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► **B** **DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**
 of 26 October 2005
 on cross-border mergers of limited liability companies
 (Text with EEA relevance)
 (OJ L 310, 25.11.2005, p. 1)

Amended by:

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► <u>M1</u>	Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009	L 259	14	2.10.2009
► <u>M2</u>	Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012	L 156	1	16.6.2012
► <u>M3</u>	Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014	L 173	190	12.6.2014



**DIRECTIVE 2005/56/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 26 October 2005

on cross-border mergers of limited liability companies

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and
in particular Article 44 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social
Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the
Treaty ⁽²⁾,

Whereas:

- (1) There is a need for cooperation and consolidation between limited liability companies from different Member States. However, as regards cross-border mergers of limited liability companies, they encounter many legislative and administrative difficulties in the Community. It is therefore necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying-out of cross-border mergers between various types of limited liability company governed by the laws of different Member States.
- (2) This Directive facilitates the cross-border merger of limited liability companies as defined herein. The laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company.
- (3) In order to facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger. None of the provisions and formalities of national law, to which reference is made in this Directive, should introduce restrictions on freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.

⁽¹⁾ OJ C 117, 30.4.2004, p. 43.

⁽²⁾ Opinion of the European Parliament of 10 May 2005 (not yet published in the Official Journal) and Council Decision of 19 September 2005.

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- (4) The common draft terms of the cross-border merger are to be drawn up in the same terms for each of the companies concerned in the various Member States. The minimum content of such common draft terms should therefore be specified, while leaving the companies free to agree on other items.
- (5) In order to protect the interests of members and others, both the common draft terms of cross-border mergers and the completion of the cross-border merger are to be publicised for each merging company via an entry in the appropriate public register.
- (6) The laws of all the Member States should provide for the drawing-up at national level of a report on the common draft terms of the cross-border merger by one or more experts on behalf of each of the companies that are merging. In order to limit experts' costs connected with cross-border mergers, provision should be made for the possibility of drawing up a single report intended for all members of companies taking part in a cross-border merger operation. The common draft terms of the cross-border merger are to be approved by the general meeting of each of those companies.
- (7) In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.
- (8) In order to protect the interests of members and others, the legal effects of the cross-border merger, distinguishing as to whether the company resulting from the cross-border merger is an acquiring company or a new company, should be specified. In the interests of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.
- (9) This Directive is without prejudice to the application of the legislation on the control of concentrations between undertakings, both at Community level, by Regulation (EC) No 139/2004 ⁽¹⁾, and at the level of Member States.
- (10) This Directive does not affect Community legislation regulating credit intermediaries and other financial undertakings and national rules made or introduced pursuant to such Community legislation.

⁽¹⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

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- (11) This Directive is without prejudice to a Member State's legislation demanding information on the place of central administration or the principal place of business proposed for the company resulting from the cross-border merger.
- (12) Employees' rights other than rights of participation should remain subject to the national provisions referred to in Council Directive 98/59/EC of 20 July 1998 on collective redundancies ⁽¹⁾, Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ⁽²⁾, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community ⁽³⁾ and Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees ⁽⁴⁾.
- (13) If employees have participation rights in one of the merging companies under the circumstances set out in this Directive and, if the national law of the Member State in which the company resulting from the cross-border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights are to be regulated. To that end, the principles and procedures provided for in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) ⁽⁵⁾ and in Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees ⁽⁶⁾, are to be taken as a basis, subject, however, to modifications that are deemed necessary because the resulting company will be subject to the national laws of the Member State where it has its registered office. A prompt start to negotiations under Article 16 of this Directive, with a view to not unnecessarily delaying mergers, may be ensured by Member States in accordance with Article 3(2)(b) of Directive 2001/86/EC.
- (14) For the purpose of determining the level of employee participation operated in the relevant merging companies, account should also be taken of the proportion of employee representatives amongst the members of the management group, which covers the profit units of the companies, subject to employee participation.

⁽¹⁾ OJ L 225, 12.8.1998, p. 16.

⁽²⁾ OJ L 82, 22.3.2001, p. 16.

⁽³⁾ OJ L 80, 23.3.2002, p. 29.

⁽⁴⁾ OJ L 254, 30.9.1994, p. 64. Directive as amended by Directive 97/74/EC (OJ L 10, 16.1.1998, p. 22).

⁽⁵⁾ OJ L 294, 10.11.2001, p. 1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).

⁽⁶⁾ OJ L 294, 10.11.2001, p. 22.

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- (15) Since the objective of the proposed action, namely laying down rules with common features applicable at transnational level, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (16) In accordance with paragraph 34 of the Interinstitutional Agreement on better law-making ⁽¹⁾, Member States should be encouraged to draw up, for themselves and in the interest of the Community, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

This Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States (hereinafter referred to as cross-border mergers).

Article 2

Definitions

For the purposes of this Directive:

- 1) 'limited liability company', hereinafter referred to as 'company', means:
- (a) a company as referred to in Article 1 of Directive 68/151/EEC ⁽²⁾, or
 - (b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC for the protection of the interests of members and others;
2. 'merger' means an operation whereby:
- (a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

⁽²⁾ First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ L 65, 14.3.1968, p. 8). Directive as last amended by the 2003 Act of Accession.

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

*Article 3***Further provisions concerning the scope**

1. Notwithstanding Article 2(2), this Directive shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in points (a) and (b) of Article 2(2) to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.
2. Member States may decide not to apply this Directive to cross-border mergers involving a cooperative society even in the cases where the latter would fall within the definition of ‘limited liability company’ as laid down in Article 2(1).
3. This Directive shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

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4. Member States shall ensure that this Directive does not apply to the company or companies that are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council ⁽¹⁾.

▼B*Article 4***Conditions relating to cross-border mergers**

1. Save as otherwise provided in this Directive,
 - (a) cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and

⁽¹⁾ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

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

2. The provisions and formalities referred to in paragraph 1(b) shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Article 16. A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

*Article 5***Common draft terms of cross-border mergers**

The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger. The common draft terms of cross-border merger shall include at least the following particulars:

- (a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;
- (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;
- (c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
- (d) the likely repercussions of the cross-border merger on employment;
- (e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;
- (f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;
- (g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- (h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- (i) the statutes of the company resulting from the cross-border merger;

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- (j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16;
- (k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
- (l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

*Article 6***Publication**

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

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Any of the merging companies shall be exempt from the publication requirement laid down in Article 3 of Directive 68/151/EEC if, for a continuous period beginning at least one month before the day fixed for the general meeting which is to decide on the common draft terms of cross-border merger and ending not earlier than the conclusion of that meeting, it makes the common draft terms of such merger available on its website free of charge for the public. Member States shall not subject that exemption to any requirements or constraints other than those which are necessary in order to ensure the security of the website and the authenticity of the documents and may impose such requirements or constraints only to the extent that they are proportionate in order to achieve those objectives.

By way of derogation from the second subparagraph, Member States may require that publication be effected via the central electronic platform referred to in Article 3(4) of Directive 68/151/EEC. Member States may alternatively require that such publication be made on any other website designated by them for that purpose. Where Member States avail themselves of one of those possibilities, they shall ensure that companies are not charged a specific fee for such publication.

Where a website other than the central electronic platform is used, a reference giving access to that website shall be published on the central electronic platform at least one month before the day fixed for the general meeting. That reference shall include the date of publication of the common draft terms of cross-border merger on the website and shall be accessible to the public free of charge. Companies shall not be charged a specific fee for such publication.

The prohibition precluding the charging to companies of a specific fee for publication, laid down in the third and fourth subparagraphs, shall not affect the ability of Member States to pass on to companies the costs in respect of the central electronic platform.

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Member States may require companies to maintain the information for a specific period after the general meeting on their website or, where applicable, on the central electronic platform or the other website designated by the Member State concerned. Member States may determine the consequences of temporary disruption of access to the website or to the central electronic platform, caused by technical or other factors.

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

- (a) the type, name and registered office of every merging company;
- (b) the register in which the documents referred to in Article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;
- (c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

*Article 7***Report of the management or administrative organ**

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

The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in Article 9.

Where the management or administrative organ of any of the merging companies receives, in good time, an opinion from the representatives of their employees, as provided for under national law, that opinion shall be appended to the report.

*Article 8***Independent expert report**

1. An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 9 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.

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

3. The expert report shall include at least the particulars provided for by Article 10(2) of Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies ⁽¹⁾. The experts shall be entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties.

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

*Article 9***Approval by the general meeting**

1. After taking note of the reports referred to in Articles 7 and 8, the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger.

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

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

*Article 10***Pre-merger certificate**

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

2. In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

⁽¹⁾ OJ L 295, 20.10.1978, p. 36. Directive as last amended by the 2003 Act of Accession.

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3. If the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies situated in Member States which do not provide for such procedure explicitly accept, when approving the draft terms of the cross-border merger in accordance with Article 9(1), the possibility for the members of that merging company to have recourse to such procedure, to be initiated before the court having jurisdiction over that merging company. In such cases, the authority referred to in paragraph 1 may issue the certificate referred to in paragraph 2 even if such procedure has commenced. The certificate must, however, indicate that the procedure is pending. The decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members.

*Article 11***Scrutiny of the legality of the cross-border merger**

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16.

2. To that end each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in Article 10(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 9.

*Article 12***Entry into effect of the cross-border merger**

The law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect. That date must be after the scrutiny referred to in Article 11 has been carried out.

▼M2*Article 13***Registration**

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, in accordance with Article 3 of Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required

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by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty, with a view to making such safeguards equivalent⁽¹⁾, for publicising the completion of the cross-border merger in the public register in which each of the companies is required to file documents.

The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection of central, commercial and companies registers established in accordance with Article 4a(2) of Directive 2009/101/EC and without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

▼ B*Article 14***Consequences of the cross-border merger**

1. A cross-border merger carried out as laid down in points (a) and (c) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

- (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
- (b) the members of the company being acquired shall become members of the acquiring company;
- (c) the company being acquired shall cease to exist.

2. A cross-border merger carried out as laid down in point (b) of Article 2(2) shall, from the date referred to in Article 12, have the following consequences:

- (a) all the assets and liabilities of the merging companies shall be transferred to the new company;
- (b) the members of the merging companies shall become members of the new company;
- (c) the merging companies shall cease to exist.

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

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

⁽¹⁾ OJ L 258, 1.10.2009, p. 11.

Editorial note: the title of Directive 2009/101/EC has been adjusted to take account of the renumbering of the articles of the Treaty establishing the European Community, in accordance with Article 5 of the Treaty of Lisbon; the original reference was to the second paragraph of Article 48 of the Treaty.

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5. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:
- (a) by the acquiring company itself or through a person acting in his or her own name but on its behalf;
 - (b) by the company being acquired itself or through a person acting in his or her own name but on its behalf.

*Article 15***Simplified formalities**

1. Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired:
- Articles 5, points (b), (c) and (e), 8 and 14(1), point (b) shall not apply,
 - Article 9(1) shall not apply to the company or companies being acquired.

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2. Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more, but not all, of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company or companies being acquired so requires, in accordance with Directive 78/855/EEC.

▼B*Article 16***Employee participation**

1. Without prejudice to paragraph 2, the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.
2. However, the rules in force concerning employee participation, if any, in the Member State where the company resulting from the cross-border merger has its registered office shall not apply, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger as referred to in Article 6, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of Article 2(k) of Directive 2001/86/EC, or where the national law applicable to the company resulting from the cross-border merger does not
- (a) provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation, or

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- (b) provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

3. In the cases referred to in paragraph 2, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, *mutatis mutandis* and subject to paragraphs 4 to 7 below, in accordance with the principles and procedures laid down in Article 12(2), (3) and (4) of Regulation (EC) No 2157/2001 and the following provisions of Directive 2001/86/EC:

- (a) Article 3(1), (2) and (3), (4) first subparagraph, first indent, and second subparagraph, (5) and (7);
- (b) Article 4(1), (2), points (a), (g) and (h), and (3);
- (c) Article 5;
- (d) Article 6;
- (e) Article 7(1), (2) first subparagraph, point (b), and second subparagraph, and (3). However, for the purposes of this Directive, the percentages required by Article 7(2), first subparagraph, point (b) of Directive 2001/86/EC for the application of the standard rules contained in part 3 of the Annex to that Directive shall be raised from 25 to 33 1/3 %;
- (f) Articles 8, 10 and 12;
- (g) Article 13(4);
- (h) part 3 of the Annex, point (b).

4. When regulating the principles and procedures referred to in paragraph 3, Member States:

- (a) shall confer on the relevant organs of the merging companies the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration;
- (b) shall confer on the special negotiating body the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened and to rely on the rules on participation in force in the Member State where the registered office of the company resulting from the cross-border merger will be situated;

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(c) may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding these rules, determine to limit the proportion of employee representatives in the administrative organ of the company resulting from the cross-border merger. However, if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third.

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

6. When at least one of the merging companies is operating under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with the rules referred to in paragraph 2, that company shall be obliged to take a legal form allowing for the exercise of participation rights.

7. When the company resulting from the cross-border merger is operating under an employee participation system, that company shall be obliged to take measures to ensure that employees' participation rights are protected in the event of subsequent domestic mergers for a period of three years after the cross-border merger has taken effect, by applying *mutatis mutandis* the rules laid down in this Article.

*Article 17***Validity**

A cross-border merger which has taken effect as provided for in Article 12 may not be declared null and void.

▼M2*Article 17a***Data protection**

The processing of personal data carried out in the context of this Directive shall be subject to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾.

▼B*Article 18***Review**

Five years after the date laid down in the first paragraph of Article 19, the Commission shall review this Directive in the light of the experience acquired in applying it and, if necessary, propose its amendment.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

▼B*Article 19***Transposition**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 December 2007.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

*Article 20***Entry into force**

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 21***Addressees**

This Directive is addressed to the Member States.