

**DIRECTIVE 2009/109/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 16 September 2009

**amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and
Directive 2005/56/EC as regards reporting and documentation requirements in
the case of mergers and divisions**

CONSULTATION DOCUMENT

August 2010

OVERVIEW OF THE DIRECTIVE

Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 (amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions) is intended to reduce the administrative burden on limited companies undertaking mergers or divisions. In particular, it allows for:

a relaxation of the reporting requirements imposed on companies undertaking mergers or divisions, particularly where the participants in such mergers or divisions are parent companies and their subsidiaries and the shareholders resolve to dispense with certain reports.

the avoidance of duplication where similar or equivalent reports are required by different EU instruments; and

the facilitation of the use of the internet and other electronic means for the publication and dissemination of documents.

GLOSSARY OF DIRECTIVES REFERRED TO IN THIS CONSULTATION DOCUMENT

The Third Directive (Council Directive 78/855/EEC) and the Sixth Directive (Council Directive 82/891/EEC) concern mergers and divisions respectively of public limited companies within any one Member State of the European Union. The Third and Sixth Directives were transposed into Irish Law as Parts II and III respectively of the European Communities (Mergers and Divisions of Companies) Regulations 1987 (S.I. No. 137 of 1987).

The Tenth Directive (Directive 2005/56/EC of the European Parliament and of the Council) concerns cross-border mergers of limited companies, whether public or

private, within the European Economic Area (EEA). The Tenth Directive was transposed as the European Communities (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

The Second Directive (Council Directive 77/91/EEC) 'on the coordination of safeguards which, for the protection of the interests of members and others, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent' is also relevant in that certain of its provisions give rise to duplication where mergers or divisions take place. The matter of duplication was, to an extent, addressed by the Third and Sixth Directives but in a manner that was not sufficiently comprehensive and consistent. The Second Directive was transposed into Irish Law by means of the Companies (Amendment) Act 1983.

There are also references to the First Directive (68/151/EEC) on co-ordination of safeguards for the protection of the interests of members and others and the Transparency Directive (2004/109/EC) on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

TRANSPOSITION INTO IRISH LAW

It is intended to transpose Directive 2009/109/EC by means of Regulations to be made by the Minister under section 3 of the European Communities Act 1972. Regulations made under that Act must adhere strictly to the content of the Directive being transposed, the only discretion being in respect of the exercise of Member State options.

Directive 2009/109/EC must be transposed into Irish law by 30 June 2011.

The full text of the Directive can also be accessed via the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:259:0014:0021:EN:PDF>

CONSULTATION

Comments are invited on the exercise of Member State options and, where applicable, the choice of alternative options. In commenting on the options respondents are requested to give reasons for preferences indicated.

Respondents are requested to indicate whether they are responding on their own behalf or on behalf of an organisation.

Reponses should be submitted as early as possible so as to reach the Department by **28 September 2010**.

Please respond, preferably by email, to:

marie.dempsey@deti.ie

or by post to:

Marie Dempsey

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FREEDOM OF INFORMATION ACT 1997 (AS AMENDED)

Your attention is drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Act. Therefore, should you consider that any information you provide is confidential or commercially sensitive, please identify it and specify the reason for its confidentiality or sensitivity. The Department will consult with you regarding information identified by you as confidential or sensitive before making a decision on any Freedom of Information request.

SUMMARY OF THE PROVISIONS

Directive 2009/109/EC comprises eight Articles, of which Articles 5-8 are technical or procedural and are not required to be transposed, so they are not referred to in this document.

The contents of Articles 1 to 4 are summarised below.

ARTICLE 1: AMENDMENT OF THE SECOND DIRECTIVE (COUNCIL DIRECTIVE 77/91/EEC)

Article 1(1)

Article 1(1) is of specific relevance to Finland only.

Articles 1(2) and 1(3)

Articles 1(2) and 1(3) of Directive 2009/109/EC bring together in one Directive (the Second Directive) different Member State options, previously located in the Third and Sixth Directives, in respect of the expert's report (required by the Second Directive) on the issue of shares for a consideration other than cash¹.

These changes must be viewed in conjunction with those made by Articles 2(7) and 3(4).

¹ See sections 30 and 31 of the Companies (Amendment) Act 1983 and Regulations 10 and 28(8) of S.I. No. 137 of 1987.

Member State Option

The Member State option (relating to the expert's report on the issue of shares for a consideration other than cash) previously available in the case of mergers differed from that available in the case of divisions. Ireland availed of each option. As a consequence of changes made by Articles 1(2) and 1(3), Member States may now exercise either, but not both, options for both mergers and divisions.

Accordingly, in transposing Directive 2009/109/EC it will be necessary to choose between:

- (a) dispensing with the expert's report on non-cash consideration (where an independent expert's report on the draft terms of the merger or division is produced); or
- (b) requiring the expert's report on non-cash consideration but allowing it to be produced by the person producing the report on the draft terms of the merger or division.

Comments are invited on which of the two approaches is considered more appropriate. Respondents are invited to give reasons for their preference.

Other Changes

A consequence of relocating the exemptions to the Second Directive is that they will apply to cross-border mergers where these involve the issue of shares for a non-cash consideration by an Irish public limited company.

The first subparagraph of Article 1(3) also extends an existing Member State option contained in the Second Directive to provide for the exemption from the need for the expert's report on the issue of shares for a consideration other than cash in the case of mergers, by making it available also in the case of divisions¹.

¹ Section 30(2) Companies (Amendment) Act 1983.

ARTICLE 2: AMENDMENT OF THE THIRD DIRECTIVE (COUNCIL DIRECTIVE 78/855/EEC) CONCERNING MERGERS OF PLCs

Note with particular regard to options on which comment is invited.

The content of Article 2, amending the Third Directive (on mergers) and Article 3 amending the Sixth Directive (on divisions) largely parallel one another. This, by and large, is the case for the Member State options also. (A comparison table of Articles 2 and 3 is set out at page 15). In addition, significant elements of the content of Articles 2 and 3 (including the options) are to be found at Article 4(1) as regards the Tenth Directive (on cross-border mergers). Accordingly, in cases where there are corresponding options at Article 3 and Article 4(1) to those arising under Article 2, comment is invited on these options under Article 2. This will help to avoid duplication.

Article 2(1)

Article 2(1) is of specific relevance to Finland only.

Article 2(2)

Article 2(2) allows a company to publish the draft terms of a merger on its website as an alternative to filing it in the public registry i.e. with the Registrar of Companies in the case of Ireland¹. Publication on a website other than the company's own website is permitted². The draft terms must be posted on the website and accessible free of charge for at least a month before the general meeting at which the vote on the proposed merger is to be held. The security of the website and the authenticity of the documents must be ensured.

¹ Article 2(2) mirrors Articles 3(1) and 4(1) which apply to divisions and to cross-border mergers respectively. It is similar in nature to Article 2(5)(c) and 3(5)(c) to the extent that both provide an alternative to making documents available for inspection at the registered office.

² If a website other than a central electronic platform is permitted, there must be a reference (link) from the central electronic platform to the relevant website.

Member State Options in respect of Article 2(2)

As an alternative to the above, Member States have two options:

- (a) the option of requiring publication on a central electronic platform¹ instead of on a company's own website, or
- (b) the option of requiring publication on an alternative website designated by the Member State.

These options are mirrored at Article 3(1) as regards the Sixth Directive (82/891/EEC) on divisions and Article 4(1) as regards the Tenth Directive (2005/56/EC) on cross-border mergers.

Comments are invited on which of the alternatives respondents consider would be more appropriate both in the case of Article 2(2) as regards the Third Directive, Article 3(1) as regards the Sixth Directive and Article 4(1) as regards the Tenth Directive i.e. use of a company's own website or one of the two optional alternatives. Respondents are asked to give reasons for their preference in the case of each of these Directives.

Member States are also permitted to require that the information in question be maintained on the central electronic platform or other designated website by companies for a specified period after the general meeting. Respondents are invited to give their views as to whether they consider that Ireland should avail of this provision, in the case of Article 2(2) and Articles 2(5), 3(1), 3(5) and 4(1) where it arises also and if so, why, and in respect of what period of time after the general meeting.

Member States are also allowed the option of determining the consequences of temporary disruption of access to the website caused by technical or other factors. Respondents are invited to give their views on whether, and if so how, the

¹ Article 3(4) of the First Directive (as substituted by Article 1(3) of Directive 2003/58/EC of 15 July 2003). In the case of Ireland the central electronic platform is the Companies Registration Office Gazette (European Communities (Companies) Regulations 2004 - S.I. No. 839 of 2004).

contingency of such a disruption of access might be addressed in the implementing regulations, in the case of Article 2(2) and Articles 2(5), 3(1), 3(5) and 4(1) where the issue also arises.

Article 2(3)

Article 2(3) makes changes to Article 8 of the Third Directive (which provides that a Member State need not require approval of a merger by a general meeting of an acquiring company if certain conditions are fulfilled¹). The changes maintain and enhance its compatibility with Article 11 to which it is linked. Article 11 is amended by Article 2(5) of Directive 2009/109/EC (see below).

Article 2(4)

Article 2(4) in effect adds two new paragraphs to Article 9 of the Third Directive. Article 9 imposes a requirement that reports on the draft terms of a merger be prepared by the management of each of the merging companies. It previously consisted of one paragraph only. That paragraph remains unchanged.

The newly introduced Article 9(2) of the Third Directive requires that general meetings be informed of any material changes in the assets and liabilities between the date of the preparation of the draft terms of the merger and that of the general meeting. It corresponds to the existing Article 7(3) of the Sixth Directive on divisions², so the change makes the two Directives consistent in this regard.

Member State Options

The new Article 9(3) of the Third Directive provides a choice of Member State options³. Member States have the option:

(a) of requiring:

¹ Article 8 was transposed as Regulation 13(4) of S.I. No. 137 of 1987.

² Regulation 32(5) the European Communities (Mergers And Divisions of Companies) Regulations 1987 - S.I. No. 137 of 1987.

³ The new Article 9(3) corresponds broadly to Article 10(2) of the Sixth Directive, to the extent that Article 10(2) provides an exemption from Article 7 of the Sixth Directive.

- (i) a management report on the draft terms of a merger as provided for at Article 9(1), and
 - (ii) that general meetings be informed of any material changes as provided for at Article 9(2),
- or
- (b) of providing either that a management report on the draft terms of a merger, as required at Article 9(1), or that general meetings be informed of any material changes, as provided for at Article 9(2), will not be required if shareholders so agree in one or other or both cases.

Comments are invited on which option is considered preferable. Respondents are asked to give reasons for their preference.

Article 2(5)

Article 2(5) makes a number of amendments to Article 11 of the Third Directive.

Article 2(5)(a)(i) inserts the words ‘where applicable,’ into points (c) (re accounting statement) and (d) (re reports of administrative or management bodies) of Article 11(1) of the Third Directive, reflecting amendments made by Articles 2(4) and 2(5)(a)(ii) of Directive 2009/109/EC.

Article 2(5)(a)(ii) provides that where a merging company publishes a half-yearly financial report (i.e. one covering the first six months of its financial year) in accordance with the requirements of Article 5 of the Transparency Directive (2004/109/EC), it may make that financial report available to shareholders instead of the accounting statement that would otherwise be required where the latest annual accounts are for a financial year ended more than six months before the date of the draft terms of the merger. This is intended to avoid the imposition of an unnecessary burden in such a case.

Member State Option

Article 2(5)(a)(ii) provides a Member State with the option of dispensing with the requirement for an accounting statement where all the holders of all securities with voting rights in the various companies involved in the merger have so agreed.

Comments are invited on the desirability or otherwise of taking this option. Respondents are asked to give reasons for their preference.

Article 2(5)(b) provides that the copies of documents to which shareholders are entitled under Article 11 may be provided by email to shareholders who have consented to this.

Article 2(5)(c) amends Article 11 of the Third Directive so as to exempt companies from the requirement to make the draft terms of a merger (and other specified documents) available, at least one month before the general meeting, for inspection at its registered office if it instead publishes those documents on its website.

Article 2(5)(c) also relieves companies from the obligation to provide shareholders with copies of the documents (including the provision of such copies by email) where such documents can be downloaded.

Member State Options

Article 2(5)(c) provides three Member State options:

- (a) the option of requiring that the downloadable documents referred to above be made available for inspection by shareholders at the registered office.
- (b) the option of requiring that information posted on a company's website be retained on that website for a specified period after the general meeting.
- (c) the option of determining the consequences of temporary disruption of access to the website caused by technical or other factors.

Article 3(5)(c) of the Sixth Directive also provides identical options in respect of divisions.

Comments are invited on the merits or otherwise of availing of any or all of these options both in the case of Articles 2(5)(c) and 3(5)(c). Options (b) and (c) above are among the options which also apply to Articles 2(2), 3(1) and 4(1).

In the case of option (c) respondents are invited to give their views on whether, and if so how, the contingency of such a disruption of access might be addressed in the implementing regulations.

Article 2(6)

Article 2(6) introduces an additional subparagraph into Article 13(2) of the Third Directive. This is a creditor protection measure, requiring Member States to lay down conditions for the protection provided for in Article 13(1) (system of protection of the interests of creditors of the merging companies).

The new subparagraph is modelled on the additional subparagraph introduced into Article 32(1) of the Second Directive (77/91/EEC) by Article 1(9) of Directive 2006/68/EC¹.

Comments are invited on what steps, if any, would be appropriate to implement in relation to Article 2(6) and similarly for Article 3(6). Respondents are requested to explain the rationale for proposals in this regard.

Article 2(7)

Article 2(7) arises as a consequence of the change made by Article 1(2) and represents the removal from the Third Directive to the Second Directive of an exemption in

¹ Transposed into Irish law by means of the European Communities (Public Limited Companies – Directive 2006/68/EC) Regulations 2008 (S.I. No. 89 of 2008). The original Article 13(2) was transposed as Regulation 17 of S.I. No. 137 of 1987.

respect of the expert's report (required by the Second Directive) on the issue of shares for a consideration other than cash.

Article 2(8)

Article 2(8)(a) makes a textual amendment to Article 24 of the Third Directive the effect of which is to remove any possible ambiguity as to the impermissibility of applying certain provisions of Chapter II of the Third Directive in specified situations (where one or more companies are wound up without going into liquidation and transfer all their assets and liabilities to another company which holds of all their voting shares). Article 2(8)(b) inserts a prohibition on the imposition of specified requirements of Chapter II in such situations. The original Article 24 was transposed as Regulation 13(8) and (9) of S.I. No. 137 of 1987.

Article 2(9)

Article 2(9) changes Article 25 of the Third Directive so that, in a situation involving the dissolution, without going into liquidation, of one or more companies and the transfer of all of their assets and liabilities to another company holding all of their voting shares, and where specified conditions are fulfilled, a Member State cannot now require the approval of a general meeting of each of the merging companies for the merger. Previously Member States had an option of not imposing the requirement for approval of a general meeting in such a case and could have imposed conditions in addition to those specified in the Directive.

Article 2(9) also makes a textual amendment applying Article 11(4) of the Third Directive, as inserted by Article 2(5)(c) of Directive 2009/109/EC, to one of the conditions specified in Article 25. This relates to the use of the internet as an alternative to making documents available for inspection in the registered office.

Article 2(10)

Article 2(10) changes Article 27 of the Third Directive much as Article 2(9) changes Article 25, though the textual changes are more extensive. Article 27 relates to a

situation involving the dissolution, without going into liquidation¹, of one or more companies and the transfer of all of their assets and liabilities to another company holding 90 percent or more of their voting shares. What had been a Member State option is now mandatory and subject only to specified conditions.

Article 2(10) also makes a textual amendment which has the effect of applying the new Article 11(4) of the Third Directive (added by Article 2(5)(c) of Directive 2009/109/EC) to one of the conditions specified in Article 27. In addition, it adds to the list of documents that must be made available for inspection in the registered office or via the internet, the reports of the administrative or management bodies of the merging companies (provided for in Article 9 of the Third Directive) and the reports of the independent experts (provided for in Article 10), where these are applicable.

Article 2(11)

Article 2(11) changes Article 28² of the Third Directive so that, in a situation involving the dissolution, without going into liquidation, of one or more companies and the transfer of all of their assets and liabilities to another company holding 90 percent or more of their voting shares, and where specified conditions are fulfilled, a Member State cannot now require the production of a report of the management explaining the draft terms of merger, reports of the independent experts on the draft terms of the merger or the making available for inspection, at the registered office or via the internet, of the documents specified in Article 11 of the Third Directive. Previously, Member States had an option not to impose such a requirement and could have imposed conditions in addition to those specified in the Directive.

Member State Option

Article 2(11)(b) changes Article 28 of the Third Directive so that a Member State now has the option of designating an administrative authority for the purpose of determining the value of a minority shareholding in the event of a dispute. At present

¹ Extended to companies already in liquidation, where a Member State option provided by Article 3 of the Third Directive was exercised. This also arises in the case of Article 2(11).

² Article 28 of the Third Directive was transposed as Regulation 13(7), taken together with Regulation 15, of the European Communities (Mergers and Divisions of Companies) Regulations 1987 (S.I. No. 137 of 1987)

this is a function of the Court. Comparable options in the original Third Directive were not exercised.

Comments are invited on whether any useful purpose would be served by providing for the determination of the value of minority shareholdings by an administrative body instead of a court. Respondents supporting the availing of the option of designating an administrative body are asked to set out their reasons for this.

Member State Option

Article 2(11)(c) further amends Article 28 of the Third Directive by allowing Member States the option of disapplying one of the conditions specified in that Article (namely, that the minority shareholders of the company being acquired be entitled to have their shares acquired by the acquiring company) where the laws of that Member State entitle the acquiring company, without a previous public takeover offer, to require the minority shareholders of the company or companies to be acquired to sell those securities to it at a fair price. Irish company law (in the form of section 204 of the Companies Act 1963 and Part 5 of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. No. 255 of 2006) provides for the compulsory acquisition of a minority shareholding only in the context of a bid or offer.

Comments are invited on this matter. Respondents should set out the rationale for their views on this option.

ARTICLE 3: AMENDMENT OF THE SIXTH DIRECTIVE (COUNCIL DIRECTIVE 82/891/EEC)

For the most part, the content of Article 3 of Directive 2009/109/EC mirrors that of Article 2, the content and layout of the Third and Sixth Directives being closely aligned. As noted earlier, the correspondence of the paragraphs of Articles 2 and 3 are broadly as follows:

Comparison Table

	<u>Paragraph Number</u>												
Article 2	1	2	3	-	4	5	6	7	8	9	10	11	
Article 3	-	1	2	3	-§	5	6	4§	-	7	-	8	

Changes made by Article 3 are described below only where these differ significantly from those made by Article 2.

Article 3(3)

Article 3(3) of Directive 2009/109/EC replaces the second subparagraph of Article 7(2) of the Sixth Directive (the change consisting of the insertion of the words ‘Where applicable,’ at the start). This change relates to the report explaining the draft terms of division and is unique to the Sixth Directive.

Article 3(5)

Articles 2(5) and 3(5) of Directive 2009/109/EC are essentially similar but the new subparagraph which Article 2(5)(a)(ii) adds to Article 11(1) of the Third Directive contains a discrete provision (a Member State option to dispense with the accounting statement where all shareholders of the merging companies agree) of which there is no equivalent in the new subparagraph added to Article 9(1) of the Sixth Directive.

Articles 3(7)

Articles 3(7)(a) of Directive 2009/109/EC differs in form from Article 2(9)(a) but is substantively equivalent to it.

Article 3(7)(c) of Directive 2009/109/EC deletes Article 20(c) of the Sixth Directive. The deleted provision was one which, in a situation where the recipient companies together held all the voting shares of the company being divided, gave minority shareholders the right to call for a general meeting to decide whether or not to approve a division. Article 25 of the Third Directive contained no equivalent provision¹.

¹ This change requires the deletion of Regulation 32(4)(ii) of S.I. No. 137 of 1987.

Other Aspects of Article 3

Article 3 of Directive 2009/109/EC contains no provision equivalent to Article 2(4) of that Directive. Article 2(4) in effect adds two new paragraphs to Article 9 of the Third Directive. Article 9 imposes a requirement that reports on the draft terms of a merger be prepared by the management of each of the merging companies.

The existing Article 7(3) of the Sixth Directive (general meeting to be informed of changes in assets and liability since draft terms of division were prepared) corresponds to the new Article 9(2) of the Third Directive (added by Article 2(4) of Directive 2009/109/EC). An amendment to the Sixth Directive does not arise.

The existing Article 10(2) of the Sixth Directive (exemption from Article 7 of the Sixth Directive, see above), is broadly equivalent to the new Article 9(3) of the Third Directive (added by Article 2(4) of Directive 2009/109/EC). An amendment to the Sixth Directive does not arise.

Article 3 of Directive 2009/109/EC contains no provision equivalent to Article 2(8) of that Directive. Article 2(8) is reflective of a structural feature of the Third Directive not present in the Sixth.

Article 3 of Directive 2009/109/EC contains no provision equivalent to Article 2(10) of that Directive. Article 2(10) amends Article 27 of the Third Directive of which there is no equivalent in the Sixth.

Please note comments were invited above on the Member State options at Article 3 in the context of the identical options contained at Article 2, i.e. 2(2) and 2(5)(c).

ARTICLE 4: AMENDMENT OF THE CROSS-BORDER MERGERS DIRECTIVE 2005/56/EC

Article 4(1)

Article 4(1)¹ is equivalent to Articles 2(2) and 3(1) of Directive 2009/109/EC. It allows a company involved in a cross-border merger to publish the draft terms of the merger on its website as an alternative to filing in the public registry.

Member State Options

Member State options equivalent to those available under Articles 2(2) and 3(1) are also available under Articles 4(1).

Comments are invited on the same basis as in respect of Articles 2(2) and 3(1) as to which of the options would be most appropriate.

Article 4(2)

Article 4(2) of Directive 2009/109/EC makes textual changes to Article 15(2) of the Tenth Directive (2005/56/EC) the essential effect of which is that the requirements of national law referred to in the text will in future be confined to requirements arising from the Third Directive whereas previously they could have been based purely on domestic law.

¹ Articles 2(5) and 3(5) contain elements which are found in Articles 2(2), 3(1) and 4(1). This is relevant also as regards 'Member State Options' and 'comments are invited...'.