

COMPANY LAW REVIEW GROUP

**Consultation on Directive (EU) 2019/2121 of 27 November 2019
(the Cross-Border Conversions and Divisions Directive)**

Review Group Submission on Member State Options

13 OCTOBER 2020

Public Consultation and this Submission

[Directive \(EU\) 2019/2121 of 27 November 2019](#) (the Cross-Border Conversions and Divisions Directive) (**the 2019 Directive**) is to be transposed into Irish law by 31 January 2023. On 13 August 2020, the Department of Business, Enterprise and Innovation (**the Department**) launched a [public consultation on the Member State options](#) in the Directive.

The Company Law Review Group's Statutory Committee proceeded to consider the 2019 Directive. The Statutory Committee is a Committee convened by the Chairperson inter alia to address company law issues that arise at short notice and to make submissions to public consultations. Membership of this Committee is open to all Review Group members, any of whom may nominate an alternate to participate in Committee deliberations and formation of recommendations. The Statutory Committee has most recently prepared submissions to public consultations in relation to the Limited Partnerships Act 1907 and the Registration of Business Names Act 1963.

The Committee met by Zoom meeting participation software on two occasions in September 2020 and generated this document, originally as a briefing paper to inform the Review Group for the purpose of the preparation of a CLRG submission as part of the Department's public consultation exercise.

At a meeting of the Company Law Review Group held by Zoom on 13 October 2020, this document was approved as the basis on which the Review Group's submission to the public consultation should be prepared. Subsequently to that meeting, the Review Group was informed that this document would itself be accepted as the Review Group's submission.

The 2019 Directive

The 2019 Directive amends [Codified Company Law Directive \(EU\) 2017/1132 of 14 June 2017](#) by:

- providing for cross-border conversions of limited companies, by the insertion of a new Chapter -1¹ containing new Articles 86a to 86t;
- amending the 2017 Directive's provisions on cross-border mergers of limited companies in Chapter II; and
- providing for cross-border divisions of limited companies, by the insertion of a new Chapter III, containing new Articles 160a to 160u.

The new provisions on cross-border conversions, the newly amended provisions on cross-border mergers and the new provisions on cross-border divisions each give Member States various options in their transposition of them. These options are almost identical across these 3 transactions regulated by Directive (EU) 2017/1132 as now amended. In the case of Irish-registered companies exiting Ireland by means of any of these transactions – conversion, merger, division – there are common principles that apply. The Committee therefore approached its consideration of these Member State options on a unified basis across all three transaction types.

Recommendations

The Review Group makes the recommendations as to Member State options as set out in the following pages and which are summarised on pages 12 and 13. The heading at each option identifies the Article in Directive (EU) 2017/1132 as amended by Directive 2019/2121 that applies to each transaction type.

¹ i.e. minus 1.

The Review Group recommends that the transposition of the Directive be effected with the revocation of the [SI No 157/2008 European Communities \(Cross-Border Mergers\) Regulations 2008](#) (as amended²) and that a new Statutory Instrument be made, consolidating the provisions of SI No 157/2008 and its amendments with the provisions made necessary by the transposition of the 2019 Directive.

The Review Group notes that in-State mergers and divisions are dealt with in the Companies Act in Part 9 and re-registrations and changes of type of companies are dealt with in Part 20 of the Act. Ideally there would be a separate Part of the Act to deal with cross-border mergers, divisions and conversions.

As against that, Directive (EU) 2019/2121 contains provisions dealing with the employer-employee relationship, provisions which in the existing transposition of the cross-border mergers regime was not included into the prior Companies Acts or incorporated into the Companies Act 2014. Similarly, the [European Communities \(European Public Limited Liability Company\) Regulations 2007](#) (S.I. No. 21/2007), which gave further effect to [Council Regulation \(EC\) No. 2157/2001 of 8 October 2001 on the Statute for a European company \(SE\)](#) contains provisions dealing with the employer-employee relationship and were not included into the prior Companies Acts or incorporated into the Companies Act 2014.

In this context, we would like to note that the Irish Congress of Trade Unions plans to make submissions directly to the Department in relation to the transposition of the 2019 Directive insofar as they relate to the processes of informing and consultation of employees, the potential use of artificial entities and other related matters.

Membership of the Statutory Committee

The membership of the Statutory Committee who prepared this document in the first instance is as follows:

Paul Egan	Chairperson
Barry Conway	CLRG member (William Fry)
Richard Curran	CLRG member (L K Shields Solicitors LLP)
Máire Cunningham	CLRG member (Beauchamps)
Rosemary Hickey	CLRG member, Office of the Attorney General
Tanya Holly	DBEI
David McFadden	CLRG member, Companies Registration Office
Vincent Madigan	CLRG member

13 October 2020

² Amended by various enactments including [S.I. No. 306/2011 - European Communities \(Mergers and Divisions of Companies\) \(Amendment\) Regulations 2011](#).

Option 1	Conversions: 86a(4)	Mergers: 120(4)	Divisions: 160a(5)
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Member States may decide not to apply this Chapter to companies which are:

- (a) the subject of insolvency proceedings or subject to preventive restructuring frameworks;
- (b) the subject of liquidation proceedings other than those referred to in point (a) of paragraph 3, or
- (c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.

Recommendation

This option should not be taken.

Rationale

These potential transactions should be available widely. As they proceed only with the consent of the Court, there is no policy reason to limit their application as might be possible under this option.

Option 2	Conversions: 86e(4)	Mergers: 124(4)	Divisions: 160e(4)
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[Report of the administrative or management body for members and employees i.e. director’s report]

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

Recommendation

Rather than excluding the application of the Article to single-member companies, provide that a single member may waive the requirement for the production of the directors’ report, in the same way that a single member may waive the requirement for the section of the report to members, as provided by the immediately preceding paragraph in the Article.

Rationale

The directors of the company may be distinct from the single member. A single member may require a directors’ report for its own purposes or as a matter of good governance. It is not a huge burden on a single member to sign one extra document or add one sentence to another document it signs.

Option 3	Conversions: 86f(3)	Mergers: 125(4)	Divisions: 160f(3)
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[Independent expert report]

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

Recommendation

Rather than excluding the application of the Article to single-member companies, provide that a single member may waive the requirement for the production of the expert’s report, in the same way that we recommend that a single member may waive the requirement for the production of the directors’ report.

Rationale

A single member may require an expert's report for its own purposes or as a matter of good governance. It is not a huge burden on a single member to sign one extra document or add one sentence to another document it signs.

Option 4	Conversions: 86g(1)	Mergers: 123(1)	Divisions: 160g(1)
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[Disclosure of independent expert's report]

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

Recommendation

This option should not be taken.

Rationale

The independent expert report is a report to members, not to the world at large.

Option 5	Conversions: 86g(2)	Mergers: 123(2)	Divisions: 160g(2)
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[Disclosure in the public register i.e. the Companies Registration Office of (a) the draft terms of the cross-border transaction; and (b) a notice to members, creditors and (representatives of) the employees]

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

Recommendation

This option should be taken, subject the prior filing by the company of a form in the CRO identifying the precise webpage/s where the documents are available for inspection.

Rationale

It is important that the public record shows that a transaction is contemplated and in progress.

Option 6	Conversions: 86g(5)	Mergers: 123(6)	Divisions: 160g(5)
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[Disclosure of the draft terms of the cross-border transaction]

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

Recommendation

The fact of delivery of information to the CRO – whether it is the draft terms of conversion, merger or division and notices to members, creditors and (representatives of) employees or as we recommend at Option 5 above, a form notifying the precise webpages where those documents are available – should be included in the CRO Gazette.

Rationale

The Companies Act 2014 provides for publication of information in the online CRO Gazette, which are published by the Registrar of Companies each Wednesday. The CRO Gazette includes lists of the following in pdf: new companies; change of name; annual returns received and registered; liquidations; foreign companies; other registered documents; strike offs; restorations. It is appropriate that the public record shows that a transaction is contemplated and in progress and that information has been filed in the CRO.

Option 7	Conversions: 86h(4)	Mergers: n/a	Divisions: 160h(4)
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Where a clause in the draft terms of the cross-border [transaction] or any amendment to the instrument of constitution of the converting company leads to an increase of the economic obligations of a member towards the company or third parties, Member States may require, in such specific circumstances, that such clause or the amendment to the instrument of constitution be approved by the member concerned, provided that such member is unable to exercise the rights laid down in Article [86i] [160i] [i.e. where shareholder cannot be given cash other securities.as compensation]

Recommendation

This option should be taken up.

Rationale

It is one thing for a member to be dispossessed of an asset and given consideration for that. It is quite different if it is proposed to impose a liability on a member.

The Companies Act 2104 section 32 (4) provides:

Subject to subsection (5) [where a member agrees to be bound by the amendment] and notwithstanding anything in the constitution of a company, no member of the company shall be bound by an amendment made to the constitution after the date on which he or she became a member, if and so far as the amendment—

- (a) requires him or her to take or subscribe for more shares than the number held by him or her at the date on which the amendment is made, or
- (b) in any way increases his or her liability as at the date referred to in paragraph (a) to—
 - (i) contribute to the share capital of the company, or
 - (ii) otherwise pay money to the company.

IN a similar vein, where a limited company is to be re-registered as an unlimited company, such that the liability of members would become unlimited, section 1296 of the Companies Act requires the assent of all members to its re-registration. It follows therefore that the liability of a member of a limited company should not be increased without that member's consent.

Option 8	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)
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[Protection of members: cash consideration for dissenting members]

Member States may also provide for other members [i.e. members other than dissenting members] of the company to have the right referred to in the first subparagraph.

Recommendation

This option should not be taken up.

Rationale

A company planning any of these transactions will require certainty. It is not appropriate that assenting members should effectively be given a put option over their shares whereby they could compel the company to buy them out.

Option 9	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)
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Member States may require that express opposition to the draft terms of the cross-border [transaction], the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general meeting referred to in Article [86h] [126] [160h].

Recommendation

This option should be taken up.

Rationale

A company planning any of these transactions will require certainty. It is appropriate that the level of dissent is known to the company before the meeting.

Option 10	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)
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Member States may allow the recording of opposition to the draft terms of the cross-border [transaction] to be considered proper documentation of a negative vote.

Recommendation

This option should be taken up.

Rationale

A company planning any of these transactions will require certainty. It is appropriate and convenient that express opposition be accepted as a negative vote.

Option 11	Conversions: 86i(4)	Mergers: 126a(4)	Divisions: 160i(4)
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[Where a Court awards a higher cash consideration]

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

Recommendation

This option should be taken up.

Rationale

Where a Court awards higher consideration, as opposed to where a separate amount might be agreed by contract, it is appropriate that the price so determined should apply to all members affected.

Option 12	Conversions: n/a	Mergers: 126a(6)	Divisions: n/a
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[Where Court adjusts consideration in the case of a merger]

Recommendation

This option should be taken up.

Rationale

Where a Court adjusts the consideration, including the share ratio, it is appropriate that the ratio so adjusted should apply to all members affected.

Option 13	Conversions: n/a	Mergers: 126a(7)	Divisions: 160i(7)
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Member States may also provide that the company resulting from the cross-border merger or division can provide shares or other compensation instead of a cash payment.

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

Recommendation

This option should be taken up.

Rationale

The law should provide for flexibility as to consideration that may be offered by the relevant company in either case, subject to the right of dissenting members to a cash payment, as elsewhere in the Directive.

Option 14	Conversions: 86j(2)	Mergers: n/a	Divisions: 160j(3)
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Member States may require that the administrative or management body [i.e. the directors] of [the company] [the company being divided] provide a declaration that accurately reflects its current financial status at a date no earlier than one month before the disclosure of that declaration.

Recommendation

This option should not be taken up.

Rationale

This is not required in the case of a merger. Companies are obliged to keep up-to-date accounting records and those will inform the design of the cross-border transaction. Such a report does not add any protection that is not otherwise available in the process.

Option 15	Conversions: 86k(i)	Mergers: 126c(1)	Divisions: 160k(1)
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Member States may decide that employees' rights to information and consultation apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC. [i.e. (a) undertakings employing at least 50 employees in any one Member State, or (b) establishments employing at least 20 employees in any one Member State.]

Recommendation

The Review Group makes no recommendation.

Rationale

The Company Law Review Group has since its establishment confined itself to matters of company law, including securities law regulated by the Companies Act. This issue is primarily a point of employment law and labour relations.

Option 16	Conversions: 86l(4)(b)	Mergers: n/a	Divisions: 160l(4)(b)
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When regulating the principles and procedures referred to in paragraph 3 [those laid down in Article 12(2) and (4) of Regulation (EC) No 2157/2001 certain provisions of Directive 2001/86/EC] Member states may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative body of the [converted company] [recipient companies]. However, if, in the company, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third.

Recommendation

The Review Group makes no recommendation.

Rationale

The Company Law Review Group has since its establishment confined itself to matters of company law, including securities law regulated by the Companies Act. This issue is primarily a point of employment law and labour relations.

Option 17	Conversions: 86m(1)	Mergers: 127(1)	Divisions: 160m(1)
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[Procedures before pre-transaction certificate]

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

Recommendation

This option is an unnecessary additional step and should not be taken up.

Rationale

There was lengthy and detailed discussion at Committee as to whether this should be taken up. When the Committee examined this first, it approached it on the basis that it was reasonable that, at a minimum, when a company is exiting the jurisdiction that it satisfies all taxation liabilities.

That is fine in principle but when one attempts to apply this in practice, difficulties arise. A company, if a trading company, will be accruing taxation liabilities with each passing day, be it VAT on supply of goods or services or PAYE and levies on employees' remuneration. Accordingly, the Committee concluded that it was impractical for there to be what would effectively be a mandatory pre-payment of taxation obligations before an order be given. The liability to pay taxes applies to the continuing company or companies.

As to obligations to satisfy any other undefined liabilities to "public bodies" the breadth of that definition might render it impossible for a company to determine whether it was in compliance and for the Court to give its approval.

The Committee considered the inherent jurisdiction of the High Court to address potential abuses of process. Article 34.3.1 of the Constitution vests the High Court "with full and original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." Whilst the court will exercise inherent jurisdiction, there are limitations. In the case of *McG v D.W. (No.2)*³ Murray C.J. noted:

"The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express."

This issue has been discussed and decided judicially very recently, the Court of Appeal judgment in the case of *Wee Care Limited v Companies Registration Office*⁴, where the Court acknowledged its inherent jurisdiction but, on the facts, declined to exercise it.

In this context, the Committee finally took comfort from the express provisions of the Directive aimed at ensuring that a pre-[transaction] certificate should not issue in the case of apparent abuse or fraud. Articles 86m(8) (conversions), 127(8) (mergers) and 160m(8) (divisions) provide:

"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 Union or national law, or for criminal purposes."

Option 18	Conversions: 86m(3)	Mergers: 127(3)	Divisions: 160m(3)
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[Information before pre-transaction certificate]

Member States may require that the application to obtain a pre-[transaction] certificate by the company is accompanied by additional information, such as, in particular:

³ [2000] 4 I.R. 1.

⁴ [2020] IECA 266.

- (a) the number of employees at the time of the drawing up of the draft terms of the cross-border [transaction];
- (b) the existence of subsidiaries and their respective geographical location;
- (c) information regarding the satisfaction of obligations due to public bodies by the company.

Recommendation

This option should be taken up, in the case of paragraph (c), but limited to moneys that may become due and owing to the Revenue Commissioners in respect of any taxes or levies. The application should not require that the taxes be paid (if not already due) but the arrangements for settling taxes to be come due should be specified.

Rationale

As in the case of option 17, there was considerable debate as to whether to recommend exercise of this option. The considerations discussed under option 17 were relevant in this case. It was argued that the provision of other information is unnecessary as information regarding employees, assets and liabilities will have already been included in the draft terms of the cross-border transaction; the court may, if it wishes, seek additional information regarding employees, assets and liabilities at the court hearing to approve the cross-border transaction. There is therefore adequate protection for employees and creditors in the court procedure. The inclusion of this option would place an additional burden on companies wishing to complete a cross-border transaction.

Following much debate it was concluded that it is not unreasonable for a company proposing to exit the jurisdiction by conversion, merger or division to make clear its intentions as to settlement of taxation liabilities. Such an obligation would not be a particularly onerous burden

Option 19	Conversions: 86m(10)	Mergers: 127(10)	Divisions: 160m(10)
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[Delay in Court approval in order to determine whether the 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.]

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

Recommendation

This option should be taken up.

Rationale

A Court should be given the necessary time to be satisfied of there being no abuse or fraud.

Summary of Recommendations

	Option	Conversions	Mergers	Divisions	Exercise option?
1	Disapply to companies in insolvency procedures?	86a(4)	120(4)	160a(5)	No
2	Disapply requirement for admin/mgt report for single member companies?	86e(4)	124(4)	160e(4)	Allow waiver
3	Disapply requirement for expert report for single member companies?	86f(3)	125(4)	160f(3)	Allow waiver
4	Require disclosure of expert report in register (at CRO)?	86g(1)	123(1)	160g(1)	No
5	Exempt companies from filing requirements where documents on company's website for a month?	86g(2)	123(2)	160g(2)	Conditionally
6	Require filing of documents in national gazette (i.e. Iris Oifigiúil)?	86g(5)	123(6)	160g(5)	Yes: CRO Gazette
7	Require consent of shareholder who suffers extra economic obligations as a result of transaction where shareholder cannot take cash-out payment under 86i/160i?	86h(4)		160h(4)	Yes
8	Extend right to be cashed out to voters in favour (as well as voters against)?	86i(1)	126a(1)	160i(1)	No
9	Require indication of dissent at or before meeting?	86i(1)	126a(1)	160i(1)	Yes
10	Accept opposition as negative vote?	86i(1)	126a(1)	160i(1)	Yes
11	Apply court-imposed cash-out consideration awarded in one case to all shareholders of that class?	86i(4)	126a(4)	160i(4)	Yes
12	Apply court-imposed share exchange ratio awarded in one case to all shareholders of that class?		126a(6)		Yes
13	Allow companies to issue shares instead of cash payment compensation?		126a(7)	160i(7)	Yes
14	Require admin/mgt financial report no earlier than one month before procedure?	86j(2)		160j(3)	No
15	Extend consultation with employees beyond companies in scope of Directive 2002/14/EC, Article 3(1)?	86k(1)	126c(1)	160k(1)	-

	Option	Conversions	Mergers	Divisions	Exercise option?
16	Adjust worker director numbers in circumstances stated?	86/(4)(b)		160/(4)(b)	-
17	Include satisfaction of liabilities with public bodies before pre-transaction certificate?	86m(1)	127(1)	160m(1)	No
18	Require info on subsidiaries, employees, satisfaction of obligations to public bodies before application for pre-transaction certificate?	86m(3)	127(3)	160m(3)	Yes: Revenue only
19	Allow authorities extra 3 months to assess transaction for abuse?	86m(10)	127(10)	160m(10)	Yes