



Notarial guidelines on M&A and other company law transactions

April 2022

These guidelines, drawn up by the CNUE Company Law Working Group, are intended to provide guidance on certain practical questions, concerning cross-border conversions, mergers, and divisions, that mainly arise in connection with the transposition and application of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

They have been drafted for the benefit of any practitioner who may be confronted with the specific situations addressed in order to offer practical solutions to a number of questions that are not directly resolved by the Directive itself.

Thus, they provide an interpretation based on the in-depth analysis of the Directive and the experience in the field of cross-border transactions of the members of the working group, with no binding character for the readers.

Guideline n. 1

Effects of Directive (EU) 2019/2121 before January 31, 2023

GUIDELINE

Before the expiration of the delay for its implementation, Directive (EU) 2019/2121 (the Directive) shall not be directly or indirectly applicable to those cross-border mergers, divisions, and conversions, falling within its scope.

Therefore, before January 31, 2023, in view of preserving the certainty of the legal framework governing cross-border transactions, so as to facilitate the mobility of companies across the European Union, within the principles mandated by EU law, the national procedural and substantive rules and principles applicable to cross-border transactions shall not be pre-empted by the provisions of the Directive, unless so expressly required by the national laws applicable to the relevant cross-border operation.



Guideline n. 2

Possible effects of Directive (EU) 2019/2121 after January 31, 2023

GUIDELINE

After the expiration of the delay for its implementation, Directive (EU) 2019/2121 (the Directive) shall not be directly or indirectly applicable to cross-border mergers, divisions, and conversions, falling within its scope in those jurisdictions that did not timely transpose it.

Therefore, after January 31, 2023, in view of preserving the certainty of the legal framework governing cross-border transactions, so as to facilitate the mobility of companies across the European Union, within the principles mandated by EU law, the national procedural and substantive rules and principles applicable to cross-border transactions shall not be pre-empted by the provisions of the Directive, unless so expressly required by the national laws applicable to the relevant cross-border operation.

In light of the mainly procedural nature of Directive (EU) 2019/2121, and of the considerable margins of discretion recognised to Member States for its transposition, according to EU law, it is unlikely that, the persons involved in cross-border operations may successfully invoke a direct effect of the provisions of the Directive.



Guideline n. 3

Scrutiny of the legality of cross-border conversions and divisions in the absence of foreign pre-operation certificates

GUIDELINE

If Directive (EU) 2019/2121 has not been transposed in the laws of one or more Member States, whose authorities would be competent to issue pre-conversion or pre-division certificates, the competent authority designated by another Member State according to Directive (EU) 2019/2121 to scrutinise the legality of cross-border conversions and divisions may still perform its task even in the absence of those foreign pre-operation certificates.

In that case, the competent authority required to scrutinise the legality of the operation may verify the proper completion of the pre-operation procedures and formalities in the other Member States relying on the documents and information (e.g. certificates, legal opinions or affidavits) that would prove the completion of the preliminary procedures and formalities required for the relevant cross-border operation in those other Member States.



Guideline n. 4

Coordination of pre-operation formalities and procedures and scrutiny of the legality of the cross-border operation

GUIDELINE

When, in view of delivering a pre-operation certificate, the legislation of a Member State imposes the completion of procedures or formalities on foreign companies, these procedures and formalities should not be interpreted as making the issuance of the pre-operation certificate conditional to (a) the issuance of the pre-operation certificates in other Member States, or (b) to the scrutiny of the legality of the transaction.

In case the law of a Member State makes the issuance of the pre-operation certificate conditional on preliminary formalities and procedures that in another Member States are directly connected with the issuance of the pre-operation certificate or with the scrutiny of the legality of the transaction (e.g. when the pre-merger certificate can be issued only after the approval of the operation by the general meeting of the absorbing company where that approval is normally the last step of the cross-merger procedure and it is directly connected with the scrutiny of the legality of the operation), it is possible, to decouple the different effects of these formalities and procedures (e.g. by using condition precedent or subsequent) in view of making possible the exchange of pre-operation certificates and the subsequent legal scrutiny of the cross-border operation.



Guideline n. 5

Pre-operation Certificate: Legalisation and Apostille

GUIDELINE

Directive (EU) 2017/1132 does not provide for any exemption from the necessity of obtaining the legalisation or other similar formalities (e.g. the apostille) of legal documents, at least as long as the applicable law of a Member State requires them. Therefore, pre-operation certificates issued by the competent authority of a Member State, shall be received by the foreign competent authority that scrutinises the legality of the cross-border operation, as any other foreign public document, in compliance, with the domestic rules governing the cross-border circulation of these documents. Such rules may require the legalisation or similar formalities (e.g. the apostille) of the pre-operation certificate.