

Rechtsangleichung in der EWG', ZHR 132 (1969) 201; Priester, 'Das neue Verschmelzungsrecht', NJW 1983, 1459; Sandhaus, 'Richtlinienvorschlag der Kommission zur Vereinfachung der Berichts- und Dokumentationspflichten bei Verschmelzungen und Spaltungen', NZG 2009, 41; Schnorbus, *Gestaltungsfreiheit im Umwandlungsrecht – Das Verhältnis des UmwG zu Strukturmaßnahmen außerhalb seines Anwendungsbereiches im System des deutschen und europäischen Umwandlungsrechts*, (Baden-Baden, Nomos, 2001); id., 'Grundlagen zur Auslegung des allgemeinen Teils des UmwG', WM 2000, 2321; Schwarz, 'Das neue Umwandlungsrecht', DStR 1994, 1694; Sonnenberger, 'Interne Fusion von Aktiengesellschaften im Gemeinsamen Markt – Kommissionsvorschlag einer dritten Richtlinie zur Angleichung des Gesellschaftsrechts', AG 1971, 76; Temple Lang, 'Three EEC Draft Directives on company law – Capital, Mergers and Management', (1972) 7 *Irish Jurist* 306; Wagner, 'Der Regierungsentwurf für ein Drittes Gesetz zur Änderung des Umwandlungsgesetzes', DStR 2010, 1629; Wooldridge, 'The Third Directive and the Meaning of Mergers', (1980) 1 *The Company Lawyer* 75; and the (numerous) standard commentaries on the German *Umwandlungsgesetz*, namely: Ganske, *Umwandlungsrecht*, (2nd ed., Düsseldorf, IDW, 1995); Goutier/Knopf/Tulloch, *Kommentar zum Umwandlungsgesetz*, (Heidelberg, Verlag Recht und Wirtschaft, 1996); Lutter (ed.), *Umwandlungsgesetz – Kommentar*, (4th ed., Cologne, Schmidt, 2009); Schmitt/Hörtnagl/Stratz, *Umwandlungsgesetz, Umwandlungssteuergesetz*, (5th ed., Munich, Beck, 2009); Widmann/Meyer (eds.), *Umwandlungsrecht*, (Bonn, Stollfuß, looseleaf, 10/2009). On division in particular: Engelmayr, *Die Spaltung von Aktiengesellschaften nach dem neuen Umwandlungsrecht*, (Bielefeld, Bielefeld University Dissertation, 1995); Heidenhain, 'Fehlerhafte Umsetzung der Spaltungs-Richtlinie', EuZW 1995, 327; id., 'Sonderrechtsnachfolge bei der Spaltung', ZIP 1995, 801; Wirth, 'Auseinanderspaltung als Mittel zur Trennung von Familienstämmen zur Filialabsplattung – Gesetzeslücke, Redaktionsversuchen oder bloßes Wunschdenken unter Außerachtlassung des Gemeinschaftsrechts?', AG 1997, 455. See also references below in §29.

I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. Importance

a) Basic Act for Structural Changes

1. In the master plan, the Third Company Directive on mergers follows that on disclosure and third party relationships and that on questions related to capital (First and Second Directives, above §§8 et seq., 11); even so, in the sequence of acts adopted, the Fourth (Annual Accounts) Directive (above §15) came a few weeks earlier. All these other Directives deal with the individual company. The Merger Directive thus was conceived as the **basic legal measure for an EC/EU law on structural changes**. Originally, it was intended to regulate both (national) merger and division, as well as some equivalent measures. On the Continent, the merger in the narrow sense – the merging of two legal personalities – can be seen

as the basic type of a structural change¹ and the division – the split into two or more legal personalities – as its counterpart. Both were also among the measures for which a cross-border realisation was doubtful until very recently (see now below for cross-border mergers §29).

b) Functions of Merger and Division

2. The **merger** serves different aims, primarily two: to combine several enterprises or simplify structures in a group of companies. In the first case, the merger serves external growth and this can have manifold advantages;² synergies in operational business, a broader capitalisation, and access to capital markets can be opened up (to or facilitated for) the shareholders of a company for the first time. In the second case, the combination of enterprises does not grow externally but is simplified – mainly the structures of decision-making (identity of management) and also liability.³

3. The **division** (including a split-off and outsourcing to a subsidiary), on the other hand, is aimed at reducing the size, at thus reducing management and supervision costs created by size and complexity not compensated by synergies between the different parts of the company. The acquiring part, however, if not newly founded, again grows externally. Elements of division and merger are typically combined and this is elegantly elucidated in the French term 'scission-fusion'.⁴

¹ In the United Kingdom, the merger with transfer of all assets and liabilities is not usual, but rather the takeover (as initially in the Netherlands): Barbato, (1984) *J.B.Law* 176 (178); Edwards, *EC company law*, 91; Farmery, 'Removing Legal Obstacles to Cross-border Mergers: EEC Proposal for a Tenth Directive', (1987) *Bus. L. Rev.* 35 (35); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (269); Wooldridge, (1980) 1 *The Company Lawyer* 75 (75 and 79). The term merger is largely used also for acquisitions and not necessarily only for mergers in the technical sense. For Germany, where division and also conversion were not possible or only to some extent and where the rules on mergers in the technical sense are still the model for the others and mergers in the technical sense also dominate practice, see Hommelhoff/Riesenhuber, *ibidem* 260–263; Kallmeyer, ZIP 1994, 1746 (1746); Schmidt, 'Gesetzliche Gestaltung und dogmatisches Konzept eines neuen Umwandlungsgesetzes – Überlegungen zur legislativen Praxis und Theorie', ZGR 1990, 580 (585).

² For instance Horn, in: id. (ed.), *Cross-border Mergers and Acquisitions and the Law*, 3 (3–8); Kallmeyer, ZIP 1994, 1746 (1747); Lutter, *Umwandlungsgesetz*, Introduction para. 2–4.

³ For instance van Ommeslaghe, ZHR 132 (1969) 201 (especially 202–204). In groups of companies, instructions pose problems and similarly the question whose interests may be furthered if action is taken in the different affiliated companies; comparative law below §31 para. 23–29.

⁴ Cozian/Viandier/Deboissy, *Sociétés*, para. 1303; Guyon, *Sociétés*, para. 638.1.

c) Aims of the Merger and Division Directives

4. The initiative was related to two others: the European Company Statute (below §33) and a Convention (today a Directive) on cross-border mergers (§29). The aim of all three initiatives was **primarily external growth**. The merger as a means of concentration therefore stood in the foreground.⁵ The objective was to have the structures facilitating (or even enabling) the adequate size of enterprises for larger markets, including the internal market – mainly in order to be in a position to compete with enterprises from the US and Japan in these large markets. They were structures of concentration, then seen positively – unlike two decades before, in the writings of one intellectual founding father of the Community.⁶

5. That concentration was the aim is also evidenced by two characteristics of legal construction: while there certainly are also rules for simplifying the structure of groups of companies (Art. 24–29 of the Merger Directive), the core rules are situated at the beginning of the Directive. These rules had to be introduced by the Member States, though the rules on the simplification of group structures in only one case, namely, merger with a 100% parent company. Otherwise (and in the case of divisions), Member States only had to introduce the safeguards prescribed in the Directive if they introduced the arrangement at all. A second characteristic is related to the first: the Merger Directive applied only to national mergers (as also the Division Directive only to national divisions). The main aim was, however, to facilitate the already ongoing negotiations concerning international mergers because the adoption of such cross-border rules seemed more likely as soon as the national laws were similar.⁷

6. In short, for a restricted range of measures, a European minimum level of protection should be introduced in any case: sufficient information for shareholders that would facilitate their decision-making (below §28 para. 21–31) and elimination of adverse external effects for creditors (below §28 para. 35–37). This restricted range of measures – the merger aiming at external growth and the simplification of group structures in the case of 100% parent companies – should be placed at the disposal of companies in any case – first at national level,

⁵ See on all this van Ommeslaghe, ZHR 132 (1969) 201 (especially 202–206); and also, for instance, Farmery, (1987) *Bus. L. Rev.* 35 (35); Hannigan, *Company Law*, 728; Ganske, 'Internationale Fusion von Gesellschaften in der Europäischen Gemeinschaft – ein neuer Ansatz', DB 1985, 581 (581).

⁶ Eucken, *Grundsätze der Wirtschaftspolitik*, (6th ed. 1990), 241–250, 264–270 et passim (1st ed. 1952) (any increase in competition is positive, any concentration therefore negative).

⁷ Wooldridge, (1980) 1 *The Company Lawyer* 75 (75); Menjuca, *Droit européen des sociétés*, 219; Ganske, DB 1981, 1551 (1551); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (269 et seq., 281 et seq.); Priester, NJW 1983, 1459 (1459).

later at international level. Even here, however, it already has to be stressed that there were and are alternative arrangements (with certain disadvantages) already existing and practised also across borders over the last thirty or forty years and which, from the perspective of taxation, are treated in principle in the same way at the EU level (below §32 para. 6–9).

d) Adoption and Legislative History

7. All this explains the fact that in 1965 – a long time before the United Kingdom eventually acceded – the merger was chosen for harmonisation, **first of all cross-border mergers**.⁸ To this end, a Directive on national mergers (intended to extend to transactions akin to mergers, including divisions) was proposed in 1970⁹ and, after two amendments,¹⁰ adopted in 1978 in its centrepiece (on mergers) (**Merger Directive**).¹¹ Because of these motives, it was also possible to split off the regime on divisions, when this latter proved to be too complex to be decided quickly. The second part, on divisions, then followed in 1982 (Division Directive).¹² The rather lengthy duration of the negotiations did not in fact result from the fact that the concept of safeguards would have been changed substantially. In the process from the first Proposal¹³ to the adopted version, what basically changed was only that nullity for other than company law reasons was explicitly admitted and that a rule on employee rights was taken out (see now Art. 12, 22 of the Merger Directive and Art. 11, 19 of the Division Directive). And there was dispute regarding Art. 23 of the Division Directive. The **Division Directive** contains identical rules to a great extent. From the point of view of legal construction, it still rather has the characteristics of yet another

⁸ On the early efforts see references below in §29 N. 2.

⁹ Proposal of 16 June 1970, OJ 1970 C 89/20; Opinions OJ 1971 C 88/18 (Economic and Social Committee) and 1972 C 129/50 (European Parliament); see already General Programme for the abolition of restrictions on freedom of establishment, OJ 1962 No 2, 36 = *OJ Special Edition*, Second Series IX, 7.

¹⁰ First amended Proposal of 4 January 1973, COM(72) 1668 final; Opinions OJ 1975 C 95/12 (European Parliament), second amended Proposal of 22 December 1975, COM(75) 672 final.

¹¹ Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited companies, OJ 1978 L 295/36; amendments so far (only) in Acts of Accession. Some de-regulation is discussed, however; see Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward of 21 May 2003, COM(2003) 284 final, 24 et seq.

¹² Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies, OJ 1982 L 378/47.

¹³ On this Proposal extensively van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123; and also id., ZHR 132 (1969) 201 (especially 208–212); Meyer-Ladewig, BB 1970, 1517; Sonnenberger, AG 1971, 76; Stein, *Harmonization of European Company Laws* (1971), 378–383; Temple Lang, (1972) 7 *Irish Jurist* 306 (313–319). On the changes occurring later and mentioned in the following see Barbato, (1984) *JBL* 176 (183); Ganske, DB 1981, 1551 (1556 et seq.); Sonnenberger, AG 1971, 76 (79 and 82).

equivalent measure in the sense of the Merger Directive,¹⁴ and therefore is treated as such in the following discussion (integrating it into the discussion of all items and only adding at the end a summary on divisions in particular). Unlike cross-border mergers (§29), cross-border divisions are still not harmonised today. The Merger and Division Directives have recently been amended by Directive 2009/109/EC¹⁵ with respect to reporting and documentation duties.¹⁶ This directive had to be transposed by the Member States by the end of June 2011.

2. Scope of Application and Subject Matter

a) Personal Scope of Application (Art. 1 Merger Directive)

8. Unlike the First and Fourth Directives, but similarly to the Second Directive, the Merger Directive – and then also the Division Directive – **apply only to the PLC which has been (validly) formed under the law of a Member State** (Art. 1(1) of the Merger Directive, Art. 1(1) and (2) of the Division Directive). On the latter, exclusively this Member State decides, which means that if it applies the incorporation theory, only the seat chosen in the company statutes, the siège statutaire (which is also the place of the register) has to be moved there by the company.¹⁷ The possibility for an exception under Art. 1(2) of the Merger Directive (Art. 1(2) of the Division Directive) is important only for the Romance jurisdictions.¹⁸ According to Art. 1(3) of the Merger Directive, PLCs subject to insolvency proceedings or other proceedings involving all assets can be exempted as well.

¹⁴ Many authors stress the similarities and that a circumvention of safeguards should be excluded, for instance Barbaso, (1984) *JBL* 176 (179); Edwards, *EC Company Law*, 94 and 102; Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 28 et seq.; Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (266); Werlauff, *EU Company Law*, 390. The decisive point is that the safeguards apply to virtually all cases but that there is no obligation on the Member States to introduce the instrument at all.

¹⁵ Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions, OJ 2009 L 259/14.

¹⁶ On the proposal of the EU Commission see Sandhaus, *NZG* 2009, 41.

¹⁷ Wooldridge, (1980) 1 *The Company Lawyer* 75 (80). There is nothing in the wording and the legislative history to support the opinion that formation has to be valid under the lex fori (conflict of laws and substantive law referred to): in this sense apparently Heenen, *CDE* 1981, 15 (16); on the fact that this alternative (with a reference also to conflict of laws) was known but that it has been eliminated from the wording, see for instance: Wooldridge, *ibid.* In this sense also the EC in the *Überserger* case, where the Court compelled any Member State to recognise a company validly founded under the incorporation theory if this company transferred its headquarters to this state, see in more detail §25 para. 28.

¹⁸ Heenen, *CDE* 1981, 15 (15); Ganske, *DB* 1981, 1551 (1551); Meyer-Ladewig, *BB* 1970, 1517 (1518); some minor importance potentially also for UK cooperative societies, see Wooldridge, (1980) 1 *The Company Lawyer*, 75 (75).

*9. Initially, a **parallel regime for the private limited company** had been envisaged,¹⁹ and the restriction to PLCs was and remains often criticised.²⁰ Considering the prime objective of regulation, however, it seems at least plausible (see more generally above §3 para. 12): the measure was primarily aimed at protecting shareholders' rights and had to provide for an instrument for cross-border external growth.²¹ Shareholders who invest across borders in an anonymous way and are therefore in need of protection which is basically the same all over Europe exist only within the PLC. Only in this situation does a need for integration arise (level playing field all over Europe). If structures for large enterprises were needed, it was by and large sufficient if at least the PLC was enabled to enter into cross-border mergers. Today, these companies typically also raise money on capital markets, and issuing securities representing membership is in any case possible only in the case of a PLC. Only aspects of creditor protection would speak in favour of a broader scope of application, because companies of other types can also have creditors all over Europe (in fact, most creditor protection rules have been taken over for other limited liability companies in most Member States, see below §28 para. 47 et seq.). Moreover, the aspect of equal treatment of different types of company may speak in favour of opening up the instrument of external growth, including across borders, also to smaller enterprises – which the Cross-Border Merger Directive (§29) largely realised (see also below §37 para. 32).

b) Subject Matter (Substantive Scope of Application)

*10. The Directives regulate the procedure (with safeguards) and validity under company law of mergers in the narrow legal sense, including merger of a 100% subsidiary, for which national law has to provide (see below II. 2 a), and of some equivalent instruments, among them also division, for which national law may (but need not) provide. If then national law decides to introduce such an instrument, all the safeguards prescribed by the Directives have to be introduced as well (see below II. 2 b and c). All obstacles to validity of mergers and divisions stemming from reasons other than company law reasons remain unaffected (Art. 22(3) of the Merger Directive and Art. 19(3) of the Division Directive), mainly those of antitrust law,²² but also of tax or labour law. The forms of merger which must be introduced must, however, always remain possible. Therefore, the question as to which types of situation are covered as mergers in the narrow sense has to be discussed first.

¹⁹ See, for instance, van Ommeslaghe, in: Zonderland, (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (125); id., *ZHR* 132 (1969) 201 (208); and still: Barbaso, 'The Harmonisation of Company Law with regard to Mergers and Divisions', (1984) *JBL* 176 (177). Barbaso, (1984) *JBL* 176 (187); also, though less vigorously: Sonnenberger, *AG* 1971, 76 (77); see more generally above §1 para. 14.

²⁰ Creditor protection rather seems to be of secondary importance. See also the differences in wording in the 4th, 6th and also 8th Recitals; see also the authors quoted below in N. 58 who hold that creditor protection is too weak.

²¹ Wooldridge, (1980) 1 *The Company Lawyer* 75 (82); Ganske, *DB* 1981, 1551 (1556 et seq.); also Farmery, (1987) *Bus. L. Rev.* 35 (53). Also national merger control – as far as it is still allowed besides the EC Merger Control Regulation: references for this Regulation and bibliography above §4 N. 63 et seq.

II. FORMS OF MERGER AND DIVISION

1. *Their Importance Within the Whole Area of European Merger Law*

11. EC law on mergers distinguishes among **three kinds of measures**: those which national law has to provide for (with safeguards (see below 2 a); those for which national law has to introduce the safeguards if it admits them at all (see below 2 b and c); and mergers and divisions in the broad, economic sense (see 3. below) to which the Merger and Division Directive(s) do not apply, but which can be caught by other Community measures, mainly the Merger Tax Directive, which is an enabling measure (on this measure see below §32), and the Merger Control Regulation, which is a business regulation control measure excluding certain practices and is part of an EU antitrust and competition law. This third tool has to be taken into account as well because it exists in practice. In fact, until rather recently, it was actually the only one which could be shaped with high legal certainty in cross-border cases as well (see now, however, §29). The Cross-Border Merger Directive introduces a duty to liberalise only for those types of merger (in the narrow sense) for which the (national) Merger Directive already had introduced a duty to enact such a tool in domestic law (see below section 2 a); see also Art. 3 para. 1 and Art. 4 para. 1 of the Cross-Border Merger Directive). The alternative tools which had already existed have thus been broadly supplemented by the Cross-Border Merger Directive – giving farther-reaching possibilities to rationalise the structure (§28 para. 19).

2. *Merger, Division and the Measures Covered by the Directives*

- a) Merger and Merger of Wholly Owned Subsidiaries (Art. 2–4, 24 Merger Directive)
12. A merger within the meaning of the Merger Directive is characterised by the transfer of all assets and liabilities of a PLC (the transferring company) in one act; the dissolution without winding up of the transferring company; and, as compensation, the grant of shares in the acquiring company to the shareholders of the transferring company with a possible cash top-up of up to 10%. If the acquiring PLC has to be created anew (and two or more companies are merged upon it), the Directive talks of merger by the formation of a new company, and if the company upon which the other(s) should be merged already exists, of merger by acquisition (on all of the preceding characterisations see Art. 3(1) and Art. 4(1) of the Merger Directive).

*13. The national legislature had to provide for these instruments (Art. 2 of the Merger Directive).²³ The transaction had hitherto been unknown in the Netherlands, and in the United Kingdom it was only available under the control of a court.²⁴ It has been doubted that the Community has the competence to impose an obligation to introduce instruments, because Art. 44(2)(g) EC (today Art. 50(2)(g) TFEU) may be the basis for harmonising safeguards, but not for requiring the national legislature to provide for instruments.²⁵ This argument does not, however, take sufficient account of the legislative history. The legal basis is certainly aimed at facilitating cross-border transactions in cases where a form of cross-border establishment does not exist (to an adequate extent) under national laws. Indeed, the Third Directive was aimed at paving the way for harmonisation of cross-border mergers.

*14. Apart from merger within the meaning of (EC) company law, there is only one instrument which the Member States had to introduce: the merger (again in the narrow sense) of a 100% subsidiary which also results in dissolution (without winding up) and in a transfer of all assets and liabilities but which does not, of course, lead to an obligation to grant shares in the acquiring company to the shareholders of the transferring company (the sole shareholder is the acquiring company). Under many laws, for instance German law, this is even characterised as a merger in the narrow sense. It has to be permitted by all legislatures in the Community. National legislatures have to provide for such a simplified procedure (Art. 24–26 of the Merger Directive).

- b) Other Equivalent Measures Under the Merger Directive (Art. 30 et seq. Merger Directive)

15. Equivalent to the merger in the narrow sense and therefore subject to the same safeguards is (1) any measure which fulfils all three requirements mentioned except that the cash top-up exceeds 10% (Art. 30 of the Merger Directive). Art. 3(1), Art. 4(1) and Art. 30 of the Merger Directive are not formulated in a very transparent manner. The basic idea is that the national legislature has to introduce the instrument if the cash top-up does not exceed 10% (necessary not to frustrate mergers de facto). The national legislature can, however, also accept (but need not do so) any other cash top-up, probably even up to 100%, if it applies all the safeguards found in the Directive (Art. 30 of the

²³ On the obligation to introduce this possibility (though not always also on the other explanations below in §28 para. 14): Barbato, (1984) *J.B.Law* 176 (178); Edwards, *EC Company Law*, 93 et seq., 100; Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (269); Lutter, *Europäisches Unternehmensrecht*, 128 et seq.

²⁴ Barbato, (1984) *J.B.Law* 176 (178); Edwards, *EC Company Law*, 93 et seq., 116; Heenen, *CDE* 1981, 15 (15); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (266); Lempereur, *La troisième directive*, 5; also Farmery, (1987) *Bus. L. Rev.* 35 (35). The Netherlands planned its own initiative in 1978 anyway: Sonnenberger, *AG* 1971, 76 (77) (also on case law in some Member States).

²⁵ Heenen, *CDE* 1981, 15 (15); Sonnenberger, *AG* 1971, 76 (77); see also Edwards, *EC Company Law*, 93.

Merger Directive refers to all rules except for those in which because of a 100% shareholding no exchange of shares is needed).²⁶

16. Equivalent to the merger in the narrow sense is also (2) any measure that leaves the **transferring company** intact but otherwise fulfils all three requirements mentioned (below §28 para. 12, 14; Art. 31 of the Merger Directive). Again, the national legislature can unquestionably accept such a measure, but must then – and this is what Art. 31 is really about – also apply all the safeguards of the Directive. Art. 31 does not cover the case, important in practice, where compensation in the form of shares in the acquiring company is not granted directly to the shareholders of the transferring company, but to the company itself.²⁷ Art. 31 was important, for instance, for Germany, where formerly the so-called conversion via merger was the only possible means of conversion.²⁸

c) Division and Other Equivalent Measures Under the Division Directive (Art. 1 et seq., 21, 24 et seq. Division Directive)

17. The **division within the meaning of the Division Directive** is also an equivalent measure within the meaning of the Merger Directive. The safeguards contained in the Merger Directive apply (in a practically identical way) if the national legislature introduces this instrument (which it is not obliged to do). Again, three elements have to be satisfied (Art. 1 et seq., Art. 21 of the Division Directive): the transfer of all assets and liabilities of one PLC (the 'transferring company') en bloc, in this case to several acquiring companies; the dissolution of the transferring company without winding up; and compensation by way of the grant of shares in the acquiring companies to the shareholders of the transferring company with a cash top-up of up to 10% again being possible. If the acquiring companies are newly created this is a division by the formation of new companies, and if they already exist, a division by acquisition. A combination of the two is possible (Art. 1(3) of the Division Directive). The division in the narrow sense

²⁶ Extensively Kalss, *JbL* 1995, 420 (423–425); see also van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (128); opposite Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 12 and apparently Wooldridge, (1980) 1 *The Company Lawyer*, 75 (75). Kalss convincingly points out that the wording in languages other than German is open. Moreover: if national law can freely introduce arrangements which are equivalent to mergers anyway, the sole question is whether it should be obliged to provide for the safeguards prescribed in the Directive only where the cash top-up amounts to 99.9% or also when it stands at 100%. This question is easy to answer in the affirmative. The dispute is thus not about the power of each Member State also to allow full cash compensation but only about whether national law then has to provide for the safeguards.

²⁷ Wooldridge, (1980) 1 *The Company Lawyer* 75 (75); Kalss, *JbL* 1995, 420 (423).

²⁸ See, for instance Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 12. When conversion was then allowed extensively (in §§190–304 *UmwG*), this need ceased to exist.

(with full dissolution) is different from the merger only in that there are several acquiring companies (the company is **split up**).

*18. In the case of a division as well, there are 'equivalent measures';²⁹ this differentiation has, however, no legal consequences because already in the case of the division, the national legislature has no obligation to introduce it, only to introduce the safeguards if it does so. In the first type of an equivalent measure (Art. 24 of the Division Directive), the additional cash payment again exceeds 10% (possible here too, if interpreted correctly, up to 100%). The national legislature can therefore permit any amount of cash payment – unlike in the case of a merger, probably also one only of less than 10%, because it need not introduce the division at all. In all cases, the safeguards have to be introduced. The second type of an equivalent measure (Art. 25 of the Division Directive) is constituted by a split (as described) in which the **transferring company** survives. The largely majoritarian view is that this also covers the **spin-off company**, widely used in Germany,³⁰ with the transfer of a part of the net worth while retaining another part, although in this case one cannot speak of a transfer of all assets and liabilities as is done in Art. 2 and 21. The only requirement would then be that the transfer be en bloc, i.e. that a certain percentage of all assets and liabilities be transferred in one act and not individual assets and liabilities separately.

3. *Types of Merger and Division in the Broad Sense Not Covered by the Directives*

19. By merger and division in the broad and economic sense, measures are meant which can serve the same function as mergers and divisions in the narrow, legal sense. Although the variety of arrangements is virtually unlimited,³¹ basic types can be derived from the following considerations. Merger and division within the meaning of the Directive(s) are mainly characterised by two elements which have to be satisfied cumulatively and both have a rationalising effect. The first of these is (1) the **transfer of all assets and liabilities en bloc**, of the whole net worth or a part of it. Unlike in the case of individual succession, each asset or

²⁹ For instance Edwards, *EC Company Law*, 102; Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (267).

³⁰ Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 39 et seq.; Lutter, *Europäisches Unternehmensrecht*, 197. Not covered is outsourcing to a newly formed company within the group under §§152–173 *UmwG*, which is about other types of transferring entities, for instance Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (267). For similar transactions in France and the Benelux countries, see: van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders* (1972), 123 (128 et seq.).

³¹ See, for instance: della Faille, *Fusions*, 401–442; Herzog/Förster, *DB* 1994, 1; Kallmeyer, *ZIP* 1994, 1746 (1747 et seq.); also Hanningan, *Company Law*, para. 26–1 through 26–7; monographs by Schnorbus, *Gestaltungsfreiheit*; Beswick, *Buying and Selling Private Companies and Businesses* (6th ed. 2001); Holzapfel, *Unternehmenskauf in Recht und Praxis*, (10th ed. 2001); Knight, *The Acquisition of Private Companies and Business Assets*, (7th ed. 1997); Picot, *Unternehmenskauf und Restrukturierung*, (2nd ed. 1998).

liability does not have to be transferred separately. The latter would be an arrangement under normal private law, the former is a rationalisation rendered possible under company law. Merger and division in the broad and economic sense therefore are realised via individual succession (assets and/or liabilities are transferred separately), and assets can be severed from liabilities (asset deal).³² A second alternative to the transfer of all assets and liabilities en bloc consists in transferring not the net worth, but the shares – and receiving as compensation either cash or again shares in the acquiring company. The most important form here (if the compensation is granted to the shareholders) is the takeover, which predominates in the United Kingdom and the Netherlands, but is not captured by the Merger Directive.³³ The second characteristic of a merger or a division within the meaning of the Directive(s) is that (2) the **compensation has to go directly to the shareholders of the transferring company**, mainly shares in the acquiring company. Alternatively, these shares can also go to the transferring company itself,³⁴ which then, for instance, becomes a holding company, keeps its shareholders and can respond to its obligations (debts) with the shares received. In the case of an asset deal (see above), both characteristics of a merger or division (merely) in the economic sense are typically combined: singular succession to each asset and payment of compensation to the transferring company (cash or in shares). In the case of an asset deal, but also a share deal and in the holding company solutions mentioned, the management structures after realisation of the transaction are (again) not simple. In a merger within the meaning of the Directive, two (potentially independent) companies result in one (potentially independent) company with again one (now larger) group of shareholders, one general meeting and one board. In the case of the asset deal, the share deal and the holding company solutions, often a group of companies is created first. This may change via subsequent winding up (or also merger in the narrow legal sense). Winding up can, however, be costly (including because of tax law), and the merger in the narrow sense becomes important at least at this stage.

³² Not caught by the Merger Directive: Edwards, *EC Company Law*, 91; Heenen, *CDE* 1981, 15 (17); Wooldridge, (1980) 1 *The Company Lawyer* 75 (75). It is precisely the possibility of transferring assets and liabilities separately which is greatly valued in the United Kingdom where practice rather refers to the asset deal or takeover or other forms which are only functionally equivalent to a merger in the technical sense: Farnery, (1987) *Bus. L. Rev.* 35 (35).

³³ Barbato, (1984) *J.B.Law* 176 (178); Farnery, (1987) *Bus. L. Rev.* 35 (35); Heenen, *CDE* 1981, 15 (17); Wooldridge, (1980) 1 *The Company Lawyer* 75 (75).

³⁴ Not caught by the Merger Directive: Wooldridge, (1980) 1 *The Company Lawyer* 75 (75); Heenen, *CDE* 1981, 15 (17); Kallmeyer, *ZIP* 1994, 1746 (1747, 1749).

III. MERGER PROCEDURE, IN PARTICULAR INFORMATION ON MERGER

*20. Both Directives regulate not only equivalent measures but also special forms of the basic types (merger and division) and, moreover, special forms of the equivalent measures, and permit certain exemptions for all these specific forms from the safeguards prescribed. In the case of a merger, these are situations where the acquiring company already holds a very high percentage in the transferring company (100% or more than 90%, slight variations in the case of a division, see below §28 para. 42). These **exemptions are discussed** in the following along with each safeguard, and the same is true for the (very few) peculiarities which distinguish merger by formation of a new company (Art. 23 of the Merger Directive). It should be noted more generally that since no exchange of shares is necessary in the case of a wholly owned subsidiary (Art. 19(1)(b) of the Merger Directive), all rules pertaining to such exchange are inapplicable (see references in Art. 24, second sentence of the Merger Directive).

1. Draft Terms of Merger and Explanatory Report

a) First Important Instrument of Protection

21. The draft terms of merger and merger report form the one pillar of ex ante protection of shareholders and creditors.³⁵ The EU legislature thus **favours an information model**³⁶ and, unlike German law formerly,³⁷ decides against guidance by state bodies. Both Directives (unlike the First and Second) follow the German model (which anyhow included only the merger) to a lesser extent than the French model,³⁸ which, moreover, satisfied the Anglo-Saxon predilection for information-based safeguards more easily. The decision-making competence was to be placed entirely in the hands of the shareholders, and for this purpose, the information needed to be placed at their disposal.

³⁵ Farnery, (1987) *Bus. L. Rev.* 35 (35); Barbato, (1984) *JBL* 176 (179–181); Ganske, *DB* 1981, 1551 (1552 and 1553); Grundmann, 'Information und ihre Grenzen im Europäischen und neuen englischen Gesellschaftsrecht', *Festschrift für Lutter* 2000, 61 (76 et seq.); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (272–278).

³⁶ Barbato, (1984) *JBL* 176 (179–181); Grundmann, *Festschrift für Lutter* 2000, 61; Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (272–274); also Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 16; and extensively (referring almost exclusively, however, to the German transposition): Bayer, 'Informationsrechte bei der Verschmelzung von Aktiengesellschaften', *AG* 1988, 323; and broad survey by Grohmann, *Das Informationsmodell im Europäischen Gesellschaftsrecht*, 2006, esp. 308–332.

³⁷ Ganske, *DB* 1981, 1551 (1552, with further references).

³⁸ Ganske, *DB* 1981, 1551 (1552); see also Edwards, *EC Company Law*, 92 and 103.

b) Draft Terms of Merger (Art. 5 et seq. Merger Directive)

22. The draft terms of merger deal with the transaction as a whole and therefore have to be drawn up by the **boards of the participating companies jointly**³⁹ – German law therefore speaks of a ‘merger contract’ (for instance §5 UmwG). The board is competent; in cases of two-tier boards, national law decides competence within the board.⁴⁰ Given that the general meetings still have to decide (i.e. have not yet ratified the merger terms), they can only be a draft.⁴¹

23. In accordance with Art. 5(2) of the Merger Directive, the draft terms contain indications of the identity of all participating companies (Art. 5(2)(a): type, business name, seat) and also of any company which has to be newly formed (subpara. 2 of Art. 23(1) of the [new] Merger Directive), very detailed indications on the exchange of shares (Art. 5(2)(b–d) and (f)), on the date of the balance sheet for the transfer of business (Art. 5(2)(e)) and on the special advantages for persons involved in the merger (Art. 5(2)(g): board members and experts referred to in Art. 10 of the Merger Directive). The latter refers only to (potential) decision-makers in the merger, not auditors.

24. The draft terms have to be **published** according to the procedure laid out in the First Directive (Art. 6 of the Merger Directive) to allow for wide dissemination of the information. This disclosure duty does not apply if the company merging publishes the draft terms of the merger on its own or any other website from at least one month before the general meeting onwards – supplemented by a reference inserted in the central electronic platform in the sense of the new (proposed) regime of the 1st Directive.⁴² With respect to the remaining, more extensive material, shareholders, under Art. 11 Merger Directive, have a right to inspect the material and again publication on the internet can substitute physical display.

³⁹ Barbaso, (1984) *J.B. Law* 176 (179); Wooldridge, (1980) 1 *The Company Lawyer* 75 (76); Ganske, *DB* 1981, 1551 (1552 et seq.); Meyer-Ladewig, *BB* 1970, 1517 (1518); Sonnenberger, *AG* 1971, 76 (78).

⁴⁰ For the two-tier board see Edwards, *EC Company Law*, 105 et seq.; Wooldridge, (1980) 1 *The Company Lawyer* 75 (77); van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (133). The same is true for the question whether a smaller circle within the board may have power of representation: in this sense (for the parallel rule in the case of a transfer of seat): Priester, ‘EU-Sitzverlegung – Verfahrensablauf’, *ZGR* 1999, 36 (40).

⁴¹ Ganske, *DB* 1981, 1551 (1553).

⁴² Proposal of the European Parliament and of the Council amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies, COM(2008) 194 final of 17 April 2008.

c) Merger Report (Art. 9 Merger Directive)

25. The merger report is an explanation of the draft terms of merger. The board of each participating company has to draw it up separately – this is the **explanation of the contract from the perspective of each partner and its interests**.⁴³ It has to be in writing and detailed, but probably only to the extent that the most important aspects are not obscured,⁴⁴ because the explanation has to **remain understandable** for the average shareholder.⁴⁵ The explanation has to give an answer to the legal, but mainly the economic, questions, primarily those concerning the exchange of shares (value and exchange ratio). Problems arising in the course of valuation have to be mentioned separately to make shareholders alert. The subject matter of the report therefore consists of all relevant aspects of the transaction. Moreover, the managing board of any company involved has to inform the general meeting of its company and the managing board(s) of the other companies – ad hoc – about any substantial change in the assets and/or liabilities that occurred between the setting-up of the draft terms of merger and the resolutions adopted at the general meeting(s). Information is provided to shareholders via an inspection right (Art. 11 of the Merger Directive). In the case of 100% shareholdings, the report is seen as being superfluous, although only the property rights remain the same while liability does not (Art. 24, third sentence of the Merger Directive).⁴⁶ According to Art. 28 para. 1 of the Merger Directive, the Member States also have to provide shareholders holding 90% or more of the stock with the possibility of renouncing to the report if minority shareholders have a (highly sophisticated) information right; Member States may, however, deviate from this regime under Art. 28 para. 2 Merger Directive if the receiving company has a right, without prior public offer, to buy the shares of the remaining

⁴³ It has to be examined whether the draft terms serve the interests of this company. Critical Ganske, *DB* 1981, 1551 (1553).

⁴⁴ On this question and mainly on the possibility of dismissing so-called predatory complaints as cases of abuse of rights: BGHZ 107, 296 (304 et seq.) (‘Kochs Adler’); ZIP 1990, 168 (170 et seq.); 1990, 1560 (1564); *NfW* 1993, 2191; for the case law of the ECJ on abuse of rights see references above in §11 N. 109. There has been some criticism that the German Supreme Court, in the absence of an ‘acte clair’, should have referred the question to the ECJ: Keil/Wagner, ‘Verschmelzungsrecht und Art. 177 EWG-Vertrag’, ZIP 1989, 214; extensive argumentation in the opposite direction then in: Henze, in: Grundmann (ed.), *Systembildung*, 235 (252–256) (with extensive explanation on the report). On the report see as well Edwards, *EC Company Law*, 105 et seq.; Wooldridge, (1980) 1 *The Company Lawyer* 75 (77); van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (132); Bayer, *AG* 1988, 323 (325–330); Mertens, ‘Die Gestaltung von Verschmelzungs- und Verschmelzungsprüfungsberichten’, *AG* 1990, 20 (22 et seq.).

⁴⁵ Although Art. 9 Merger Directive is not explicit this view is supported by a systematic interpretation of the European shareholder and creditor protection rules, mainly Art. 19(4) and (5) MiFID (reference above in §22 N. 6), which is based on the assumption that the individual horizon of understanding is important.

⁴⁶ Ganske, *DB* 1981, 1551 (1557); opposite for this reason apparently Edwards, *EC Company Law*, 105.

shareholders of the company which is to be merged upon it (squeeze-out right).⁴⁷ Art. 9 para. 3 Merger Directive allows the Member States to legislate so as to waive the merger report and ad hoc disclosure concerning major changes in the assets and liabilities if all shareholders of the companies involved have (unanimously) agreed. This rule, however, only has a clarifying effect. As these disclosure duties only protect interests of individuals, these individuals must have been able to renounce their right to them.⁴⁸ With respect to the issues mentioned (and also with respect to the auditing requirements named below para. 27 et seq.), the content of the Reform Directive 2009/109/EC is therefore that of rather moderate deregulation.

2. *Impartial Examination (Art. 10 Merger Directive)*

a) Second Important Instrument of Protection – Reliability of Information

26. The European legislature placed particular emphasis on **independent examination of the information** – i.e. reliability of the information on the basis of which the participating companies act. This is the second pillar of the (protection via an) information model. On the side of the transferring company, there is moreover **liability for negligence** both for the board members and for the experts with respect to the shareholders (Art. 20 et seq. of the Merger Directive, Art. 18 of the Division Directive, below §28 para. 40). In the case of 100% shareholdings, neither of these two instruments applies (Art. 24, third sentence of the Merger Directive), and in the case of 90% or more, Member States must waive the report on the examination if each minority shareholder of the transferring company is given a sell-out right which in addition is strengthened by several safeguards (in more detail Art. 28 of the Merger Directive). This expert report and also the liability involved are not prescribed in the case of other structural changes which do not imply an exchange of shares (transfer of seat, above §27) or where the exchange is a question of offer and acceptance (takeover, below §30). These instruments are therefore specifically designed for situations in which shares are exchanged on the basis of collective decision-making.

b) Experts' Report on the Examination

*27. Indeed, while the **subject matter** of the expert examination and report is the draft terms of merger as a whole Art. 10(1), the emphasis is nevertheless on the computation of the share exchange ratio (Art. 10(2)). In this respect, the experts must provide at least an

overall evaluation (adequate or not) and – more concretely – an indication of the valuation method(s) used (mainly based on the intrinsic value, on returns and on stock exchange prices) as well as a statement as to whether their application is suitable and how far it influences the result.⁴⁹ Problems arising in the course of valuation again have to be discussed separately. Conversely, under Art. 10(5) and Art. 27(3) of the Second Directive, the auditor's report renders superfluous the specific audit of the contribution in kind normally required by the Second Directive.

*28. The experts have to be **professional and independent** (Art. 21 of the Merger Directive, Art. 18 of the Division Directive and Art. 10(1), first sentence of the Merger Directive, Art. 8(1), first sentence of the Division Directive). A guarantee of compliance with these two requirements is sought by imposing the obligation to have a public licence and, if the experts are to act for both companies (where both companies request this), even appointment by a court is needed for each individual case (Art. 10(1) and Art. 8(1) respectively). An extensive and unlimited right on the part of experts to ask for information, to inspect documents and to check them guarantees that they are adequately informed.

3. *Inspection of Documents and Resolution by the General Assembly (Art. 7 et seq., 11 Merger Directive)*

a) Inspection of Documents – Access to Information

*29. All shareholders can inspect all documents mentioned and ask for copies free of charge. Besides the documents mentioned, **in connection with the transaction**, there are **standard documents** needed for evaluating the participating companies: the last three annual accounts and, if the last accounts are older than six months, interim accounts dating back at most three months. The interim accounts may be shorter, but must respect the principle of consistency (especially of valuation methods) (in more detail Art. 11(2)). In the case of 100% shareholdings, the inspection right is reduced (Art. 24, second sentence of the Merger Directive), and in the case of 90% or more, Member States may again waive the right if each minority shareholder of the transferring company is given a sell-out right which in addition is strengthened by several safeguards (in more detail Art. 28 of the Merger Directive). Strengthening shareholder information by extensive inspection rights before the general meeting of shareholders (and not by individual information rights in the meeting itself, as in the case of §131 AktG) is again in line with French tradition (see above §13 para. 22).

⁴⁹ On the three methods see della Faille, *Fusions*, 37–115, also 117–136 (transposition and combinations); also Großfeld, *Unternehmens- und Anteilsbewertung im Gesellschaftsrecht*, (4th ed. 2002); Spremann, *Finanzanalyse und Unternehmensbewertung*, (2002). On the extensive discussion during the legislative process and the fact that it had been attempted (in vain) to fix one method, see Ganske, *DB* 1981, 1551 (1553); in favour of naming at least all possible computation methods and the one chosen: Wooldridge, (1980) 1 *The Company Lawyer* 75 (77) (this would render judicial review easier).

⁴⁷ See in more detail on this issue, with particular attention on the German transposition: Freytag, *BB* 2010, 1611 and Wagner, *DSuR* 2010, 1629 (1632 et seq.).

⁴⁸ Sandhaus, *NZG* 2009, 41 (42). The protection aimed at by the duties to report are set out more specifically in the 4th recital of the directive. On the discussion about this issue before Directive 2009/109/EC brought some clarification see Lutter/Drygala, §8 *UmwG* para. 49.

b) Resolution by the General Meeting

30. The decision itself – unlike the information for it – is regulated only in some core respects (Art. 7 of the Merger Directive). A majority of at least two-thirds is needed, or a simple majority if at least half of the subscribed capital is represented and if, moreover, the majority needed for amendments to the company statutes is reached where the measure makes such an amendment necessary.⁵⁰ The resolution has to cover both the merger and the necessary amendments to the company statutes. In the case of a merger by formation of a new company, the resolution by the general meeting also has to cover the statutes of the newly created company (Art. 23(2) of the [new] Merger Directive). Each class of shares affected by the resolution has to consent separately. There is no harmonisation of matters concerning the convening of the meeting, the quorum, the exercise of the right to vote, etc.; Art. 17 of the draft Convention on international mergers (see below §29 para. 2) had made this explicit (see comparative law above in §13 para. 10–31). Today, however, the Shareholders' Rights Directive applies in this respect (§13).

*31. In the acquiring company, if the draft terms of merger are made public and full inspection is possible, the resolution by the general meeting can also be replaced by a mere right to require that a meeting be convened. This right, however, has to be guaranteed to any (group of) shareholder(s) holding 5% or more (Art. 8 of the Merger Directive, for comparative law on this and on the Shareholders' Rights Directive, see above §13 para. 17). The same is true if the acquiring company owns more than 90%, but then even inspection of the merger report and the experts' report (which are not needed here) does not have to be guaranteed. The Member States may not require a resolution by the general meeting if the prerequisites named in Art. 25 Merger Directive are met in the case of a merger of a 100% subsidiary.⁵¹

4. Registration Procedures and Powers of Investigation – *Renvoi*

*32. The rest of the Directive – besides questions of employee protection (see reference in Art. 12 of the Merger Directive) and creditor protection (Art. 13–15) – deals with registration procedures, powers of supervision and the legal consequences of registration (see V. below).

IV. IN PARTICULAR: PROTECTION OF EMPLOYEES, SHAREHOLDERS, CREDITORS AND THE PUBLIC

1. Employee and Shareholder Protection (Art. 12 Merger Directive)

33. Unlike the Proposal (with a rule on employee information), the Directive does not deal with employee protection. Instead, it refers to the Transfer of Undertakings Directive (Art. 12 of the Merger Directive), which contains consultation rights, the rule that the employment relationship passes to the acquirer in the event of transfer of a (part of a) business undertaking and the rule that the transfer as such is not a ground for making employees redundant.⁵²

34. The Directive does not deal with shareholder protection either, at least not explicitly (unlike, for instance, Art. 6(4), second sentence of the draft Proposal for a Transfer of Seat Directive). In essence, however, the procedure described so far is aimed at shareholder protection – with information, expert examination and the competence of the shareholders' meeting – and this in both companies, which was not evident from a comparative law perspective in the case of the bidder company.⁵³ The fact that the national legislature is not explicitly required, or at least encouraged, to provide additional safeguards most probably does not mean that these would be unlawful – for instance the introduction of a sell-out right for dissenting shareholders, which is not guaranteed by the Merger Directive.⁵⁴ Only with respect to the right to challenge the validity of the merger are there limits set for the national legislature (below §28 para. 41).

2. Creditor Protection (Art. 13–15 Merger Directive)

35. For creditors, national law has to provide for an adequate system of safeguards insofar as the claim has arisen before publication of the draft terms of merger and not yet fallen due.⁵⁵ It has been criticised that claims already due do not have to be secured, because creditors are thus compelled to go for forced

⁵² See references above in §4 N. 49.

⁵³ This kind of protection was new, for instance, for the United Kingdom: Wooldridge, (1980) 1 *The Company Lawyer* 75 (76 et seq.). For a convincing explanation of the rule see Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 15; Lutter, §5 UmwG for instance para. 12, 18. In the case of takeover law (at EC level and in the United Kingdom, whose law was very influential here) protection of the shareholders of the bidder company is again lacking – although typically losses in price rather occur here.

⁵⁴ See Art. 28(a) Merger Directive. In this sense explicitly Statement No 15 (by Italy) on the Protocol of the Council 2337/78 of 5 October 1978; see Heenen, *CDE* 1981, 15 (20).

⁵⁵ In the German version the word used is 'erloschen', but this is a translation error. The other language versions say (as also in the case of the Division Directive) 'échues', 'fallen due', etc.

⁵⁰ Edwards, *EC Company Law*, 106; Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembil-dung*, 259 (272); without the limitation contained in the last subordinate clause: Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 18; it was, however, deliberate that Art. 4 of the Proposal which provided for the latter was not adopted.

⁵¹ For German companies this implied that European Law changes the competences of the different organs which otherwise would have existed, see Neye/Jäckel, AG 2010, 237 (238); Wagner, *DSiR* 2010, 1629 (1630).

execution immediately.⁵⁶ They can, however, also negotiate. The principle of adequate protection also applies – and this is new for some Member States – to the acquiring company, whose creditors can indeed face the problem that the net worth which was available can be diluted if the ratio between liabilities and assets in the transferring company is less advantageous.⁵⁷ The principle is then specified in the sense⁵⁸ that a creditor has a right to be given security if there are no safeguards so far and if the 'financial situation of the merging companies' makes such protection necessary. Under the second subpara. of Art. 13(2) Merger Directive, the Member States set the modalities of the creditor protection rules. They must, however, guarantee a minimum standard, which is that creditors must have the right to ask for additional security 'provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake.' It is not completely clear whether the determining criterion is that execution of the obligation is not fully secured (given the financial status after realisation of the merger) or that the prognostics of execution have deteriorated because of the merger (comparing the financial status of the debtor of this creditor before and after realisation of the merger). The latter seems to be more logical and also more in line with the wording of the rule. A waiver by each creditor individually must be possible, although only Art. 14 of the Merger Directive states this explicitly.

*36. This regime is modified in Art. 14 et seq. of the Merger Directive for some particular groups of creditors. Art. 14 applies to bondholders with the proviso that, by majority vote, deviations can be authorised, if, as in the case mainly of France, national law provides for bondholder meetings at all.⁵⁹ Convertible bonds, to which this rule applies as well, are moreover subject to a squeeze-out option (Art. 15 of the Merger Directive).

⁵⁶ Heenen, CDE 1981, 15 (21). Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (280) even renounce this element completely. Comparative law survey on creditor protection in mergers in van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (137–139).

⁵⁷ Wooldridge, (1980) 1 *The Company Lawyer* 75 (78). See, however, also para. 3. This was different, for instance, in the United Kingdom and in Germany, see: Wooldridge, *ibid.*; Ganske, DB 1981, 1551 (1555).

⁵⁸ Therefore, the regulatory content of Art. 13 Merger Directive might well be more intensive than Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (279) would like to suggest; critical also: Farmery, (1987) *Bus. L. Rev.* 35 (35); see on the other hand Heenen, CDE 1981, 15 (21) (precise rule); see for the legislative history Wooldridge, (1980) 1 *The Company Lawyer* 75 (77 et seq. and 80 et seq.); for a comparative law survey on the most important models see references below N. 78.

⁵⁹ Art. 14. For France, for instance for the transferring and for the acquiring company Art. L. 228–65, 228–72 and 236–13 through 236–15 (Nouveau) Code de Commerce; Cozian/Viandier/Deboissy, *Sociétés*, para. 1340. In Germany the relevant act is the – less far-reaching – Gesetz betreffend die gemeinsamen Rechte der Besitzer von Schuldverschreibungen of 4 December 1899, RGBL. 1899, 691, BGBI. III 4134–1, last amended on 2 March 1974, BGBI. 1974 I, 469.

3. Protection of the Public

37. The protection of the public is not addressed (explicitly), again unlike in the case of the draft Proposal for a Transfer of Seat Directive (there Art. 9, above §27 para. 26). The core instrument of protection in this respect, however, an expert examination of contributions in kind, as provided for Germany, for instance, in §36 para. 2 UmwG, should be admissible in national law.⁶⁰ The reason is that also Art. 10(5) and Art. 27 (3) of the Second Directive, while allowing the Member State to renounce this instrument (in the case of a merger by formation of a new company), does not force it to do so.

V. IN PARTICULAR: VALIDITY AND IRREGULAR MERGERS

1. Approval or Authentication of the Merger (Art. 16 Merger Directive)

*38. The Directive provides for another independent examination before the merger as a whole takes effect (registration). Initially, control by a court was envisaged. After lengthy negotiations, control by an administrative body was judged to be equivalent (not completely, see Art. 22(2) of the Merger Directive), and finally even authentication by a notary public. The notary public, however, has therefore to be bound to exercise full formal and substantive control of the merger as a whole.⁶¹ Then, however, the examination is realised for one company only – unlike in cases of control by a court or an administrative body, but nevertheless in accordance with what is prescribed in international cases (below §29 para. 18 et seq.).

2. Validity and Effects of the Merger (Art. 17–19 Merger Directive)

39. Whereas the time at which the merger produces its effects is set by national law (Art. 17 of the Merger Directive), publication follows, for all participating companies, Art. 3 of the First Directive; the acquiring company has the right to carry out the formalities needed in this respect in its own name and thus is able to speed up the procedure (Art. 18 of the Merger Directive). The effects are largely harmonised as well (Art. 19 of the Merger Directive), starting with the elements contained in the definition of a merger (transfer of all assets and liabilities en bloc, exchange of shares with the shareholders of the transferring company/companies, and dissolution of the latter). Moreover, the shares held by

⁶⁰ Implicitly in this sense also Harter, in: Koppensteiner (ed.), *Wirtschaftsprivatheit*, 307 (312); on explicit rules in this sense in the Proposal see Sonnenberger, AG 1971, 76 (80).

⁶¹ Heenen, CDE 1981, 15 (19); and apparently also Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (273) (also on the admissibility of a cumulation under national law, for instance German law with §6 UmwG); apparently opposite: Edwards, *EC Company Law*, 112 (esp. N. 145: 'presumably in the sense of formal documents').

the acquiring company in the transferring company/companies are excluded from such an exchange. Finally, exceptions are allowed from the principle of transfer en bloc for certain (individual) rights whose transfer is subject to particular formalities, which are aimed at protecting the public. Again, the acquiring company can secure compliance with these formalities in its own name, and in addition, the transferring company can be deemed fictitiously to exist for this purpose for up to another six months.

3. Personal Liability (Art. 20 et seq. Merger Directive)

40. The shareholders of the transferring company are seen as being particularly vulnerable. In order to foster professional and loyal action by those responsible on this side (board members and experts), the latter are subject to (rather strict) liability. Liability can be based on any violation of duties concerning the merger, mainly of information duties and of duties to examine the information given.⁶² Any breach of the duty of care, however minor, can be imputed to them,⁶³ which is not in line with the standard of care normally required in similar situations in quite a few national laws (for instance in Germany under §§45 et seq., 77 BörsG, 15 para. 6 WpHG), and which has also been criticised as paralysing those responsible.⁶⁴ Those responsible are liable to the **shareholders directly**, and not only to the company (which typically is dissolved already),⁶⁵ making actions more likely to be taken.

4. Nullity (Art. 22 Merger Directive)

41. In Art. 22 of the Merger Directive, nullification of a merger is limited considerably and **regulated restrictively similarly** to nullification of a company once registered. In the Proposal, the limits had been even tighter because undoing the merger was considered highly impractical.⁶⁶ The model is again to

⁶² Similar Farmery, (1987) *Bus. L. Rev.* 35 (35).

⁶³ In this sense apparently also Farmery, (1987) *Bus. L. Rev.* 35 (35); and quite clearly Sonnenberger, AG 1971, 76 (82); opposite Edwards, *EC Company Law*, 117.

⁶⁴ Critical, for instance, Farmery, (1987) *Bus. L. Rev.* 35 (35); also Wooldridge, (1980) 1 *The Company Lawyer* 75 (77).

⁶⁵ Habersack, *Europäisches Gesellschaftsrecht*, §7 para. 19 (however with the exception of those damages which affect the capital of the company [capital protection is prevailing]); Martens, 'Kontinuität und Diskontinuität im Verschmelzungsrecht der Aktiengesellschaft', AG 1986, 57 (63) (what would, however, be more important is to undo the merger); van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (145 et seq.).

⁶⁶ Ganske, DB 1981, 1551 (1556); see also Edwards, *EC Company Law*, 114 et seq. This is still a rule which is aimed at establishing a minimum guarantee for continuance, not minimum shareholder protection: Heenen, CDE 1981, 15 (15); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (275); van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (146 et seq.).

examine compliance with the rules intensively *ex ante*, but then largely to guarantee continuance (Art. 22(1)). Already, the procedural requirements are quite demanding (a court decision is needed, Art. 22(1)(a), or a decision by an administrative body subject to court control, Art. 22(2); and the time limit for instituting nullification proceedings is six months, Art. 22(1)(c), with some deviations in Art. 22(2), second sentence; similarly for recourse against this decision, Art. 22(1)(f)). The substantive requirements are demanding as well: only grounds which cannot be rectified are relevant (Art. 22(1)(c)) and of these only two (Art. 22(1)(b)): complete lack of *ex ante* control or authentication on the one hand or the nullity of the resolution of the shareholders' meeting on the other.⁶⁷ Moreover, extensive protection of the public is guaranteed in the event of avoidance of the merger by a court or administrative body (Art. 22(1)(c), (g) and (h)): protection of bona fide transactions postdating publication and liability of the acquiring company for all claims arisen in between, with joint and several liability of all participating companies – the latter a model for divisions (see Art. 14(3), 6 and 7 of the Division Directive).

VI. LARGELY PARALLEL REGIME FOR DIVISIONS

1. Orientation

42. The division procedure, safeguards and also the legal consequences are regulated in the Sixth Directive **largely parallel to those in the case of mergers**. The Directive, by and large, contains only adaptations which seemed necessary because of the remaining substantive differences between divisions and mergers: more particularly, the fact that in the case of divisions, an additional split is necessary between assets and liabilities, shareholders and creditors – with additional valuation problems and potential risks of manipulation. Moreover, divisions often take place within rescue proceedings under court control. In this context and mainly with respect to the United Kingdom, a simplified regime has been permitted (Art. 23 of the Division Directive).⁶⁸ On the other hand, it can already be emphasised at this point that the possibilities of a **simplified procedure** which exist for mergers in the case of 90 to 100% shareholdings (Art. 27–29 of the Merger Directive) would have been too complex for divisions and therefore are **absent** here. Even in the case of 100% parent companies, Art. 20 of the Division Directive grants exemption only from the requirement of consent by

⁶⁷ The latter follows exclusively national law, because there is no harmonisation: Edwards, *EC Company Law*, 114 et seq.; Ganske, DB 1981, 1551 (1557) (implicitly); van Ommeslaghe, in: Zonderland (ed.), *Quo vadis, Ius Societatum? Liber Amicorum Pieter Sanders*, 123 (147); Schwarz, *Europäisches Gesellschaftsrecht*, para. 657.

⁶⁸ On this motivation and on the intensive discussion prior to enactment see Barbato, (1984) *J.B.Law* 176 (183).

the shareholders' meeting. As a substitute, Art. 10 of the Division Directive permits the requirement for an expert examination and for inspection rights to be totally waived, although only by unanimous consent. The parallels which can be drawn are far-reaching and the remaining differences can be summarised as follows:

Figure 8. Comparison of the Regimes for Divisions and for Mergers (Parallel Regimes)

Division Directive	Merger Directive	Equivalence or cross-reference	Addition (add)/adaptation (apt)
1 I (1.T), IV	1	x (companies covered)	-
-	2	-	apt: need to regulate only for mergers
1 I (2.T), 2	3	x (definition: merger by acquisition)	-
1 II, 21	4	x (definition: merger by the formation of a new company)	-
1 III	-	-	add: possibility to combine both measures
2 III	-	-	add: explanation of the terms that apply respectively
24 et seq.	30 et seq.	x (equivalent measures)	apt: different effect of the equivalence, §28 para. 18
3-6	5-8	largely (draft terms, publication, shareholders' meeting)	add: rules with respect to the ratio of the split 3 II h/i, III, and A: to the sell-out right, 5 II
7 et seq.	9 et seq.	largely (report, examination)	Apt no less demanding rules in case of 90/100% subsidiaries.
9	11	x (inspection)	-
10	-	-	substitute for other procedural relieves in the Merger Directive
11-13	12-15	x, one single exception	joint and several liability of all participating companies (14 para. 3, 6 and 7 Division Directive)

Division Directive	Merger Directive	Equivalence or cross-reference	Addition (add)/adaptation (apt)
14-19	16-22	x, one single exception	apt: 19/22 (para. 1 lit. h) limitation of the joint and several liability to the share of the net assets acquired only in case of divisions
20	25	-	apt: largely, but not completely parallel regulation of merger and division in case of wholly owned subsidiaries
21 see above	-	-	-
22	23	x, one exception	apt: special rules for how much stock is needed (para. 5)
No equivalent	25-27		
23	No equivalent		
24 et seq.: see above			
26	32 et seq.	x	-

2. Division Procedure (Art. 3-10 Division Directive)

*43. The division procedure consists – again – of draft terms, the explanatory report, an expert examination, the inspection of documents and a resolution by the shareholders' meeting. The **draft terms of division** (drawing up, contents, publication) are regulated in Art. 3 et seq. of the Division Directive in exactly the same way as the merger in Art. 5 et seq. of the Merger Directive (above §28 para. 21-24), even with respect to the modifications for cases where the acquiring company is newly formed (Art. 22(2) of the Division Directive). The one exception is that in the draft terms of division, of course, the split for the assets and liabilities additionally has to be established in great detail (Art. 3(2)(h)) and also for the shareholders (Art. 3(2)(i)), and that a default rule is needed where the design remains incomplete (Art. 3(3) of the Division Directive). The **division report** is regulated in Art. 7 Division Directive in the same way as the merger report in Art. 9 Merger Directive (§28 para. 25) – with one peculiarity: there are no exceptions provided even in the case of 100 or 90% subsidiaries (compare Art. 24, third sentence, and Art. 28 Merger Directive with Art. 20 Division Directive), because the ratio of how to divide them is problematic and requires explanations. If there is an audit of a contribution in kind under Art. 27(2) of the Second Directive, this has to be mentioned according to

subpara. 2 of Art. 7(2) Division Directive.⁶⁹ The audit report is regulated in Art. 8 Division Directive in the same way as the audit report in Art. 10 Merger Directive (§28 para. 26–28), again with no relaxation in the case of 100% subsidiaries. Under Art. 10(5) and Art. 27(3) of the Second Directive, the division audit report renders the audit of contributions in kind superfluous again (as in the case of mergers). The Member States must, however, waive the division report and the audit report under Art. 7 and 9 Division Directive in one case where no questions of evaluation arise even with respect to divisions because the receiving company (or companies) is (or are) a newly formed company (companies) and all shareholders get the same share in that company (those companies) as well (Art. 22(5) Division Directive).

*44. Inspection rights are also regulated identically in Art. 9 of the Division Directive and Art. 11 of the Merger Directive (above §28 para. 29). And the same is true for the resolution by the shareholders' meeting and potential exceptions in Art. 5 et seq., Art. 22(3) of the Division Directive and Art. 7 et seq. and also Art. 23(3) of the Merger Directive (above §28 para. 30 et seq.). In this context, though, there are two exceptions: Art. 5(2) of the Division Directive provides for a sell-out right – foreign to the Merger Directive – albeit only in one specific case which would be impossible under the Merger Directive: if the shareholders of the transferring company do not participate in the shares of all acquiring companies in a strictly proportional way, but some to a higher extent in one company and others in another (division changing the ratios). Moreover, Art. 20 of the Division Directive does not regulate cases of 100% stockholdings by the acquiring companies in all details in the same way as Art. 25 of the Merger Directive does with the parallel type of merger.

3. Protection of Employees, Shareholders, Creditors and the Public (Art. 11–13 Division Directive)

*45. Nor does the Division Directive contain new rules as regards employee and shareholder protection, (above §28 para. 33 et seq., see Art. 11 of the Division Directive). And the rules on creditor protection contained in Art. 13, 14 and 15 of the Merger Directive can also be found in identical form again in Art. 12(1),⁷⁰ (2) and (4) and Art. 12(5) and Art. 13 of the Division Directive. There are in addition, however, the rules contained in Art. 12(3), (6) and (7) of the Division Directive. These rules concern the problem that, in the case of a division, there is one additional risk for creditors' claims: the assets which should respond to these claims can be attributed in an arbitrary way to one acquiring company or the other. For this reason, at least joint and several liability of all participating companies has to be stated, at least with respect to the net amount of assets received (Art. 12(3), exception in the case of proceedings under court control if

⁶⁹ The examination of contributions in kind (which applies in this case, see §11 para. 26) is traditionally seen primarily as a means of creditor protection: see above §11 para. 5–9. Indeed, creditor protection is still more needed under the Division Directive: Barbaso, (1984) *JBL* 176 (182); Hommelhoff/Riesenhuber, in: Grundmann (ed.), *Systembildung*, 259 (280).

⁷⁰ In particular, the description of the claims covered is the same ('échues', 'failliten due', see above N. 55).

there is a waiver by three quarters of the creditors as well). The Member State does not need to introduce any of these safeguards for creditors if it introduces more generally unlimited liability, whereby all companies are jointly and severally liable (Art. 12(6)) – the reason seems to be that then the creditors have at least two debtors in any case. If, however, a Member State complies with Art. 12(1–5), it can also introduce (in addition) joint and several liability, albeit of course in a limited way, namely, only to the net amount of the assets received (in this sense explicitly Art. 12(7)). For the protection of the public, again the explanations for mergers (above §28 para. 37) apply identically.

4. Validity and Nullity of the Division (Art. 14–19 Division Directive)

*46. The rules on validity (and the relevant timing), ex ante control and nullification in Art. 14–19 of the Division Directive are exactly parallel to those contained in Art. 16–22 of the Merger Directive both in systematic order and in content, with one exception only: whereas in both contexts all participating companies are jointly and severally liable for claims of third parties arising between the time when the transaction takes effect and the time when it is avoided, this liability can be limited under Art. 19 of the Division Directive, but not under Art. 22 of the Merger Directive (in each case (1)(h)) to the share of net assets acquired.

VII. TRANSPOSITION OF THE THIRD AND SIXTH DIRECTIVES FROM A COMPARATIVE LAW PERSPECTIVE

*47. There is extensive comparative law literature on merger and division, especially in German but also in English literature, for France,⁷¹ Italy⁷² and the Benelux countries,⁷³

⁷¹ Broad functional comparative law survey on the law of mergers and divisions by: Rock/Davies/Kanda/Kraakman, in: Kraakman/Armour/Davies/Enriques/Hansman/Hertig/Hopt/Kanda/Rock, *The Anatomy*, 197–214. On France in particular: Bertrel/Jeanin, *Acquisitions et fusions des sociétés commerciales*, (2nd ed. 1991); Tauchert-Nosko, *Verschmelzung und Spaltung von Kapitalgesellschaften in Deutschland und Frankreich*, (1999). For the division in particular which is an instrument stemming from French law: Micheler, 'Spaltung und Teileinbringung von Gesellschaften nach französischem Recht – Scission und Apport Partiel d'Actif', *RIW* 1993, 15 (with extensive further references to older literature); today, for instance: Cozian/Viandier/Deboissy, *Sociétés*, para. 1298–1367; Guyon, *Sociétés*, para. 624–639. Extensive country reports for all Member States in: Begg (ed.), *Corporate Acquisitions & Mergers*, vol. II; for France: De Pardieu/Weyd, in: *ibid.*, 31–35.

⁷² Tatham, 'Merger and Division of Companies in Italy', (1992) 3 *EBLR* 52; Marchetti, 'Die neuere italienische Gesetzgebung auf dem Gebiet des Gesellschaftsrechts', *ZGR* 1992, 545 (545–549).

⁷³ For Belgium: Della Faille, *Fusions*, 139–342; Guyot, 'New Regulations on the Merger and Split-Up of Belgian Companies', (1993) 4 *EBLR*, 287; Scholtissek, 'Umsetzung der Verschmelzungs- und Spaltungs-EG-Richtlinien in Belgien', *RIW* 1994, 251. For the Netherlands: Wakke/van der Meer, *Mergers and Acquisitions in the Netherlands: Legal and Tax Aspects* (1992), 156–158.