023.

It is not currently possible for an overseas company to re-domicile so as to become a UK company (although it is possible for an overseas company to transact business in other ways). These include:

- by incorporating a subsidiary in the UK, in which case that subsidiary will be subject to the usual rules applicable to UK companies;
- carrying on business in the UK by appointing an agent. Depending on the agent's activities, this might or might not constitute the establishment of a place of business in the UK under the overseas companies regime under the Companies Act 2006;
- carry on business in the UK without establishing a presence by conduct all business over the internet or by telephone; or
- opening an establishment in the UK.

The overseas companies' regime largely applies when an establishment is opened in the UK.

In addition, there is separate registration regime in other legislation for overseas entities that own UK land: the Register of overseas entities under Part 1 of the Economic Crime (Transparency and Enforcement) Act 2022.

This situation may be changing, however. In October 2021 the UK Government launched a consultation on corporate re-domiciliation which set out proposals to introduce a UK re-domiciliation regime, which would allow foreign-incorporated companies to re-domicile in the UK by changing their place of incorporation to the UK, while maintaining the same legal identity. The consultation period closed in January 2022. The UK Government's report on the outcome of the consultation was that while the majority of respondents were supportive or broadly supportive of the proposals, given only a high-level overview of the proposed regime design had been set out, further details of the proposals were needed. The UK Government resolved to continue to refine the policy.

In November 2023, the Department for Business & Trade announced it had established an Independent Expert Panel, chaired by Professor Vanessa Knapp, to explore how best to establish a UK corporate re-domiciliation regime to make it easier for foreign companies to relocate to the UK. The introduction of such a regime will require changes to company and tax law in the UK. The role of the Expert Panel was to provide independent, non-binding advice to the UK Government on how best to establish such a

framework. The Independent Expert Panel published its report on Corporate Re-domiciliation on 1 October 2024. In its report the Panel strongly supports the introduction of a two-way re-domiciliation regime to allow bodies corporate registered outside the UK to become a UK company and also to allow UK companies to re-domicile outside the UK. The report also sets out how such a regime could work including which organisations would be eligible to re-domicile, the information they would have to provide to re-domicile, the process for dealing with an application and how this would interact with requirements in another jurisdiction. The Panel also considered how a re-domiciled company would be treated once it has re-domiciled to the UK, not only for company law purposes, but also how legislation relating to tax, accounting and insolvency could be changed to take account of re-domiciled companies. The Panel has also considered how a regime for UK companies to re-domicile outside the UK could work and how the interests of members, creditors and national security could be protected.

The UK government has welcomed the Panel's report and intends to consult in due course on a proposed regime design, although no information in respect to proposed timing is yet available.

5. PRECEDENTS

The table below sets out which Cross-border transactions have been effectuated under the Mobility Directive in the Best Friends jurisdictions.

		INBOUND					
		The Netherlands	**Italy**	**France**	**Germany**	**Spain**	**Portugal**
OUTBOUND	**The Netherlands**						
	Italy				X		
	France						
	Germany		X				
	Spain				X		
	Portugal				X	X	

ANNEX I DEFINITIONS AND GLOSSARY

"Amended Directive"	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.
"Cross-border conversions"	A transaction whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II of the Mobility Directive, and transfers at least its registered office to the destination Member State, while retaining its legal personality.
"Cross-border divisions"	Divisions of European limited liability companies, provided that at least two of the limited liability companies involved in the division are governed by the laws of different Member States.
"Cross-border mergers"	Mergers of European limited liability companies, provided that at least two of them are governed by the laws of different Member States.
"Cross-border transactions"	Means Cross-border conversions, Cross-border divisions and Cross-border mergers, all together or any of the three, irrelevant which one, to the extent governed by the Mobility Directive or the relevant Implementation Act(s).

"European limited liability companies"	Limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union.
"Implementation Act(s)"	Means the different acts within the Best Friends jurisdictions implementing the Mobility Directive.
"Mobility Directive"	Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards Cross-border conversions, mergers and divisions.
"SE Regulation"	Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

ANNEX II OVERALL SUMMARY OF THE MOBILITY DIRECTIVE

I. Scope of the Mobility Directive

Scope Cross-border conversions and Cross-border division rules

Legal form

The rules on Cross-border conversions as included in the Mobility Directive apply to the conversion of a European limited liability company into limited liability companies governed by the law of another Member State.

The rules on Cross-border divisions as included in the Mobility Directive apply to European limited liability companies, provided that at least two of the limited liability companies involved in the division are governed by the laws of different Member States.

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

Furthermore, Member States must ensure that the rules on Cross-border conversions and Cross-border divisions do not apply to companies in either of the following circumstances:

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

(ii) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of the Bank Recovery and Resolution Directive (BRRD) I.

Member States have discretion to decide whether the rules on Cross-border conversions and Cross-border divisions apply to companies which are:

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

(ii) the subject of liquidation proceedings other than those referred to in point (i) of this paragraph; or

(iii) the subject of crisis prevention measures in accordance with BRRD I, including the exercise of powers to direct removal of deficiencies or impediments to recoverability, the exercise of powers to address or remove impediments to resolvability, the application of an early intervention measure, the appointment of a temporary administrator or the exercise of the write down or conversion powers.

Geographical scope

The Mobility Directive is applicable to Cross-border conversions and Cross-border divisions of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union. Accordingly, the Mobility Directive does not provide for Cross-border transactions between a Member State company and a non-Member State company.

Variants

The Mobility Directive covers the following types of Cross-border divisions:

(a) a division whereby a company being divided, on being dissolved without going into liquidation, transfers all its assets and liabilities to two or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of those securities or shares ("full division");

(b) a division whereby a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies, in the company being divided or in both the recipient companies and the company being divided, and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10 % of the accounting par value of those securities or shares ("partial division"); or

(c) a company being divided transfers part of its assets and liabilities to one or more recipient companies, in exchange for the issue to the company being divided of securities or shares in the recipient companies ("division by separation").

With respect to Cross-border divisions, the Mobility Directive provides only for Cross-border divisions to acquiring companies that are incorporated at the occasion of the division. A Cross-border division to an existing company is not possible.

Scope Cross-border merger rules

Legal form

For Cross-border mergers, the framework currently applicable pursuant to the national acts implementing Directive 2017/1132 is amended to align with the provisions on scope applicable to Cross-border conversions and divisions.

Accordingly, Member States must ensure that the rules on Cross-border mergers do not apply to companies in either of the following circumstances:

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

(ii) the company is subject to resolution tools, powers and mechanisms provided for in Title IV of BRRD I.

Furthermore, Member States have discretion to decide whether the rules on Cross-border mergers apply to companies which are:

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

b. the subject of liquidation proceedings other than those referred to in point (i) of this paragraph; or

c. the subject of crisis prevention measures in accordance with BRRD I, including the exercise of powers to direct removal of deficiencies or impediments to recoverability, the exercise of powers to address or remove impediments to resolvability, the application of an early intervention measure, the appointment of a temporary administrator or the exercise of the write down or conversion powers.

Geographical scope

The Mobility Directive is applicable to Cross-border conversions and Cross-border divisions of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union. Accordingly, the Mobility Directive does not provide for Cross-border transactions between a Member State company and a non-Member State company.

Variants

The Mobility Directive provides for a new type of Cross-border merger to be covered by its provisions. It concerns a merger whereby "one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, without the issue of any new shares by the acquiring company, provided that one person holds directly or indirectly all the shares in the merging companies or the members of the merging companies hold their securities and shares in the same proportion in all merging companies.

II. Corporate process

The corporate process is divided into three stages.

1. Preparatory phase

a. Cross-border transaction draft terms

A The must be prepared by the boards of the company or companies involved.

b. Explanatory statement

Involved companies must draft a written explanation on the Cross-border transaction. This explanation must include specific information for members and for employees. Within six weeks before the decision is made, the explanation and the draft terms must be made digitally available for members and the works council (or the employees).

c. Auditor oversight

In principle, the auditor must be involved for example by researching the Cross-border transaction and declaring that the exchange ratio of the shares and the compensation is reasonable.

d. Notice to members, employees and creditors

The board of each company involved must notify members, creditors and the works council (or in the absence, employees) that they may submit their comments on the draft terms to their respective companies.

e. Disclosure obligations

The draft terms, the research by the accountant and the notification must be filed with the trade register and made digitally available. The same documents, including the explanatory statement, the report of the auditor, and any comments submitted by the works council or employee representatives must be filed at the offices of the company or must be made accessible by electronic means.

f. Announcement

That the relevant documents have been filed or are available for consultation need to be published in the Official Gazette.

g. Opposition period creditors

Until three months after the announcement, creditors may oppose the draft terms. The company must for each creditor that requests this, provide security, or give another fitting guarantee.

h. Employee participation

The process involves specific employee participation requirements.

2. The decision-making phase

a. Decision-making

The decision to implement the Cross-border transaction will normally be made at the general meeting.

b. Member's right to exit and exchange ratio

The member voting against the Cross-border transaction is allowed to invoke its exit right and get a financial compensation. If the member deems the compensation to be unreasonable, it is allowed to request additional compensation. The request for the appointment of experts may be made within one month after the date of the resolution for the transaction.

In case of a merger or division, the members of the disappearing company or the company that keeps existing after the division will keep shares based on an exchange ratio. Members that have not invoked their right to exit are allowed to have the proposed exchange ratio redetermined by one or more experts, to receive an additional cash payment. The articles of association may include provisions on the exchange ratio.

3. The executive phase

a. Pre-transaction certificate

A pre-transaction certificate must be issued. The company is allowed to apply for the certificate, after the decision to execute the transaction is made.

This certificate must include a statement in which the relevant authority declares that the formal requirements have been complied with and, if relevant, that the procedure for determining the employee participation regime has started. The relevant authority is also required to perform an anti-abuse test. If after this test it is determined that the transaction is set up for fraudulent purposes, it will not issue the certificate. The certificate is filed with the trade register and after shared with the trade register of the Member States involved.

The relevant authority is not allowed to issue the pre-transaction certificate before: (i) the company has paid the compensation to the existing members, and (ii) if the independent experts have not yet determined the cash compensation and therefore, the company has not paid the additional compensation. If (i) and (ii) are not satisfied, the relevant authority can only issue the pre-transaction certificate when the company has decided that it, in case of conversion, it will pay the indemnification

no later than two months after the Cross-border conversion becomes effective or when it has been decided that the indemnification will be paid by the acquiring company.

b. Notarial deed

In certain cases, a notarial deed is required for the implementation of the transaction.

c. Final certificate

The relevant authority will at the request of the company also issue a final certificate in the same vein as the pre-transaction certificate, excluding the anti-abuse test.

d. Act takes effect

The act takes effect on a date that varies according to the transaction.

III. Member information rights and protection of members

The Cross-border transaction may put members in a position that is less favourable than they were in before the Cross-border transaction, because of a less favourable (legislative) regime of the destination Member State. Therefore, the Mobility directive contains rules to protect the rights of members.

Information rights for members

The Mobility directive requires the board to draw up and publish a report for members (see part IV below for this requirement for employees) explaining and justifying the legal and economic aspects of the Cross-border transaction, explicitly stating the implications of the Cross-border conversion for the future business of the company. This report must include:

- the cash compensation and the method that is used to determine the cash compensation;
- the implications of the Cross-border conversion for the members; and
- the rights and remedies available to members in accordance with the rights of protection included in the Mobility Directive.

This report is not required if all members of the company have agreed to waive the requirements. Member States can exclude single-member companies from this requirement.

Furthermore, the Mobility Directive requires the board to prepare a notice addressed to members (see part IV below for this requirement for employees) that they have the possibility to submit comments on the draft terms for the Cross-border transaction to the company no later than five working days before decision-making on the Cross-border transaction. This notice needs to be made publicly available in the register of the Member State together with the draft terms and the accompanying notes for the Cross-border transaction.

Protection of members

As a safeguard, members who voted against the Cross-border transaction or other members of the company that the Members State designated will have the right to dispose of their shares for adequate cash compensation. Members that want to exercise this right must file a request for compensation with the company at least within one month after the general meeting decided on the Cross-border transaction.

Member States must determine the period within which the members have to declare to the company their decision to exercise the right to dispose of their shares (no longer than one month after the decision-making on the Cross-border transaction) and the period within which the cash compensation must be paid (no longer than two months after the decision-making on the Cross-border transaction. The rights must in any case be exercised no longer than one month after the decision-making on the Cross-border transaction.

To this end, the draft terms for the Cross-border merger must specify the compensation offered to existing members. This includes not only a description of the amount of compensation, but also an additional description including, for example, a description according to which method(s) the indemnification was determined and what special difficulties occurred in determining the indemnification.

The auditor will review the reasonableness thereof and considers, the market price, if any, before announcement of proposal or the value of company excluding the effects of the transaction. When the articles of incorporation or an agreement to which the company being divided and the members concerned are parties, contains provisions regarding the determination of the value of the shares or the determination of indemnification or includes a clear standard by which the value of the shares or the indemnification can be determined, the auditor shall prepare their report with consideration thereof.

If a member wants to exit, but determines the cash compensation not be adequately set, this member is entitled to claim additional cash compensation before the competent authority or body mandated under national law. This claim will be subject to a time limited determined by Member States. The additional cash payment will be valid for all members that wish to exercise the right to exit.

Member States must ensure that the law of the departure Member State governs that the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that departure Member State.

Independent experts' opinion

An independent expert must examine the draft terms for the Cross-border transaction and issue a report to the members. The report must in any case include an opinion as to whether the cash compensation is adequate. This is determined on the basis of any market price of the shares in the company prior to the announcement of the proposal or the value of the company excluding the effect of the proposed Cross-border transaction, as determined in accordance with generally accepted valuation methods. The report must include at least:

- the method(s) used to determine the cash compensation that is proposed;
- state whether the method(s) used are adequate for the assessment of the cash compensation, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on; and
- a description of any special valuation difficulties that occurred.

When the articles of incorporation or an agreement to which the company being divided and the members concerned are parties, contains provisions regarding the determination of the value of the shares or the determination of indemnification or includes a clear standard by which the value of the shares or the indemnification can be determined, the experts shall prepare their report with consideration thereof.

This report will be made available to the members not less than one month before the decision-making on the Cross-border transaction.

This report is not required if all members of the company have agreed to waive the requirements. Member States can exclude single-member companies from this requirement.

The determination of the amount of compensation by the independent experts is binding on all holders of shares of the same class or designation who have submitted a request.

Exchange ratio

The board of each of the merging or companies being divided is required to draw up and publish (at least electronically) no less than six weeks before the decision-making, a report (whether or not in the accompanying notes) for members explaining and justifying the legal and economic aspects of the Cross-border merger. The Mobility Directive explicitly states that the board must, in particular, explain the share exchange ratio and the method or methods used to arrive at the share exchange ratio, where applicable.

Furthermore, an expert, who is independent from the company, must examine the draft terms of the Cross-border merger or division and draw up a report for members. The report, which will be made available to the members not less than one month before the decision-making on the Cross-border merger or division, must at least: (i) indicate the method or methods used to determine the cash compensation proposed; (ii) indicate the method or methods used to arrive at the share exchange ratio proposed; (iii) state whether the method or methods used are adequate for the assessment of the cash compensation and the share exchange ratio, indicate the value arrived at using such methods and give an opinion on the relative importance attributed to those methods in arriving at the value decided on, and in the event that different methods are used in the merging companies, state also whether the use of different methods was justified; and (iv) describe any special valuation difficulties which have arisen. This report is not required if all members of the company have agreed to waive the requirements.

For Cross-border mergers and Cross-border divisions, Member States must ensure, that members of the merging or companies being divided who did not have or did not exercise the right to dispose of their shares, but who consider that the share exchange ratio set out in the draft terms of the Cross-border merger or division is inadequate, may dispute that ratio and claim a cash payment.

Proceedings in that regard shall be initiated before the competent authority or body mandated under the law of the Member State to which the relevant merging company is subject, within the time limit laid down in that national law and such proceedings shall not prevent the registration of the Cross-border merger. The decision shall be binding on the company resulting from the Cross-border merger.

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

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

IV. Employee information rights and employee participation

Legal basis Mobility Directive

The Amended Directive already included rules on employee participation regarding Cross-border mergers. The Mobility Directive amends these rules and supplements those by introducing rules on employee participation rights regarding Cross-border conversions and Cross-border divisions with the aim to ensure that employee participation is not unduly prejudiced as a result of any Cross-border transaction. The premise of the Mobility Directive is that it does not affect existing participation rights in national law.

Information rights and employee consultation pre-Cross-border transaction

The first step in the process of a Cross-border restructuring is the preparation of the draft terms for the Cross-border transaction by the board. The Mobility Directive introduces the requirement for the board to prepare a notice addressed to, among other, the (representatives of the) employees, informing them that they have the possibility to submit comments on the draft terms for the Cross-border transaction to the company no later than five working days before decision-making on the Cross-border transaction. This notice needs to be made publicly available in the register of the departure Member State together with the draft terms and the accompanying notes for the Cross-border transaction.

In addition, the board is required to draw up and publish (at least electronically) no less than six weeks before the decision-making, a report (whether or not in the accompanying notes) for employees explaining and justifying the legal and economic aspects of the Cross-border transaction, as well as explaining the implications of the Cross-border merger for employees. The Mobility Directive explicitly states that the report must explain the implications of the Cross-border conversion for the future business of the company. The information for employees must, in particular, explain: (i) the implications of the Cross-border transaction for employment relationships, as well as, where applicable, any measures for safeguarding those relationships; (ii) any material changes to the applicable conditions of employment or to the location of the company's places of business; and (iii) how the factors set out in (i) and (ii) affect any subsidiaries of the company. This explanation is not required where a company and its subsidiaries, if any, if all employees of the company and their subsidiaries are members of the board.

Before deciding whether to approve the Cross-border transaction, the general meeting must take note of any employee opinion and comment submitted in the preparatory phase.

Furthermore, as mentioned in part V below, the relevant authority must conduct an anti-abuse test. This includes relevant facts and circumstances related to employee participation.

Employee participation post-Cross-border transaction

The Mobility Directive stipulates that the company will be subject to the employee participation regime of the law of the Member State in which the company has its registered office following the Cross-border transaction. This rule does not apply when:

- the company has an average number of employees in the six months prior to filing of four-fifths of the employee participation threshold applicable under national law;
- the destination Member State has a lower level of employee participation. The company must provide for at least the same level of employee participation as operated in the company or companies prior to the Cross-border transaction. This is measured by reference to the proportion of employee representatives among the members of the administrative or supervisory body or their committees or of the management group which covers the profit units of the company, subject to employee representation; or
- the participation of the destination Member State 'favours' domestic employees.

If one of these exemptions occurs, the co-determination regime will be determined in accordance with the European system laid down in the SE Regulation and the SE Directive. This means that a Special Negotiating Body (SNB) must be established, with which an agreement on the involvement of employees will be negotiated. The Mobility Directive states that this SNB must negotiate: *with a view to finding an amicable solution that reconciles the right of the company to carry out a Cross-border transaction with the employees' rights of participation*." The company is not allowed to perform the Cross-border transaction without first entering into negotiations. Negotiations start as soon as the SNB is established and may continue for six months. The general meeting of each company may decide to refrain from negotiations on employee participation if at least one of the concerned companies has employee participation arrangements in place.

The negotiations may result in:

- a bespoke and agreed solution. In this case, the agreed regime applies;
- no agreement within the six months as of start of the negotiations. In this case, the standard rules as set out in the SE-directive apply mutatis mutandis;

- termination of the negotiations by the SNB. This means that the regime in the destination Member States will apply. This option is always available in case of a Cross-border merger. For a Cross-border conversion and division, this is only possible if the company did not already have an employee participation regime in place.

To protect the agreed solution or application of the standard rules, the company is not allowed to remove the participation rights through carrying out a subsequent (Cross-border or domestic) conversion, merger or division within four years.

Furthermore, where the company is to be governed by an employee participation regime, it is obliged to take a legal form allowing for the exercise of participation rights.

V. Anti-abuse test

Legal basis Mobility Directive

The Mobility Directive includes provisions to implement a scheme for an anti-abuse test to prevent a Cross-border transaction being used for abusive or fraudulent purposes. This scheme is connected to the pre-conversion, pre-division or pre-merger certificate that is to be issued by the competent authority (e.g., courts, notaries or other authorities, a tax authority or a financial service authority appointed to scrutinise the legality of Cross-border transactions as regards the parts of the procedure which are governed by the law of relevant the Member State), to ensure that all relevant conditions are met and to the proper completion of all procedures and formalities in the relevant Member State.

Member States must ensure that the competent authority does not issue the pre-conversion, pre-merger or pre-division certificate, where it is determined in compliance with national law that a Cross-border transaction is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes. According to the Mobility Directive recitals, abusive or fraudulent purposes are for example the circumvention of the rights of employees, social security payments or tax obligations, or criminal purposes.

Where the competent authority, during the scrutiny has serious doubts indicating that the Cross-border transaction is set up for abusive or fraudulent purposes, it must take into consideration relevant facts and circumstances, including through consultation of relevant authorities. The Mobility Directive includes, as example, the following factors to consider: "*the intention of the transaction, the sector, the investment, the net turnover and profit or loss, the number of employees, the composition of the balance*

sheet, the tax residence, the assets and their location, equipment, the beneficial owners of the company, the habitual places of work of the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the Cross-border transaction, the number of employees working simultaneously in more than one Member State, and the commercial risks assumed by the company or companies before and after the Cross-border transaction. The assessment should also take into account relevant facts and circumstances related to employee participation rights, in particular as regards negotiations on such rights where those negotiations were triggered by reaching four-fifths of the applicable national threshold." All these elements should be considered only as indicative factors in the overall assessment and therefore should not be regarded in isolation.

When the Cross-border transaction leads to a company having effective management or place of economic activity in the Member State in which the companies are to be registered after the Cross-border transaction, this could be an indicator of the absence of circumstances leading to abuse or fraud.

Where, during the scrutiny of the legality of a Cross-border transaction, the competent authority becomes aware that the Cross-border transaction is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, it should not issue the pre-transaction certificate.

The assessment for the purposes of this paragraph shall be conducted on a case-by-case basis. Member States have the flexibility to implement this test through existing procedures in national law.

VI. Tax considerations

Legal basis Mobility Directive

The Mobility Directive provides that a Cross-border transaction which has taken effect in compliance with the procedures transposing the Mobility Directive may not be declared null and void. This does not affect Member States' powers, inter alia, in relation to taxation and law enforcement, to impose measures and penalties, under national law, after the date on which the Cross-border transaction took effect.

The Mobility directive does not directly cover further specific tax measures; however, the Mobility Directive of course involves tax-related attention points.

VII. Transitional provisions

Legal basis Mobility Directive

A situation could occur where an Implementation Act comes into force during the preparation of a Cross-border transaction. Without transitional provisions, this could lead to uncertainties as to which rules would apply in practice; the rules included in the Mobility Directive or the draft Implementation Act, or the rules that are in force prior to entry into force of the Implementation Act. To avoid this ambiguity, Member States may decide to include certain transitional provisions in the Implementation Act. The Mobility Directive does not provide for any transitional provisions.

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