DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committee on Commercial Law

on the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 64.500 German lawyers. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession.

Summary

In principle, the DAV welcomes the proposal for this Directive, yet sees the need for improvement in many details.

In a number of respects the requirements of the draft seem inappropriate, for example those of Art. 86c paragraph 3, which obliges Member States to ensure that a cross-border conversion is ruled out if it constitutes an “artificial arrangement” aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members. This provision is superfluous on the one hand, because the protective provisions which exist already are sufficient, and on the other hand it creates legal uncertainty; further, with this requirement, the draft is inconsistent because the requirement is to apply only in relation to conversions and divisions, whilst it is not provided with respect to cross-border mergers (cf. p. 6 et seq. below). One could at best consider supplementing the required content of the draft terms of cross-border conversions and divisions (Art. 86d, 122) with information on the motives for the intended transformation and extending the expert’s examination assignment to cover the plausibility of this information. Too far-reaching are, for example, also the provisions on the protection of creditors (Art. 86k paragraph 2, 126b paragraph 2, 160m paragraph 2), which grant a claim to the provision of security merely on the ground that creditors are dissatisfied with the protection of their interests (more details on this below, p. 13 et seq.).

The regulatory concept of some provisions, such as Art. 86j, 126a on the adequacy of compensation and the share-exchange ratio as well as the judicial review of adequacy (below, p. 13 et seq., 26 et seqq.) or the provisions on the effective accounting date in cross-border mergers and divisions (below, p. 24 et seq., 32 et seq.) does not yet seem to be fully developed. In several instances, the new regulations need to be harmonised with the existing regulations on cross-border conversions; this applies, for example, to

the different time limits, for which no objective reason for the differences is discernible (e.g. below p. 8 et seqq). Finally, the DAV notes a number of inconsistencies and ambiguities which necessitate a review of the corresponding draft regulations.

Chapter I: Cross-Border Conversion

Art. 86a: Scope

The cross-border change of legal form ("conversion") is to be regulated for the change of form of a "limited liability company". In this respect, Art. 86b paragraph 1[1] refers to the company forms listed in Appendix II, i.e. for Germany to the *Aktiengesellschaft*, "AG", the *Kommanditgesellschaft auf Aktien*, "KGaA" and the *Gesellschaft mit beschränkter Haftung*, "GmbH". This corresponds to the scope of application of the provisions on cross-border mergers of corporations in Art. 119 CLD, which is to remain unchanged insofar.

Accordingly, the draft Directive does not envisage a regulation for the cross-border conversion of partnerships. This is regrettable as, according to the jurisprudence of the ECJ on the freedom of establishment, the cross-border change of legal form of a partnership must also be possible without winding it up and without a loss of identity, so that there is also a need for regulation in this respect. The DAV, through its Committee on Commercial Law, had previously commented to this effect on the scope of application of the Directive to cross-border mergers (Position Paper No. 47/06 No. 16, printed in NZG 2006, 737 et seqq.), and the 71st Deutsche Juristentag 2016 [*Association of German Jurists*] had recommended legally regulating the relocation of the head office of partnerships to another country and extending the scope of application of the provisions on cross-border mergers to partnerships.

Art. 86b: Definitions

According to the definition of the term "cross-border conversion" in paragraph 2, the company retains its legal personality in accordance with Recital 8 pursuant to which the continuity of the legal personality of the converted company must not be affected by the

[1] Articles stated without naming the legal act are references to the proposed new Directive; articles stated with the addition CLD (Company Law Directive) refer to the currently applicable version of the Directive (EU) 2017/1132.

destination Member State. This principle of the preservation of identity is inconsistent with the wording in Art. 86s, pursuant to which the entire assets and liabilities are “transferred” to the converted company through the conversion and the members of the company executing the conversion “become” members of the converted company. Instead, the effects of the cross-border conversion should be rewritten in conformity with Sec. 202 German Mergers and Transformations Act [*Umwandlungsgesetz, UmwG*].

Art. 86c: Conditions relating to cross-border conversions

Paragraph 3 is intended to oblige Member States to lay down rules to ensure that a change of legal form is excluded if it is an “artificial arrangement” which aims at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority shareholders. There are problems with such a regulation:

– The Commission bases its reasoning upon the general principle that EU law cannot be used to justify abusive objectives (Explanatory Note on Art. 86c and Recital 7). The question is, however, whether it would not be better to leave this general principle as it is instead of picking out two conceivable cases of an abuse and prescribing national regulations for them.

  In any case, the English version of the two cases of abuse is too broadly defined by the use of the word “undue” instead of “illegal”. According to the stricter and more accurate German version, these have to be “*unrechtmäßige*” [illegal] tax advantages or “*unrechtmäßige*” [illegal] infringement of rights, which in the case of the intended tax advantages means that only the aim of tax evasion is disapproved.

– To protect against an illegal impairment of the rights of employees, creditors or minority members, the preventative requirements laid down by the Directive itself in Art. 86i, 86k and 86l are sufficient.

– With the envisaged regulation, the Directive is also inconsistent because it is only intended for conversions and divisions (Art. 160d paragraph 3), whilst there is no regulation to protect against tax evasion in connection with cross-border mergers

and the regulation for the protection of the rights of creditors, employees and minority members in Art. 121 CLD is not fully comparable. Whilst Art. 121 CLD establishes in paragraph 1 point (b) in conjunction with paragraph 2 the right of Member States to adopt special provisions to protect creditors, employees and minority members on grounds of public interests, the granting of these rights is not to be equated with the mandatory requirement of Art. 86c paragraph 3 for the Member States to adopt additional protective provisions, and, secondly, Art. 121 paragraph 2 CLD is proposed to be restricted, which the Commission plausibly explains with the fact that the protection of creditors and minority members is specifically regulated in Art. 126a and 126b (Explanatory Note on Art. 121).

Art. 86d: Draft terms of cross-border conversion

According to paragraph 1 point (c), the draft terms of a cross-border conversion shall include the “instrument or instruments of the constitution of a company in the destination Member State”. Here, reference should be made to the actual “instrument or instruments of constitution of the company resulting from the cross-border merger in the new legal form in the destination Member State” (as also in Art. 122 point (i)). These are a necessary part of the draft terms of conversion. A separate resolution of the general meeting on the necessary “amendments to the instruments of constitution of the company”, as provided for in Art. 86i paragraph 4, is then superfluous. It is not clear from the current wording of the draft how else this resolution is to be prepared in practice.

Paragraph 1 point (d) provides that the draft terms of conversion must also contain information on the “proposed timetable”. The importance of this information is not clear, especially if there is a (significant) deviation from the proposed timetable at a later date. Point (d) should therefore be deleted.

Paragraph 1 point (i) refers to the offer of cash compensation to be made pursuant to Art. 86j. The wording of the two provisions is not harmonised. Art. 86d paragraph 1 point (i) refers to the cash compensation for the members “opposing” the conversion, while the claim to the cash compensation pursuant to Art. 86j is to exist for all members who have not voted for the approval of the draft terms of conversion or who hold shares without voting rights. In Art. 86d paragraph 1 point (i) the words “for the members

opposing the cross-border conversion" should therefore be replaced by "details of the offer of a cash compensation according to Art. 86j". However, Art. 86j should also be amended; cf. in this respect the comments on p. 12 et seq. et seq. below.

Pursuant to paragraph 2 sentence 1, the draft terms of conversion, including the other documents to be prepared, apparently are to be prepared in the languages of the departure and destination Member States. Additionally, it should also be possible to use a language customary in the sphere of international business and finance. However, it is not clear whether or not additional versions in the official languages of the Member States involved are required if the documents are drawn up in an international common language.

Another problem appears to be that, pursuant to paragraph 2 sentence 2, the Member States are to determine which language is decisive in the event of discrepancies between the different language versions. This leads to problems if the departure and destination Member States regulate this differently. It should therefore be left to the companies to determine in the draft terms of conversion which language version is decisive.

Art. 86e – Report of the management or administrative organ to the members

According to paragraph 3, the report to the members – like the report to the employees (Art. 86f paragraph 3) – is to be made available "not less than two months" before the date of the general meeting. This period is obviously linked to the two-month period for the application for the appointment of an independent expert specified in Art. 86g. The provision deviates without objective reason from the corresponding provision for cross-border mergers, for which no such period for the application to appoint the independent expert are provided (Art. 125 CLD) and, accordingly, the report must be made available to the members (like the report to the employees) only one month before the relevant general meeting (Art. 124 paragraph 3, 124a paragraph 3). The provisions should be harmonised.

According to paragraph 3, the report to the members – like the report to the employees (Art. 86f paragraph 3) – shall be made available to the addressees "at least electronically". First of all, it is unclear which requirements have to be imposed for its

“electronic” availability. Is it enough to post it on the internet or do additional measures need to be taken so that the addressees know about it? The words “at least” can also give rise to misunderstandings. Is it to be permissible to make the documents accessible in another way instead of electronically, if this is qualitatively better than the electronic form? What this probably means is that the report has to be made available electronically in all events, but it should not be ruled out that, in addition, it can also be made available in other forms. This goes without saying, however, and does not require regulation. The DAV recommends deleting the words “at least electronically” and providing instead that the documents must be transmitted in the form prescribed by the respective national law (and, if applicable, the articles of association) for communications of the company to the respective addressees. Otherwise, the words “at least” should be deleted in any case.

It is not provided that the draft terms of conversion must be transmitted to the members simultaneously with the report of the management organ pursuant to Art. 86d. According to Art. 86h, the draft terms of conversion need to be disclosed only one month before the general meeting. There is no discernible reason for this differentiation. Should the two-month period be retained in Art. 86e, the draft terms of conversion may also be made available with the report. The draft must be available by this date, as it has to be provided to the independent expert in accordance with Art. 86g.

Art. 86f – Report of the management and administrative organ to the employees

a) The management or administrative organ shall prepare a report to the employees explaining the implications of the planned cross-border conversion on future operations, business strategy, employment security and employment conditions. According to paragraph 2 point (d), the report must state “whether” the implications described also relate to the subsidiaries of the company. Accordingly, with respect to the subsidiaries it would suffice to simply state that the information does not relate to them. Correctly, the report should have to state “how” the cross-border conversion affects the factors mentioned at the subsidiaries.

b) According to paragraph 3 sentence 1, the report to the employees – like the report to the members – shall also be made available at the latest “two months”

before the general meeting “at least electronically”. For criticism of this point, cf. the comments on Art. 86e paragraph 3 (p. 8 et seq. above).

c) The report for the employees shall also be made available to the members of the company “similarly” (paragraph 3 sentence 2). Nothing is said about the time by which it must be made available to the members of the company. It is also unclear what exactly is meant by the word “similarly”. Does the word refer to the type of communication or the time or both? If it refers to the type of communication, does it mean the manner prescribed “at least” or does it mean the manner in which the communication is actually transmitted to the employees/employee representatives?

d) If the management receives, “in good time”, an opinion from the representatives of its employees or from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to “the report” (paragraph 4). It is unclear what “in good time” means and to which report the opinion is to be appended. The opinion will refer to the report of the management to the employees, hence it cannot be this report to which the opinion is to be appended. If the report to which the opinion is to be appended merely refers to the communication informing the members of the opinion, then it would be easier and clearer to use the following wording:

> “The members of the company shall be informed thereof together with a copy of the opinion”.

Art. 86g: Examination by an independent expert

Paragraph 1 provides for an examination of the cross-border conversion by an independent expert whose appointment is to be applied for not less than two months before the general meeting that decides on the conversion. The purpose of this two-month period is hard to understand, as the protection of the group of persons for whom the examination report is intended is adequately guaranteed by the disclosure period of Art. 86h. Furthermore, in practice, the appointment of the expert will generally have to be made sooner if the report is to be made available in good time before the general meeting (cf. Art. 86h paragraph 1). Accordingly, the existing provisions of the CLD providing for an expert examination also do not specify a period for the application for

the expert's appointment (cf. Art. 96 paragraph 1, 125 paragraph 1, 142 CLD). The provisions on periods should be harmonised *in toto* (cf. also p. 8 above).

Paragraph 3 addresses the required content of the report and thus indirectly the subject matter of the examination of the conversion. The examination assignment in point (a), which demands "a detailed assessment of the accuracy of the reports and information submitted by the company", is too broad. Such an extensive examination assignment cannot be fulfilled by the expert, and such a broad assessment is also not necessary to protect the parties. Rather, the subject of the examination should be the draft terms of conversion, with a focus on assessing the adequacy of the compensation to be offered pursuant to Art. 86j paragraph 3, as is also the case with other transformation examinations (cf. Art. 96 paragraphs 1 and 2, 125 paragraph 3, 142 paragraphs 1 and 2 CLD).

According to paragraph 3 point (b), the report shall also contain a description of all elements of the facts required to determine whether the planned conversion is an artificial arrangement aimed at obtaining illegal tax advantages or at illegally prejudicing the rights of employees, creditors or minority members. In this respect, reference must be made first to the criticism of Art. 86c paragraph 3 (p. 6 et seq. above). Irrespective thereof, however, paragraph 3 point (b) would be problematic even if the abuse provision of Art. 86c paragraph 3 were to be maintained. It goes too far to require an enterprise exercising a statutory right to change its structure to submit an expert opinion assessing the possible abusive nature of the chosen structure. At most, it might be considered to supplement the prescribed content of the draft terms of conversion in Art. 86d paragraph 1 with information on the motives for the intended conversion and to extending the expert's examination assignment to checking the plausibility of this information.

Paragraph 4 sentence 1 shall ensure that the expert has access to relevant information and documentation. This is basically appropriate. However, the provision in paragraph 4 sentence 2, pursuant to which the expert must be authorised to receive comments from the employees, creditors and members of the company, seems to be an unnecessary over-regulation. The expert will do so anyway if he receives such comments.

Art. 86h: Disclosure

The obligation to disclose documents in paragraph 1 shall be fulfilled by the departure Member State according to the wording of this provision. It would make more sense, however, to structure the disclosure obligation as an obligation of the company. Paragraph 2 also correctly assumes that this refers to a disclosure obligation of the company as opposed to an obligation of the departure Member State.

Art. 86i: Approval by the general meeting

The provision in paragraph 4, pursuant to which the general meeting determines by resolution whether the cross-border conversion requires “amendments to the instruments of constitution” of the company is not practicable. Rather, the documents of constitution, i.e. in particular the new articles of association of the company in its new legal form, should be a necessary part of the draft terms of conversion (see p. 7 et seq. above on Art. 86d). In this case, a further resolution is unnecessary and paragraph 4 can be deleted.

Art. 86j: Protection of members

Paragraphs 1 to 4 provide that members who no longer wish to belong to the company being converted are able to leave the company against adequate cash compensation. This is basically appropriate. However, the scope of the right to the cash compensation is excessive. According to the draft, not only those members who have actively opposed the conversion would be entitled to compensation, but also all those who simply did not vote for the approval, for example because they are holders of non-voting shares or because they did not attend the meeting. The DAV considers it more appropriate to limit the right to compensation to those members who expressly oppose the conversion (as, for example, in German law, Sec. 207 UmwG). Such opposition can also be declared by a holder of non-voting shares.

Paragraph 3 sentence 2 provides for a maximum period for accepting the compensation offer of one month from the date of the general meeting resolving on the conversion. This presupposes that all members are promptly notified of the outcome of the resolution. More convincing insofar is the provision in German law, which is linked to the announcement of the registration of the conversion (cf. Sec. 209 UmwG). Moreover, a provision should at least be made for the right of the Member States to provide for a

suspension of the acceptance period for the duration of a judicial review of the compensation's adequacy pursuant to paragraph 5. The current concept forces members to decide on the choice of compensation without knowledge of the final amount of the compensation.

Paragraph 5 extends the principle of judicial proceedings based on the German and Austrian models to all EU Member States. Such proceedings have proven appropriate in principle (apart from the extremely long duration of the proceedings) and have provided greater legal certainty, especially regarding the legal subsistence of resolutions changing the company structure. This provision can therefore generally be welcomed.

The one-month period for initiating proceedings to review the cash compensation in accordance with Art. 86j paragraph 5 is relatively short. The period also begins separately for each member, namely with the acceptance of the offer. It would be advisable to provide for a uniform period, which is linked, for example, to the expiry of the acceptance period.

The draft does not provide that all of the members who accepted the offer shall benefit equally from the outcome of the judicial proceedings to review the adequacy of the compensation. This means that – depending on the national law – each individual who wants to preserve his or her rights to a higher compensation would have to sue; this could lead to divergent decisions, which could lead to an unnecessarily heavy burden on the companies as well as the judiciary. Therefore, the Member States at least should have the possibility to determine that the judicial decision has such a general effect.

Art. 86k: Protection of creditors

Pursuant to paragraph 1, Member States may require that, in order to protect the creditors, the management or administrative organ of the company carrying out the cross-border conversion provides a declaration reflecting the financial status of the company as part of the draft terms of the cross-border conversion. The declaration shall declare that, on the basis of the information available to the declaring organ at the date of the declaration, and after having made reasonable enquiries, it is not aware of any

reason why, after the conversion takes effect, the company should be unable to meet the liabilities when those liabilities fall due.

It is unclear what significance this declaration should have in the context of the protection of creditors. In contrast to the report by an independent expert provided for in paragraph 3 point (a), the declaration pursuant to paragraph 1 does not appear to give rise to any presumption that the rights of the creditors will not actually be affected by the conversion. On the other hand, a declaration that turns out to be incorrect may lead to liability on the part of the company, whereby it remains open whether such liability is only possible in cases of intent or also in cases of simple negligence. Since the introduction of the declaration is to be left to the Member States, they may need to develop a coherent approach.

According to paragraph 2, the Member States shall ensure that within one month of disclosure of the draft terms of conversion and other documents (Art. 86h) creditors who are dissatisfied with the protection of their interests provided for in the draft terms of conversion (Art. 86d paragraph 1 point (f)) can apply to the appropriate administrative or judicial authority for adequate safeguards. It is not appropriate to grant such a right merely on the ground that creditors are “dissatisfied” with the protection of their interests. Rather, the right of application should – as in the provision on cross-border mergers (Art. 99 paragraph 2 subparagraph 2, 121 paragraph 2 sentence 1 CLD) – depend on proof by the creditors that the satisfaction of their claims is jeopardised by the conversion and that the company has not provided adequate safeguards. From the outset a claim to safeguards should not exist for claims that are due. They can be asserted and therefore require no security. Apart from this, the intended provision leaves open which arrangements can be made by the relevant body. Ultimately, adequate safeguards can only be provided by the company itself.

The draft also does not contain a definition of the term “creditor” and leaves open which stage the position of a person must have reached at the relevant point in time in order for that person to qualify as a “creditor”. In particular, it is unclear, whether it is sufficient if the legal base for an obligation has been created (such as the conclusion of a contract) or whether all prerequisites for the actual existence of an obligation must have been satisfied (such as the completion of the contractor’s work as a condition for the

obligation of his customer to pay the price). It would be advisable to regulate these questions in parallel with Art. 99 paragraph 1 CLD in such a way that the obligation or the claim must have existed at the time of disclosure of the draft terms of conversion.

In addition to the provision in paragraph 2, paragraph 3 points (a) and (b) provides for two presumptions which are, however, intended to be rebuttable (cf. the explanation at the bottom of p. 24 of the Explanatory Note). However, the refutability of the presumptions should be explicitly addressed in the text of the Directive, as the wording in Recital 18 does not make this clear and the Explanatory Note is not part of the proposed act. If the conditions of either of these two presumptions are met, it can ordinarily be assumed that the creditors will not be prejudiced by the cross-border conversion. The right pursuant to paragraph 2 apparently does not exist in this case, but this is not clearly expressed in the text of the Directive.

According to the first presumption, the creditors are not prejudiced where the company discloses together with the draft terms of conversion an independent expert report which concludes that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. This provision raises the question why the creditors are to be deemed not to be prejudiced even if the report only excludes an “undue” [“*übermäßige*”] impairment of their rights. Above all, however, it should be made clear that the expert submitting this report may be the same person as the one retained to examine the conversion process pursuant to Art. 86g.

The second presumption applies if the creditors are offered a right to payment against a third-party guarantor or against the company resulting from the conversion. In this case, this right to payment must have at least the same value as the original claim. It must be enforceable before the same court as the original claim and its credit quality immediately after completion of the conversion must at least correspond to the credit quality of the original claim.

While, according to the first presumption, the disclosure of an expert report should constitute a practicable way of protecting the creditors, the fulfilment of the second presumption seems disproportionately complex if the guarantee of a third party is required. A right to payment against the company resulting from the conversion is not

really a safeguard because this company in any case becomes the debtor of all claims existing against the converting company when the cross-border conversion takes effect (Art. 86s paragraph 1 point (a)). A confirmation or duplication of these claims therefore does not lead to greater protection. In this respect, regulation is only required to the effect that the claims transferred to the target company can still be asserted at the place of jurisdiction of the converting company.

Art. 86l: Employee participation

a) Like the current CLD for cross-border mergers, in respect of employee participation, the draft adopts the system introduced for the first time with the SE and the directive accompanying it. Accordingly, an existing employee participation status is basically to be maintained, but can be modified by a special negotiating procedure. Contrary to the provisions on cross-border mergers (which remain unchanged insofar), the special negotiating procedure is not only to apply if the converting company is already operating under an employee participation system (as in Art. 133 paragraph 2 CLD), but also if the average number of employees at this company was four fifths of the threshold for employee participation laid down by the law of the departure state. The obligation to conduct the special negotiating procedure irrespective of the current employee participation situation corresponds to the provisions governing the SE (Art. 12 paragraph 2 Regulation No. 2157/2001 (EC) in conjunction with Directive 2001/86/EC). However, a cross-border conversion is not comparable with the establishment of an SE. There is no objective reason for a differentiation from cross-border mergers (Art. 133 CLD). Whilst it may be assumed that in the absence of a participation system already in place at the converting company on the date of the conversion, on grounds of the default provision, the special negotiating procedure will have the result that no system of employee participation is to be introduced at the company resulting from the conversion, in these cases, the obligation to conduct the special negotiating procedure will unnecessarily complicate and, above all, delay the conversion. The delay would be caused especially by the time required to set up the special negotiating body and the duration of the negotiations, which could take a further full six months. Therefore, the requirements for the mandatory introduction of a special negotiating procedure should be adapted to the provision of Art. 133 CLD.

b) Even if this proposal is not accepted, Art. 86l paragraph 2 of the draft should be amended in several respects:

- To begin with, it should be made clear that the average number of employees of “four fifths” is a minimum size. It should therefore be worded as “corresponding to at least four fifths of the threshold laid down in the law of the departure Member State”.

- Pursuant to paragraph 2 point (a), a prerequisite for the special negotiated procedure is to be that the national law of the destination Member State does not contain an equivalent employee participation provision; this is worded as follows:

> “does not provide for at least the same level of employee participation as existed in the company before the conversion”.

However, if according to the current draft of paragraph 2, it is not a prerequisite of the special negotiating procedure that there actually was a system of employee participation at the converting company, this comparison has no second element with which to compare. It should therefore be worded as follows:

> "(where the national law of the destination Member State) does not provide for companies in the legal form of the company resulting from the conversion whose number of employees exceeds the employee participation threshold under the law of the departure Member State to have at least the same level of employee participation as that applicable under the law of the departure Member State to a company in the legal form of the converting company whose average number of employees exceeds the threshold.”

c) Furthermore, Art. 86l paragraph 2 contains an error, which is also contained in Art. 133 paragraph 2 CLD: according to these provisions, the prerequisite for the application of the negotiating procedure is (abridged):

- existing employee participation (or for the conversion: minimum number of employees is four fifths of the participation threshold) or

- absence of equivalent employee participation provisions in the target legislation.

This is obviously incorrect. If there was no employee participation system in the initial situation (or the number of employees lies below four fifths of the threshold), the employee participation provisions (or the absence thereof) in the legislation of the destination Member State would remain applicable. The negotiating procedure can be required only if an employee participation system existed in the initial situation (merger) or if the number of employees is at least close to the threshold (at least four fifths) and the target legal system does not contain an equivalent employee participation provision. In the introductory part of Art. 86l paragraph 2, therefore, after the reference to Directive 2001/86/EC the words “or where” should be deleted and replaced by the words “and where”.

d) Art. 86l paragraph 2 point (a) states (as also Art. 133 paragraph 2 point (a) CLD, which is unchanged in this respect) at the end:

> “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”.

This refers to the proportion of employee representatives in the respective organs in which employee participation exists. The English text is unclear – possibly the deletion of the comma before “subject to employee representation” would make it clearer, but it would be preferable to say “which are subject to employee representation”. In the German version, the words “, subject to employee representation” read “*wenn eine Arbeitnehmermitbestimmung besteht”*; and the French version of Art. 133 paragraph 2 point (a) CLD reads “*à condition qu’il y ait une représentation des travailleurs*”; [if there is (or on the condition that there is) employee participation]. In the context of the entire paragraph, this is incomprehensible; it should read “ ‘*in dem oder in denen’ eine*

Arbeitnehmermitbestimmung besteht"] [in which there is employee participation] – where these relative pronouns (in the German text) would refer to the respective organ or committee or, if applicable, the profit units.

e) The chosen method of cross-reference to Directive 2001/86/EC is confusing and unclear in many details: Art. 86l paragraph 3 point (g) refers to point (a) of Part 3 of the Annex to Directive 2001/86/EC. Point (a), which is referred to in this manner, in turn refers to point (b), however. With the reference provided for in Art. 86l, no reference would be made to point (b), and consequently it would not be included in the referring provision by way of reference. Therefore, the reference paragraph (i.e. Art. 86l No. 3 point (g)) should be supplemented by the addition "and point (b), to the extent reference is made to this in point (a)".

Art. 86m: Pre-conversion certificate

Art. 86m provides for a compliance certificate to be issued by an authority to be designated by the Member State, attesting compliance with the conditions of conversion and the proper completion of all procedures and formalities in the departure Member State. The authorities of the destination Member State shall be bound by this preliminary decision (Art. 86p paragraph 5). This is an appropriate concept.

Against the background of the general description of the compliance check in paragraph 1, however, paragraph 4 appears superfluous. Paragraph 4 deals with the information required in the draft terms of conversion pursuant to Art. 86d paragraph 1 point (k), which must already be scrutinised according to paragraph 1. It also should be considered to delete the provision of paragraph 5 as it does not provide any additional clarity. On the contrary, at least with regard to the subject matter of the assessment pursuant to paragraph 5 point (c), it is unclear what exactly the subject matter of the assessment is and which purpose it serves.

According to paragraph 7, the assessment has to be carried out within one month of receipt of the information on the approval of the conversion by the general meeting. This period is extended in Art. 86n paragraph 2 sentence 3 in the event of an in-depth assessment, but otherwise appears to be mandatory. This would mean that the competent authority would have to refuse to issue the pre-conversion certificate

pursuant to paragraph 7 point (b) sentence 2, if it is not established within the one-month period that the conversion “meets all the relevant conditions”. However, this certainly is not possible if an action is filed against the validity of the members’ resolution on the conversion. At least in that case, but also in other cases where an obstacle cannot be removed within the one-month period, the possibility to extend the period should therefore be created or it should at least be made clear that a new pre-conversion certificate can be applied for once the obstacle has been removed.

Regarding paragraph 7 point (c), cf. the comments on Art. 86n (p. 20 below).

Art. 86n: In-depth assessment

According to Art. 86m paragraph 7 point (c), the competent authority which decides on the application for the pre-conversion certificate should decide to carry out an in-depth assessment pursuant to Art. 86n if it has serious concerns that the cross-border conversion is an artificial arrangement within the meaning of Art. 86c paragraph 3. In that case, the period for processing the application for the pre-conversion certificate would be extended until the expiration of two months from the start of the in-depth assessment (Art. 86n paragraph 2 sentence 3).

The DAV has reservations about the provision in Art. 86c paragraph 3 (cf. in this respect p. 6 et seq. above); if these reservations are followed, the provisions in Art. 86m paragraph 7 point (c) and Art. 86n would become obsolete as well. Irrespective thereof, even if the concept of Art. 86c paragraph 3 is maintained, it would be advisable to significantly shorten Art. 86n paragraph 1. The list of those facts and circumstances which must at least be taken into account in the assessment is not suitable to provide assistance for the assessment and should be omitted. The reference to the need to assess “all relevant facts and circumstances” is sufficient and brings greater clarity than the list that follows in the draft.

Art. 86o: Review and transmission of the pre-conversion certificate

Paragraph 1 regulates the legal protection against the pre-conversion certificate. The provision is unclear and gives cause for concern. Paragraph 1 sentence 1 requires the possibility of a judicial review of the issue and the refusal of the pre-conversion certificate. However, this right is to apply only where the competent authority of the

departure Member State is not a court. How this restriction relates to paragraph 1 sentence 2 is unclear, as paragraph 1 sentence 2 apparently presupposes the possibility of legal protection against the issue of a pre-conversion certificate in any case, i.e. also in the event that the pre-conversion certificate is issued by a court.

Obviously, there should be legal protection against the refusal to issue the pre-conversion certificate, and that is to say even if the competent authority for the pre-conversion certificate of the departure Member State is a court. The right to take legal action against a refusal to issue the pre-conversion certificate must lie with the party that applied for the pre-conversion certificate, i.e. the company.

It is less clear, on the other hand, why it should be necessary that an action before a court can be taken also against the issue of a requested pre-conversion certificate. It is not clear either, why, in order to protect this right, the pre-conversion certificate is to become effective only after the expiry of a certain waiting period, and who the “parties” should be who are entitled to bring such action (paragraph 1 sentence 2). The legal protection of the members is guaranteed generally by their right to challenge the conversion resolution by taking legal action; they require no additional legal protection against the issue of the pre-conversion certificate. The only point that needs to be ensured is that the registration in the destination Member State is not made on the basis of a pre-conversion certificate, despite a pending action for avoidance. However, this requires neither an independent right to bring an action against the pre-conversion certificate nor a waiting period for the pre-conversion certificate to become effective. Rather, it can be left to the Member States how they regulate this matter; in Germany, a provision following the model of Sec. 16 paragraphs 2 and 3 UmwG would be appropriate. Art. 86k paragraph 2 is sufficient for the protection of creditors with its right to apply for adequate safeguards. Employee participation rights should be protected adequately by Art. 86l, in particular its paragraph 4 point (c) (perhaps with the exception of the obligation under Art. 86l paragraph 6). In any case, for these reasons, creditors and employees do not need any right to bring an action against the issue of the pre-conversion certificate.

Art. 86s: Consequences of the cross-border conversion

The consequence of the cross-border conversion is that the converting company is dissolved and replaced by the company resulting from the change of form. Pursuant to Recital 8 and according to the definition in Art. 86b No. 2, there shall be continuity of the legal personality of the company in the destination Member State and not the establishment of a new company. However, the provision in Art. 86s paragraph 1 points (a) and (c) erroneously adopts the wording of Art. 131 CLD and assumes a transfer of assets to the new company. Cf. also the comments on Art. 86b paragraph 6 (p. 5 et seq. above).

As in the case of mergers, account should be taken of the fact that national provisions can make cross-border transfers of assets subject to special approval requirements. It should be possible for the company resulting from the conversion to meet these requirements if the converting company has been dissolved already. In order to clarify this, the following paragraph should be added to Art. 86s paragraph 1 (cf. also the corresponding provision on cross-border divisions, Art. 160u paragraph 4):

> "Where, in the case of a cross-border conversion of companies within the meaning of this Directive, the applicable law requires the completion of special formalities before the transfer of certain assets, rights and obligations becomes effective against third parties, those formalities can be carried out also by the company resulting from the conversion."

Paragraph 3 provides for a new basis of liability in case of cross-border conversions. The company resulting from the conversion is to be liable for any losses arising from any differences in national legal systems of the Member States of departure and destination, where any contracting party had not been informed of the cross-border conversion prior to concluding that contract. The purpose of this provision is obviously to compensate the contractual partners of the converting company for any disadvantages resulting from any differences in the applicable legal systems, unless they were informed hereof prior to contract conclusion. An argument against such liability is the fact that the converting company must publish the draft terms of the cross-border conversion and the report of an independent expert (Art. 86h paragraph 1 points (a) and (b)) and, in addition, a notice to the members, creditors and employees of the

company that they may submit comments (Art. 86h paragraph 1 point (c)) before implementing the conversion. To require the individual notification of individual contractual partners of all relevant legal differences in the Member States of departure and destination in addition to this general disclosure, contradicts the very purpose of the disclosure provisions and is not justified objectively. In the case of contracts that have already been running for some time, a notification prior to the conclusion of the contract would not even be possible. For this reason, no such liability is provided for in the case of cross-border mergers (cf. Art. 131 CLD).

Art. 86t: Liability of the independent experts

The content of the provision differs from the existing parallel provisions in Art. 107 and Art. 152 CLD for no comprehensible reason. Art. 107 CLD requires legislation of the Member States on the civil liability of the experts only with respect to liability vis-à-vis the shareholders of the company; Art. 152 CLD should be understood in the same way, although it is not clear. Art. 86t, however, is not intended to include such a limitation of liability to shareholders of the company. Moreover, the German language versions of both Art. 107 and Art. 152 CLD speak of the expert's liability "*für schuldhaftes Verhalten*" [(culpable conduct) in the English version: "for misconduct"], whereas the German language version of Art. 86t speaks of "*Fehlverhalten*" [in the English version also "misconduct"]. Probably there should be no difference, but the term "*Fehlverhalten*" should be avoided because it addresses objective misconduct whilst liability naturally also requires culpabilty.

Chapter III: Cross-border merger of limited liability companies

Art. 119: Definitions

Art. 119 No. 2 point (c) CLD already covers the case of the merger of a wholly owned subsidiary. The new point (d) is now intended to define further forms of intra group mergers, namely such mergers that can take place without the granting of shares. On the one hand, the constellation is mentioned where one person directly or indirectly holds all the shares in all of the merging companies and, on the other hand, the constellation of the merger of sister companies whose shares are held in the same proportion by the same members.

The simplified formalities applicable to these forms of merger are to be regulated in Art. 132, albeit incompletely: the previous Art. 132 paragraph 1 CLD exempts from the requirement to grant shares and to obtain the approval of the general meeting in the case of a 100% intra group merger. The proposed new wording of Art. 132 paragraph 1 covers the case of a 100% group merger, where, in deviation from Art. 119 No. 2 point (c) CLD, it is stated to suffice if the parent company owns all voting shares. Further, the simplified formalities are to apply also in the event that one person directly or indirectly holds all shares in all of the merging companies. However, there is no provision for the case of a merger of sister companies additionally defined in No. 2 point (d), where the members of the merging companies hold their shares in the same proportion in all merging companies. The new definition in No. 2 point (d) indicates that the simplified formalities referred to in Art. 132 may also be applied in this case. However, the draft of Art. 132 paragraph 1 does not contain a corresponding regulation of the legal consequences.

Art. 121: Conditions relating to cross-border mergers

See in this respect the comments on Art. 86c paragraph 3 (p. 6 et seq. above)

Art. 122: Common draft terms of cross-border mergers

For point (m), cf. the comment on Art. 86d paragraph 1 point (i) (p. 7 et seq. above); for subparagraph 2, cf. the comments on Art. 86d paragraph 2 (p. 8 above).

Art. 122a: Accounting date

According to Recital 30, the accounting date shall be determined according to clear rules and the Member States should ensure that the effective date is treated, for accounting purposes, as the single binding date pursuant to the national law of all parties to the merger. The provisions laid down in Art. 122a do not comply with this guideline.

The starting point is the obligation to specify the date for the change in accounting in the draft terms of the merger (Art. 122 point (f) CLD). This is the date as of which the transferring company presents its final balance sheet for the last time. It can only do this as long as its organs are still capable of taking action, which means that the relevant balance sheet date is necessarily before the merger takes effect. Art. 122a paragraph 1

subparagraph 2 therefore misses the mark by assuming that the accounting date will coincide regularly with the effective date of the merger and that the merging parties can only set a different effective date. In fact, the accounting date to be determined in the draft terms of the merger must necessarily be before the effective date of the merger.

The provision in paragraph 1 subparagraph 1 is also flawed, by providing that the accounting standards applicable to the company resulting from the merger date are decisive for the determination of the accounting date. This conflicts with the guideline in Recital 30, which requires the Member States to ensure that the date of the final balance sheet of the transferring company specified in the draft terms of the merger as the accounting date is the only binding accounting date under the national law of all of the parties involved.

The provision in paragraph 2 merely clarifies that the “accounting date” refers to the date to be specified in the draft terms of merger in accordance with Art. 122 point (f) CLD as the date for the change in accounting. Paragraph 2 is superfluous, at least if the “accounting date” is defined in. Art 122a by reference to Art. 122 point (f) CLD.

In addition, paragraph 3 provides that the accounting regime of the acquiring company must be applied to the recognition and valuation of assets and liabilities in the financial statements from the date of the change of accounting. This appears appropriate, but prevents the continuation of the book values permitted under German merger law (Sec. 24 UmwG). It should be noted that this is not about a regulation of company valuations and the valuation date for determining the share-exchange ratio.

Art. 124: Report of the management or administrative organ to the members

The same comments apply here as to Art. 86e (p. 8 et seq. above).

Art. 124a: Report of the management or administrative organ to the employees

The same comments apply here as to Art. 86f (p. 9 et seq. above). On p.9 et seqq. above a harmonisation of the periods is proposed. Since the period for the application to appoint the independent expert in Art. 86g seems inappropriate (cf. p. 10 et seq. above), it seems right to leave the provision of Art. 124a as it stands with respect to the periods for the report to the (representatives of the) employees.

Paragraph 4 could clarify whether the opinion needs to be sent only to the members of the company from whose employees it originates or to the members of each of the merging companies.

Art. 126: Approval by the general meeting

The provisions are substantially being adapted to the new Art. 86i (with the necessary adjustments regarding the share-exchange ratio and valuation). In this respect, the comments on Art. 86i apply correspondingly (above p. 12). However, the minimum requirements for the required majority vote have not been specified and should be added.

Art. 126a: Protection of members

The provisions substantially correspond (with the adjustments required for mergers) to the provisions of Art. 86j. Insofar, the comments on p. 12 et seq. above apply correspondingly. The main difference is that the special valuation procedure applies here also to the determination of the share-exchange ratio.

Paragraph 5 provides that the independent expert shall review the adequacy of the cash compensation and the share-exchange ratio. This seems sensible and corresponds to the legal situation under German merger law. However, the provision that the expert shall have regard to the “value of the company excluding the effects of the proposed merger” is misleading. Correctly, this provision is not about the valuation of the company resulting from the merger, but the values of the merging companies; this should be made clearer in the text. It is a helpful clarification that these values must be calculated “excluding the effect of the proposed merger”, i.e. on a stand-alone basis.

Art. 126a paragraphs 8 and 9 provide that a judicial review of the share-exchange ratio is possible both in favour of the members of the transferring company and in favour of the members of the acquiring company, and that compensation can also be granted in the form of additional shares in the acquiring company. This is to be welcomed. However, the following is pointed out:

- If the share-exchange ratio is improved (through a cash payment or the granting of additional shares) in favour of the members of the acquiring company, this

payment is not the consideration for a contribution to the company by the members benefitting from the correction. In substance, this constitutes a special dividend to the old members of the acquiring company or a capital increase from company funds solely in their favour. Both measures then have the effect that, by reducing the value of the company or increasing the total number of outstanding shares, the value of a share is reduced to an extent so that the value of the shares issued to the members of the transferring company corresponds to the value of their contribution.

- Such measures may be incompatible with the otherwise applicable principles of raising and maintaining capital (see, for example, Art. 47 CLD). It should be made clear that the principles otherwise applicable do not preclude a compensation mechanism of the kind described.

Moreover – both for the review of a cash compensation pursuant to paragraph 7 and for the review of the share-exchange ratio pursuant to paragraphs 8 and 9 – the same courts should have sole jurisdiction. Appropriately, that should be the courts competent for the registered office of the acquiring company. Without uniform jurisdiction (and the mandatory combination of all proceedings) divergent decisions would be conceivable, up to the possibility that in one proceeding the cash compensation or share-exchange ratio could be adjusted as being too detrimental for the members of the transferring company and in another proceeding as being too unfavourable for the members of the acquiring company.

Art. 126b: Protection of creditors

See in this respect the comments on Art. 86k (p. 13 et seqq. above).

Art. 133: Employee participation

The comments on the wording of Art. 86l (p. 16 et seqq. above) apply correspondingly here. In addition, the proposed Directive provides an opportunity to correct an error in the German version of Art. 133 paragraph 6 CLD. According to this provision, under the conditions laid down therein

> "this provision of paragraph 2 is to be applied to the company resulting from the merger".
> [in the German original:] "*diese Regelung des Abs. 2 auf die aus der Verschmelzung hervorgehende Gesellschaft angewandt werden*".[*]

This is incorrect and does not correspond to either the English or French versions of the CLD. Correctly, it should read something like this:

> "such a system shall be applied to the company resulting from the merger in accordance with the provisions referred to in paragraph 2".

Art. 133a: Liability of independent experts

The content of the proposed new provision on the liability of the independent experts corresponds to the draft provision in Art. 86t; cf. in this respect p. 23 above.

Chapter IV: Cross-border divisions of limited liability companies

Art. 160a: Scope

The specification of the scope in paragraph 1 corresponds to the provision applicable to cross-border mergers in Art. 118 CLD. The rules on cross-border divisions, too, are to apply only to limited liability companies, thus in Germany to the *Aktiengesellschaft*, "AG", the *Kommanditgesellschaft auf Aktien*, "KGaA" and the *Gesellschaft mit beschränkter Haftung*, "GmbH".

Art. 160b: Definitions

The definition of division ["*Spaltung*"] in No. 3 does not include divisions for transfer to an existing company. Cross-border divisions, both divisions pursuant to point (a) and divisions pursuant to point (b), are to be possible for transfer to one or several newly formed companies. The reason for this restriction is not clear and is not explained by the Commission. In Recital 38 the Commission merely states that very complex rules

[*] Translator's Note: the English-language version of Art. 133 paragraph 6 CLD reads: "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"

would be required if a division for transfer to more than one existing company were to be permitted. This may well be true, but no justification is given for not allowing a division for transfer to one existing company in the other Member State.

The draft appropriately accepts that a cross-border division does not necessarily need to maintain the existing share ratio, but can also take the form of a division resulting in disproportionate shareholdings for the purpose of dividing the business among the shareholders. This can be seen from the extensive provisions in the draft on justifying and reviewing the share-exchange ratio (see Art. 160g paragraph 2 point (b) and Art. 160i paragraph 3), which only make sense in the event of a division which does not preserve the proportions of the shareholding.

Art. 160d: Conditions relating to cross-border divisions

With regard to the reservation of the case of abuse in paragraph 3, see the comments on the corresponding provision for conversions in Art. 86c para. 3 (p. 6 et seq. above).

Art. 160e: Draft terms of cross-border divisions

With regard to paragraph 1 points (d) and (g), paragraph 4, cf. the comments on Art. 86d paragraph 1 points (d) and (i), paragraph 2 (p. 7 et seq. above).

Art. 160f: Accounting date

The provisions substantially correspond to the provisions in Art. 122a on the effective date for the change in accounting in the case of cross-border mergers. Reference is made insofar to the comments on Art. 122a (p. 24 et seq. above).

In addition, paragraph 1 subparagraph 3 point (b) states that the date for the change in accounting with respect to a recipient company may not be prior to the date on which the recipient company was formed. This is erroneous. A final balance sheet of the dividing company is used as the basis for the division to form a new company, which must be prepared as of a date prior to registration of the recipient new company. Since the accounting of the new company follows seamlessly from the last accounting of the dividing company in its final balance sheet, the change in accounting has to be set at a date necessarily prior to the registration of the new company resulting from the division. For accounting purposes, the new company is deemed to exist already. This is

recognised practice in German transformation law. (Drygala in: Lutter UmwG, 5th ed. 2014, Sec. 5 margin No. 74; Schröer in: Semler/Stengel UmwG, 4th ed. 2017, Sec. 5 margin No. 53; Ulrich/Böhle GmbHR 2006, 644 et seq.)

Art. 160g: Report of the management or administrative organ to the members
The same comments apply here as to Art. 86e. (p. 8 et seq. above).

Art. 160h: Report of the management or administrative organ to the employees
The same comments apply here as to Art. 86f. (p. 9 et seq. above).

Art. 160i: Examination by an independent expert
With the exception of paragraph 3 points (a) to (d), this provision corresponds to the provision in Art. 86g; in this respect, reference can be made to the comments on p. 10 et seq. above. Paragraph 3 points (a) to (d) describe the appropriate examination duties of the expert and the contents of his report.

Art. 160j: Disclosure
The provision corresponds to Art. 86h; cf. therefore p. 12 above.

Art. 160k: Approval by the general meeting
Cf. the comment on Art. 86i (p. 12 above).

Art. 160l: Protection of members
Cf. first the comments on Art. 86j (p. 12 et seq. above) and Art. 126a (p. 26 et seq. above).

With regard to the judicial review and, if necessary, adjustment of the share-exchange ratio, paragraphs 7 and 8 contain the same provisions as Art. 126a paragraphs 8 and 9 for cross-border mergers. Since the draft provides for a cross-border division only to form a new company (and not for inclusion by an existing company), there can only be grounds to review the share-exchange ratio in the event of a disproportionate division, i.e. in which the proportions of shareholdings in the companies existing after the division are not identical to those in the dividing company before the division. If such a disproportionate division does not require the unanimous consent of all members in any

case (as is the case under the applicable German law, Sec. 128 UmwG), the provision would have to determine more precisely how the share-exchange ratio should be adjusted. If, for example, the division results in a complete physical division into two separate companies, where some of the former members of the divided company hold shares in one company whilst the other members hold shares in the other, compensation can only take the form of a claim of the disadvantaged members to a compensation payment (be this through shares or a cash payment) against the other company. If, on the other hand, all of the members hold shares in each of the two companies, albeit in different ratios, then (depending on the extent of the disadvantage to be compensated) compensation can be considered either at both companies or, where applicable, only at one of the two companies in which the members entitled to compensation also hold shares. The simple adoption of the wording (applicable to cross-border mergers) of Art. 126a paragraphs 8 and 9 addresses this topic too broadly. It would be desirable to specify the possible cases of application and the adjustment mechanisms, so that the Member States know how they can and should implement these provisions. Alternatively, the structuring could also be left to the Member States. In this case, however, in order to avoid legal uncertainties, it should be expressly stated in the Directive that the Member States can regulate the details, including the determination of the debtor of the compensation.

Art. 160m: Protection of creditors

Cf. first the comments on Art. 86k (p. 13 et seqq. above).

Art. 160m paragraph 4 provides for the joint and several liability of the dividing company/companies if creditors whose claims have been transferred to a recipient company are not satisfied. This joint and several liability is appropriate, but should – as under German law (Sec. 133 UmwG) – be limited in term to, for example, five years, however if necessary in conjunction with a right of the creditors (before the expiry of the five years) to accelerate their claims and declare them due if there is reason for the concern that the recipient company to which the liability is assigned will be unable to satisfy the debt.

Additionally, paragraph 4 is erroneously worded in that it refers to a creditor “whose claim” [“*dessen Forderung*”] is transferred to a recipient company. It is not the creditor’s claim [“*Forderung*”] that is transferred, but the liability [“*Verbindlichkeit*”]. Although it is clear what is meant, a correct wording would be desirable.

Art. 160n: Employee participation

In principle, the same comments apply here as to Art. 86l (p. 16 et seqq. above). Paragraph 3 refers to those provisions of Directive 2001/86/EC which relate to the formation of an SE by conversion. This is the right starting point. However, one point is unclear. According to paragraph 3 point (a), reference is made to Art. 3 paragraph 2 point (a) (i) of Directive 2001/86/EC. According to this provision, the employees of the "concerned subsidiaries" participate in the establishment of the special negotiating body. The term "concerned subsidiary" is defined in Art. 2 point (d) of Directive 2001/86/EC. It is unclear whether, in the event of a division, the employees of subsidiaries who remain with the dividing company are considered to be employees of a concerned subsidiary. Since Directive 2001/86/EC does not cover the case of divisions, nothing can be derived from it on this point.

Art. 160o: Pre-division certificate

The provision corresponds to Art. 86m; cf. therefore p. 19 et seq. above.

Art. 160p: In-depth assessment

The provision corresponds to Art. 86n; cf. therefore p. 20 above.

Art. 160q: Review and transmission of the pre-division certificate

The provision corresponds to Art. 86o; cf. therefore p. 21 et seq. above.

Art. 160u: Consequences of the cross-border division

Paragraph 2 subparagraph 2 provides for liability of the company being divided for losses arising from any differences between the national legal systems of the companies being divided. Contrary to the wording, such liability can only be considered in case of a spin-off ["*Abspaltung*"], since in case of a split-up ["*Aufspaltung*"] the company being divided ceases to exist (Art. 160u paragraph 1 point (d)). In all other respects, see the comments on Art. 86s paragraph 3 (p. 22 et seq. above).

Art. 160v: Liability of the independent experts

The provision corresponds to Art. 86t; cf. therefore p. 23 above.