Directive 2005/56/CE of the European Parliament and of Council of 26 October 2005
On cross-border mergers of limited liability companies

This Directive emerges, as it is quite clear from the preamble, having as goal to facilitate the cross-border mergers of limited liability companies, longing for to safeguard the potential of the single market.

Just as is referred by the Directive, which analysis now begins, it has as target to facilitate and to promote the cross-border mergers limited liability companies, of different Member States-members, facilitating procedures.

In order to facilitate the operations of cross-border mergers, it is opportune to foresee, unless the Directive provides otherwise, that each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law that will be applicable in the case of a national merger.

None of the provisions and formalities of national law, to which reference is made in this Directive should introduce restrictions on freedom of establishment or on the free movement capital, save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements.

For the development of this such goal such will have to be based on a common project of merger, with the same conditions for each one of the companies involved in that project, i.e., containing the minimum content of that project. During that process, the common draft terms of cross-border mergers and the completion of the cross-border merger are to be publicised for each merging company via an entry in the appropriate public register, but before a report was elaborated on the merging project. The common draft terms of the cross-border merger are to be approved by general meeting of each of those companies.

In order to facilitate the operations of cross-border mergers, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those

companies, whereas monitoring of completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified.

In order to protect the interest of members and others, the legal effects of the cross-border merger, distinguishing as to whether the company resulting form the cross-border merger is an acquiring company or a new company, should be specified. In the interest of legal certainty, it should no longer be possible, after the date on which a cross-border merger takes effect, to declare the merger null and void.

Employees' rights other than rights of participation should remain subject to the national provisions referred to in Council Directive 98/59/CE of 20 July 1998 on collective redundancies, Council Directive 2001/23/CE of Council of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, Directive 2002/14/CE of the European Parliament and of the Council of 11 March 2002 establishing a general framework of informing and consulting employees in the European Community and Council Directive 94/45/CE of Council of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

INFORMATION AND CONSULTATION

This Directive doesn't move away the application of remaining Directives on Employees' Information and Consultation in several occasions, trying to guarantee the employees' involvement, and for such purpose it should be articulated with those Directives, according with the following:

Directive 2002/14/CE - Directive on Information and Consultation at national level - the employees, and their representatives, according with the national law transposing the Directive must be informed and consulted, before the decision to merge, as provided in the Directive or the national Law, eventually, in the event of not existing a transposition of the Directive for already be consecrated a larger level of information and consultation in the

Member State. So that the «target» of the Directive can be informed and consulted, i.e., in a way that the ones included by Directive can issue an opinion and that it can be taking into consideration, if is that the case.

Directive 94/45/CE - Directive establishing the European Works Councils or Procedure in community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, this Directive is to be applied to cross-border operations, i.e., to operations or acts with implications, or affecting, in more than one Member State, within the European Union. In these cases the body established should be informed or consulted (usually an EWC). Note: due to the actual text of the Directive there are doubts regarding the «consultation» concept and a moment when it should happen. We would like, however, to refer, that due to case-law of the Court of Justice, consultation should be understood as an act carried through in due time so it can be taken into consideration.

Directive 2001/23/CE - Directive on the safeguarding of the employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This Directive assumes, also, the development of a process of information and consultation in a way to safeguard the maintenance of the employees' rights in case of a merger.

Directive 2001/86/CE - Directive supplementing the Statute for a European company with regard to the involvement of employees. The Directive that we are analysing in this work remits, with the due adaptations, to the Directive 2001/86/CE, once it intends that the principles provided in the Directive to be applied to safeguard the employees' involvement in the merger process.

Directive 2005/56/CE - Step by Step

- Application -

The present Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State provided, at least, two of those companies, are governed by the laws of different Member States and having their registered office, central administration or principal place of business within the Community, hereinafter referred as: designated for:

"Cross-border mergers"

We have, like this, as initial factors or requirements, decisive for the application of this Directive:

An objective element:

- **The merging companies have to be formed as a limited liability company in the member State where the company is located;**
  and
- **They have to have their registered office, central administration or undertaking within the UE territory;**
  and
- **To involve, at least, two of those companies societies governed by laws of different Member States.**

And what a limited liability company should understand?

a) One of the companies referred in the article 1 of the Directive 68/151/CEE:

- for the Federal Republic of Germany:
die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschraenkter Haftung;

- to Belgium:
of naamloze vennootschap, of commanditaire vennootschap, op aandelen, of personenvennootschap met beperkte aansprakelijkheid;

la société anonyme la société en commandite equal actions, la personnes société to the responsabilité limitée;

- to France:
La société anonyme, la société en commandite equal actions, la société to the responsabilité limitée;

- to Italy:
società per azioni, società in accomandita per azioni, società the responsabilità limitata;

- for Luxembourg:

la société anonyme, la société en commandite equal actions, la société to the responsabilité limitée;

- to Netherlands:
of naamloze vennootschap, of commanditaire vennootschap op aandelen

b) and also:

- A company with share capital;
- With legal personality;
- Possessing separate assets which alone serve to cover its debts;
- Be subjected under the national law governing it to conditions concerning guarantees such as are provided for by Directive 68/151/EEC, for the protection of the interests of members and others.

What **merger** should understand?

☞ **Incorporation**

- «*One or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares*»

A merger by incorporation means that an existent company will «incorporate» one or more companies, already existent. These last ones will disappear and it will be maintained just one company, the incorporating company.

☞ **Constitution of a new company**

- «*Two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10 % of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares*»

In this case a new entity emerges, composed by the assets and liabilities of the companies that constitute it, those companies are dissolved, without going into liquidation.

☞ **Transfer**

- «*A company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital*»

There is a transfer, of one company to another (holder of the totality of the securities shares representing its capital). The company, which is dissolved without going into liquidation moves all of its assets and liabilities to the company that we will designate by «dominant company».

Note:

Despite the present Directive, apparently, only allows the constitution of companies by merger, for incorporation or through the constitution of a new company, since the cash payment doesn't exceed the 10% of the nominal value or, in the absence of the nominal value, of the accounting par value of those securities or shares of the company resulting from the merger. The Directive also saves this rule, because it allows that such value to be exceeded in the event of the legislation of a Member State member allow payment of such amount in cash, in the cases above identified, superior to 10% of the nominal value or, in the absence of the nominal value, of the accounting par value of the shares or those securities representing of the capital of the cross-border resulting from the cross-border merger. In these cases, the present Directive is also applied.

If until so far we have been talking of the cases where the Directive is applied, we will approach the cases in which its application can be excluded.

- The first exception is referred to the possibility of the Member States to decide not to apply this Directive:

  ☒ To cross-border mergers involving a co-operative society even in the cases where the latter would fall within the definition of a limited liability company;

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

What are the conditions, whose verification is necessary, so that a cross-border merger is possible?

✓ The involved companies have to fit in the concept of «*limited liability company*»;

✓ That exists a will of integrating a merger's project;

✓ **That the companies can be merged within the terms of the national law of the concerned Member States**. It will be the national law of each Member State, where each company is located, that will determine the provisions and formalities to proceed (namely in what concerns to process of decision making on the merger, to the protection of the merging companies' creditors, debenture holders and the holders of securities or shares, as well as of employees - other than the ones regarding the participation right, within the terms of the Directive itself).

Note: a Member State may enable its national authorities to oppose a given internal merger on ground of public interest shall also be applicable to a cross-border merger.

Procedure

❋ Project

The first step will be the elaboration, by the management or administrative organ **of each one of the merging companies, of a common draft project of cross-border merger.** This common project will include, at least:

i. the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

ii. the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

iii. the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;

iv. the likely repercussions of the cross-border merger on employment;

v. the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

vi. the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

vii. the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;

viii. any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

ix. the statutes of the company resulting from the cross-border merger;

x. where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined;

xi. information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

xii. dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

✵ Publication

The common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State in accordance for each of the merging companies at least one month before the date of the general meeting, which is to decide thereon.

It should be also published in the national gazette of the Member States where are located the different merging companies, the following particulars:

- the type, name and registered office of every merging company;
- the register and the respective number of the entry in that register;
- the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

❋ Report

Equally, the management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees. Independent experts that can be natural persons or legal persons will elaborate this report.

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

The merging companies shall make available, to the experts, the information that they consider necessary to elaborate the report.

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

❋ Project's approval

In the case of this possibility has not been used, the report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, **not less than one month before the date of the general meeting that will decide on the common project's approval.**

We should mention that the report would only be made available to the employees themselves if by any chance there were no employees' representatives. As for this aspect, we think that it is important not to forget the articulation of the present Directive with the Directives 2002/14/CE and 94/45/CE, in what concerns each company individually considered and the

processes of information and consultation provided in the terms of the referred normative instruments.

In case of existing an opinion of the employees' representatives, and the management or administrative organ one of the merging companies has received it and if it has been emitted in accordance with the respective national law, this opinion should be attached to the elaborated report.

The general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger. However, it may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

The laws of a Member State need not require approval of the merger by the general meeting of the acquiring company whenever, in the quality of social organ, have the power to bind the company, what turns any irregularity occurred not opposable to third parties save, if the company proves that those third parties were aware of the irregularity.

☞ **Scrutiny of the legality**

- **Regarding each one of the merging companies:**

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

However, previously, each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure, which concerns each merging company subject to its national law. This authority shall in particular ensure that the merging companies have approved the common draft terms

of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined as provided by the present Directive.

- **Regarding to the conclusion of the merger:**

Once again each Member State will designate the designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law.

Each merging company shall submit to the referred competent authority the certificate above described within six months of its issue together with the common draft terms of the cross-border merger approved by the general assembly of the respective company.

Only after the merger will entry into effect. Member State law to whose jurisdiction the company resulting from the cross-border merger is subject will determine the date on which the cross-border merger takes effect.

❋ Publicity

Each merging company shall submit to the public register in accordance with the law of the Member State which jurisdiction the company was subject. Each law of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, for publicising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

As for the company resulting from the cross-border merger shall be registered in accordance with the national law of the Member State to which the company is subject.

The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect

Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

❋ Consequences of the cross-border merger

A cross-border merger carried out by Incorporation or Transfer, and from the date it takes effect on, will have the following consequences:

I. all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;

II. the members of the company being acquired shall become members of the acquiring company;

III. the company being acquired shall cease to exist.

In the cases of cross-border merger carried out by the constitution of a new company will have, and from the date it takes effect on, the following consequences:

A. all the assets and liabilities of the merging companies shall be transferred to the new company;

B. the members of the merging companies shall become members of the new company;

C. the merging companies shall cease to exist.

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

It is glimpsed a certain parallelism here with previous community normative instruments, that aim, as the present Directive, to assure the maintenance of the employees' rights, i.e., of the current conditions from their employment contracts and from employment relationships, which will be transferred for the company resulting from the cross-border merger.

- The employees' participation -

The company resulting from the cross-border merger can only be registered if it has been reached an agreement on the employees' participation terms, or if the relevant organs of the merging companies choose without any prior negotiation to be directly subject to the standard rules for participation, or once reached the end of the period for negotiation without an agreement, or if none of the merging companies have been regulated by participation rules before the registration of the company resulting from the cross-border merger.

The statutes of the company resulting from the cross-border merger cannot, in any way, be with what has been agreed on the employees' involvement.

So, in order to know which is the applied law, or even if the company resulting from the cross-border merger will have, or not, regulated the employees' participation, it will have to be observed certain requirements, similarly to what happens with the participation right provided by the SE directive.

According with the terms of article 16 of the present Directive, the rule to apply infers that the company resulting from the cross-border merger will be submitted to the eventual dispositions on the employees' participation of the Member State of the respective registered office.

However, such is not applied, if:

- ⌦ At least, **one of the merging companies** has in the six months before the publication of the draft terms of the cross-border merger, an average number of **employees that exceeds 500 and is operating under an employee participation system,** meaning this the

capacity to influence exercised by the employees' representative body and/or their representatives the activities of the company through:

1. the right to elect or appoint some of the members of the company's supervisory or administrative organ;

   or

2. the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

⌦ If the applicable national law to the company resulting from cross-border merger:

☹ provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation,

or

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

Like this it is tried to, at least apparently to safeguard the participation right and the eventual loss of it.

To the exceptions, will be applied the rules of the Member States and also, though with the necessary adaptations, some of the rules provided in the SE Regulation and in the Directive 2001/86/CE regulating the employees' involvement in the SE.

- Constitution and Composition of the SNB -

In that sense a special group of negotiation should be constituted, designated by SNB that will allow the negotiation of the participation right between employees and employers.

When establishing the project of a cross-border merger, the management or administrative organs of the merging companies shall give information on the identity of the merging companies and the number of employees, to initiate negotiations with the employees' representatives of those companies on the employees' involvement and the right of participation within the company resulting from the cross-border merger.

For such effect, and in the event of the relevant organs of the merging companies have chosen without any prior negotiation to be directly subject to the standard rules for participation, will be constituted a Special Negotiation Body, hereafter identified as SNB.

This SNB, constituting a representative special negotiation group of the employees of the merging companies, will be constituted according a rule: "**Each involved country should have a representative**", in order to assure that those members are chosen or designated in proportional number to the number of employed employees in each Member State by the merging companies, being attributed, to each Member State, a seat for each fraction of 10%, or fraction of this value, of the number of employees employed by the merging companies in all the Member States, considered as a whole.

Assuring that there are so many additional members for each Member State as many as necessary to assure that the SNB includes, at least, a member that represents each merging company and that it has employees in that Member State, since the number of those additional members is not superior to 20% of the total of the designated members and that the composition of the SNB doesn't have, as consequence, a double representation of the employees.

It is from this principle that the Directive departures, in this concrete case, by establishing several limitations. However, for an easier understanding, we initiate this approach with the rule and with a concrete example.

To understand better what the Directive intended, in this case, we will present an example a little complex:

Country	Company X	Company Y	Company Z	Total per country
Portugal	50	100	200	350
Spain	60	140	30	230
Denmark	35	15	100	200
Total	145	255	330	780

After we have to repeat the steps followed in the previous example and determine the number of representatives per country, based on the principle of one seat by each fraction of employees employed in that Member State, corresponding to 10% or a fraction of that amount.

Country	Company X	Company Y	Company Z	Total per country	%	No of seats in the SNB
Portugal	50	100	200	350	44.8	5
Spain	60	140	30	230	29.4	3
Denmark	35	15	100	200	25.6	3

In the case of a merger it is still added the requirement that all the merging companies have to be represented. In this sense the Directive establishes the resource to additional members.

Like this and as it has been stressed, it has to attributed to each merging company one seat, in the event of that company is not represented in the end of the first operation. However, the Directive provides limits to this rule, meaning that the number of additional seats cannot exceed 20%.

In our concrete case it would not be a problem once, in all of the countries, each merging company is represented.

We go, now, to slight change the example:

Country	Company X	Company Y	Company Z	Total per country	%	No of seats in the SNB	No of additional members
Portugal	50	100	200	359	49.6	5	-
Spain	60	140	30	230	32.6	4	-
Denmark	15	10	100	125	17.8	3	1
Total	125	250	330	705	100	11	1

However, the number of additional member cannot exceed the 20% of the regular members, so in this case, the regular number is 11, so that all the companies are represented is necessary to attribute an additional seat to Denmark, this additional member, in this case, doesn't exceed that value. Such will not represent a problem.

Let's raise, now, the possibility of that value exceed the 20%, the seats will be allocated by a decreasing order of the number of employees.
We present, now, another example:

Country	Company X	Company Y	Company Z	Total per country	%	No of seats in the SNB	No of additional members
Portugal	50	100	200	350	57	6	-
Spain	60	140	30	230	37.5	4	-
Denmark	2	11	1	14	2.2	1	2
Greece	5	2	12	19	3.3	1	2
Total	117	253	243	613	100	12	4

In this example, the four necessary additional members to allow that all of the merging companies are present in the SNB exceed, clearly, the criterion of the 20%, reaching a value of 33%, because it would be necessary more four representatives.

For that reason, and in this situation, Portugal and Spain would not need additional members once all the companies are represented.

After it should be analysed which is the maximum number of acceptable additional seats. In this example the acceptable maximum figure is two.

The Directive attributes these seats to the largest companies that are not still represented and in different Member States. Like this, and according this example, will be allocated additional seats to the company with larger number of employees, but yet not represented, the two seats would be attributed to Company Z in Greece and another seat to Company Y in Denmark.

- Way of Election -

The Member States shall determinate the way of election, or appointment, of the SNB members, to be elected or appointed in it territory and also to undertake the necessary

measures to assure that, whenever possible, there is amongst the members of the group, at least, one representative of each merging company having employees in the Member State territory.

The laws of the Member States can provide that, among the members of the group, can be equally, included trade unions' representatives, despite being, or not, employed in one of the merging companies, or an undertaking concerned.

The Member States shall provide that the employees of the companies, or undertakings, where there are no employees' representatives, for strange reasons to their will, have the right to elect or appoint members to the SNB.

The SNB determines how will be the employees' involvement within the company resulting from the cross-border merger, which is done by a written agreement between this body and the competent organs of the merging companies.

- Deliberations -

The SNB decides ***by the majority, representing the majority of the employees, each member is entitled to one vote.*** There is here a novelty, too, in what concerns what was previously legislated. In this case, besides the votes' counting there is, also, the need to verify the meaning of the vote of the representatives, which can restrict, in a certain way, the freedom of vote.

Exceptions: The SNB has the right to decide, by a majority of two thirds of its members representing at least two thirds of the employees, including the votes of members representing employees in at least two different Member States, not to open negotiations or to terminate negotiations already opened.

If the result of the negotiation leads to a limitation of the proportion of employees' representatives in the administrative organ of the company resulting from the cross-border merger, it will be required a majority of two thirds of the SNB's members, representing, at

least, two thirds of the employees, including votes from the employees employed in two Member States, minimum, if the participation covers, at least, 33% of the total number of employees of the merging companies.

There is a limitation of the participation rights if the proportion of members of the organs of the company resulting from the cross-border merger, in the terms of the "participation" concept, understood as the right of to choose or to designate some of the members of the supervisory or the administrative organ, or the right to appoint and/or to reject the designation of some or all of the members of the supervisory or of the administrative organ of the company, is inferior to the highest proportion in the merging companies.

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

- Functioning -

The SNB may request the support of experts of its choice, for instance, representatives of the appropriate trade union organisations at Community level. These experts can be present at the negotiation meetings, playing a consultative role, upon request of the SNB, if necessary to promote the coherence and the compatibility at level of the Community. The SNB can decide to inform the representatives of the appropriate external organisations, including the trade union organisations of the beginning of the negotiations.

The expenses concerned with the functioning of the SNB and, in general, of the negotiations, are supported by the merging companies, so that the SNB can accomplish its mission completely (the Member States can limit the financing to the covering of the expenses of a single expert).

- Confidentiality -

The Member States shall determine that the SNB members, the representative organ, as well as the experts assisting them, are not authorised to reveal to third parties information that has been transmitted to them as confidential.
This obligation is applicable regardless of the place where those persons are, and even after the term of the respective mandates.
Each Member State shall determine that, in specific cases and according with the conditions and limits fixed by the national law, the supervisory or the administrative organ is not complied to communicate information that, for its nature and according objective criteria, can be susceptible to seriously obstruct the operation of the company.

- The Agreement -

The negotiations initiate as soon as the SNB is constituted and continue during the following six months. This period can be extended, if the parts agree on that, beyond the six months up to one year, in total, counting from the institution of the SNB.

Exception: the relevant organs of the merging companies have the right to choose without any prior negotiation to be directly subject to the standard rules for participation referred to in article 16, paragraph 3(h), as laid down by the legislation of the Member State in which the company resulting from the cross-border merger is to have its registered office, and to abide by those rules from the date of registration.

The competent organs of the merging companies and the SNB should negotiate within a co-operation spirit in order to reach an agreement on the employees' involvement in the company resulting from the cross-border merger.

The reached agreement establishes its extent of application.

If during the negotiation process the parts decide to establish a participation arrangement, the fundamental elements of such including, if it the case, the number of members of the administrative organ or the supervisory of the company resulting from the cross-border

merger that the employees will be entitled of elect, to designate, to recommend or to reject, the procedures according which the members can be chosen, designated or rejected by the employees, and their rights.

The agreement shal also include the date on which the agreement takes effect and its duration, the cases where the agreement shall be renegotiated and the renegotiation process.

As such, the SNB can:

- To decide not to initiate or even to end negotiations already open (for majority of two thirds of their members since representing the two thirds of the employees and, at least, two different Member States). In this case the rules to be applied to the employees' participation will be applied the ones from the Member State where will be located the registered office of the company resulting from the cross-border merger;

- If the SNB decides not to open negotiations or to end the ones already opened and it does not invoke the dispositions of the Member State of the registered office of the company to constitute will be applied the standard dispositions of the Member State of the registered office of the company to constitute if, at least, one third of the employees had participation right previously;

- Agree on the employees' involvement and their participation rights;

- Agree on a reduction of rights - the negotiations can lead to a quantitative reduction of the participation rights (votes of two thirds of the members of the SNB, representing, at least, two thirds of the employees, including the votes of the employees employed in two Member States, minimum, if participation covers, at least, 33% of the total number of employees of the merging companies);

- Agree on the application of the standard dispositions limiting the number of the employees' representatives in the supervisory or the administrative organ, however if in one of the merging companies the employees' representatives constitute one third of the supervisory or administrative organ, the limitation cannot be inferior to one third;

- Not reach and agreement, or to let to end the period foreseen for the negotiations and to reach an agreement, in these cases will be applied the standard dispositions of the Member State of the registered office of the company to constitute;

- The SNB can, also, if before registration, one or more form of participation were applied to one or more companies, including, less than 33% of the total number of the employees of the group of the merging companies, to decide to apply the standard dispositions. In this case the SNB will decide which form will be adopted in the company resulting from the cross-border merger.

  ➲ The standard dispositions will be applied, still, if before the registration, one or more participation forms were applied in one or more companies, including, at least, 33% of the total number of the employees of the group of the merging companies;

  ➲ The parts can, also, agree on the application of the standard rules; it can also take place if the competent organs decide so if an agreement is not reached and the competent organs accept its application.

The Member States are entitled to choose for not transposing into their national law the participation standard dispositions provided by the Directive 2001/86/CE. If is this the case, if it is not possible to reach an agreement on the participation right and some of the companies had already participation right, previously, the company resulting from the cross-border merger cannot be registered in that Member State, except if there is an agreement or none of the merging companies had participation previously.

- Employees' Protection -

The members of the SNB, the employees' representatives participating in the supervisory or administrative organ of the company resulting from the cross-border merger and that are employed by it, or one of the merging companies, have protection and identical warranties as the ones provided to the employees' representatives by the national law of the country employing them. Such is applied, in particular, to the meetings of the SNB or in any other meeting of the supervisory or administrative organ, as well as regarding the payment of the

remuneration of the members during the necessary absence periods to the exercise of their functions.

- Scrutiny of the legality -

The Member State having, in its territory, the management of the undertakings of one company resulting from the cross-border merger and merging companies and the respective employees, shall assure that the management of the company and its employees comply with what is stipulated by Community law. It also shall take the necessary measures for the disrespect, making available administrative and judicial processes that allow the execution of the obligations resulting from it.

The Member States shall take the necessary measures to guaranty that the employees' representation structure of the merging companies and that stop existing while legal and autonomous entities are maintained after the registration of the company resulting from the cross-border merger.

- Standard Dispositions -

The employees of the company resulting from the cross-border merger, branches and establishments are entitled of elect, designate, recommend, and to oppose to the designation of a number of members of the supervisory or administrative organ of the company resulting from the cross-border merger equal to the highest of the proportions in force in one of the merging companies before registration.

If any of the companies had participation rules before registration, this is not obliged to establish dispositions as regards to the employees' participation.