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POSITION ON THE EC PROPOSAL ON THE COMPANY LAW PACKAGE

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SUMMARY

We welcome the Commission's Company Law Package as an important tool to foster company mobility in Europe and the use of digital tools for setting-up and running a business. We appreciate the effort to set forth a common legal framework aiming at enabling conversions and ensuring protection of the involved stakeholders, although we believe that the procedure is too cumbersome for companies and may even go against the objective to facilitate corporate mobility. Also, we fully support the promotion of the use of digital technologies in the creation of a new company or in up-dating business relevant information in public registries which is an added value for companies; however, few amendments are needed to make the proposal more effective.

We therefore suggest to:

- simplify the procedure for cross-border conversion - providing for a single report of the management or the administrative organ to the members and to the employees and deleting the report by the independent expert;
- better define the scope and the condition for the exit right of members;
- make clear that creditors who should benefit from the possibility to ask for safeguards are creditors whose rights originate before the conversion;
- align the regime for the protection of employees with the one set forth in the cross-border merger directive;
- align the possibility to restrict the right of establishment with EU's settled case-law and only to cases where transfer would constitute a "wholly *artificial arrangement which do not reflect economic reality,"* adopt a simplified regime for intra-group restructurings (relocations, mergers) - which are likely to be an important part of future cross-border operations;
- apply the same comments to the rules concerning cross-border mergers and divisions; repeal Member states option to provide for the circumstances in which online registration may be excluded where the share capital of a company is to be paid by way of contributions in kind;
- ensure that a disqualification in one Member State does not automatically lead to disqualification in all other Member State;
- address the issue of the legal value of the digital copy of a company's document.

INTRODUCTION

EuropeanIssuers, representing the interests of publicly quoted companies across Europe, welcomes the Commission's Company Law Package putting forward new rules enabling companies' conversions, mergers and divisions, as well as facilitating their operations by digitalizing the process of setting-up and running a business.

The proposal for a directive regarding cross-border conversions, mergers and divisions aims at harmonizing rules for moving, merging and dividing companies across borders. We would like this be achieved through simplified procedures reducing red tape for businesses while providing for specific safeguards allowing national authorities to prevent potential abuses.

A common legal framework for cross-border operations is likely to enhance company mobility throughout Europe, which is a goal set forth also by the CMU Action Plan. Additionally, the proposal for a procedure for conversion of companies provides for a greater legal certainty for a cross-border transfer of the legal seat, in the light of the most recent decisions of the ECJ on the right of establishment. In the Polbud Case (25 October 2017), the ECJ confirmed the right of companies to carry out cross-border conversions based on the freedom of establishment when the registered office alone, without the real head office, is transferred from one Member State to another.

We appreciate the effort to set forth a common legal framework aiming at enabling conversions and ensuring protection of the involved stakeholders. However, we believe that the procedure is too cumbersome for companies and may even go against the objective to facilitate corporate mobility. In particular, the Commission seems to distrust conversions, which would be pursued *per se* in order to obtain undue tax advantages, prejudice employees' rights or create letterbox companies. As the consequence of this negative bias, the operation is constrained by burdensome and disproportionate procedures which may put in question the benefit of having such a legal instrument. Also, there are differences among the procedures for cross-border conversions, divisions and mergers, which are not clear. For instance, the in-depth assessment - carried out by the competent authority – which is requested only for conversions and divisions.

The proposal regarding the use of digital tools and processes in company law introduces an on-line business registration and enables companies to set up new branches or file documents to the business registers online. The "once-only principle" aims at ensuring that companies are not required to submit the same information several times to different authorities in a company life-cycle. The proposal introduces requirements around registration and filling of information, provides for the use of templates, authentication of documents and means of identification.

Access to digital tools is fundamental in the ever faster and highly competitive business environment. Enabling use of digital technologies in the creation of a new company or in up-dating business relevant information in public registries is an added value for companies. However, the issue of the legal value of the digital copy of a company's document should be addressed in the proposal.

POSITION

1. Cross-border conversions

a. Definition

According to the Commission proposal, cross-border conversion means an operation whereby a company, without being dissolved, wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of a company of a destination Member State and transfers at least its registered office into the destination Member State whilst retaining its legal personality.

From a general standpoint, we are concerned at the multiplication of restrictions to the free right of establishment, which are excessive in relation to the purpose of preventing tax fraud and do not appear to be in keeping with settled case-law according to which such restrictions must not only be justified but also proportionate.

[1]The draft Report published on August 21st by the JURI Committee of the European Parliament reinforces this belief by giving an interpretation of the notion of genuine economic activity that would hinder any cross-border conversion. (see draft Amendment 50 and 58).

b. Procedure

The proposal sets forth a specific procedure for cross-border conversions with the goal to provide for a common legal framework while ensuring the protection of the interests of the stakeholders and a scrutiny on the legality of the operation by the competent authorities of the Member States involved.

We appreciate the effort to define a procedure for cross-border conversions which takes into consideration the main outcomes of the ECJ decisions on the right of establishment. However, we express the following concerns:

- *Reports of the management or the administrative organ to the members and to the employees*

The proposal requires the management or the administrative organ to prepare two targeted reports addressed to shareholders and employees on the implications of cross-border conversions.

We believe that a separate report for the employees is not needed as the requirement creates the risk of a duplication of information which could easily be provided for in one document. The report prepared by the management should address, inter alia, the effects of the conversion for the employees and should be sent also to the employee's representatives. However, when all the members of the company have agreed to waive the requirement to draw up a report, information shall be provided to employees.

In this respect, a good example is given by the takeover directive (Directive 2004/25/EU). According to Article 9, the board of the offeree company shall draw up and make public a document setting out its opinion on the bid and the reasons on which it is based. This should include its views on the effects of implementation of the bid on all company's interests, specifically on the employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on the employment and the locations of the company's places of business as set out in the offer document. The board of the offeree company shall at the same time

communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Similarly, Article 6 of the directive provides that once the offer document is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

Finally, we suggest adopting a simplified regime for intra-group restructurings (relocations, mergers) - which are likely to be an important part of future cross-border operations – in order not to provide for unnecessary and burdensome requirements.

- <u>Examination by an independent expert</u>

The proposal requires that an independent expert shall draw up a written report assessing the accuracy of the reports and information submitted by the company and a description of all factual elements necessary for the competent authority to carry out an in-depth assessment to determine whether the envisaged conversion is a mere artificial arrangement.

The provision of an examination by an independent expert. with the level of detail requested - in any cross-border conversion is too cumbersome. Also, it is not clear whether the intention of the Commission is to require an expert to formally check that the information requested was provided, or whether to require the expert to assess the accuracy and reliability of the information given. In addition, having an independent expert appointed by competent authorities appears to be most unusual, especially since in all other cases where EU legislation requires a report by an independent third party, the latter is appointed by the company's management or administrative body.

We therefore suggest deleting the requirement, as proposed also by the JURI Committee in its draft report published early September.

- *<u>Protection of members and creditors</u>*

Members who did not vote for the cross-border conversion and those holding shares without voting rights have the right to dispose of their shareholdings in consideration of adequate cash compensation under the conditions set forth in the proposal, which defines how to determine the compensation, who should buy their shares and the procedure and the timing to dispose of these shares.

EI agrees that the proposal should provide for a minimum common framework for carrying out the cross-border conversion, including protection of members. However, the proposal should also strike a right balance between the interests of shareholders who want to leave and the majority of shareholders who wish the cross-border operation to be achieved. But, as it stands especially when read in conjunction with the other provisions of the proposal, the proposed regime would appear disproportionate in relation to the stated aim of combating tax fraud.

There is no agreement among EuropeanIssuers members concerning whether the exit right should be provided for in the directive or be left at the option of Member States. However, should it not be optional for Member States, the current proposal should be amended to clarify that:

- members who voted against the draft term of conversion are entitled to ask for cash compensation; the wording "did not vote" leaves room for interpretation as it questions whether it includes shareholders who abstained and those who did not even attend the general meeting;

- Member States may provide that shareholders are asked to express their intention to use exit right before AGM, without prejudice to their decision becoming effective and binding only after the AGM;
- define how the adequate cash compensation should be calculated; criteria for the determination of fair compensation should be provided for in the proposal;
- reduce the period for recalculation from 1 month to 15 days and get a quote from the expert to recalculate cash compensation;

According to paragraph 5, members who accepted the offer for cash compensation are entitled to demand its recalculation before a national court within one month of the acceptance if they consider it is not appropriately set and the provision risks to add a degree of uncertainty to the procedure, also considering the lack of any criteria as to how to determine a fair cash compensation;

As to the protection of creditors, the proposal raises several concerns.

It should be clear that creditors who should benefit from the possibility to ask for safeguards are creditors whose rights originate before the conversion.

EI welcomes the creation of a presumption of non-prejudicial operation (86k §3), which makes the cross-border merger/ transformation lighter for companies. However, EI raises concerns about the condition to benefit from that presumption. The draft Directive requires that creditors are granted a right to payment at least equivalent to their original claim value. Indeed, the value of a claim may change as time goes by: it can diminish if partial payments are made, or it can increase or decrease with interest rate for example. So, EI proposes that, in order to benefit from that presumption, companies only have to offer a right to payment at least equivalent to the actual value of the claim at the at the date when the draft of the operation is made public).

The cross-border conversion may raise specific concerns as to the competent jurisdiction with respect to obligations arising before the conversion. Jurisdiction on disputes involving a company is normally defined by reference to the seat of the company itself and the cross-border conversion is realized via the cross-border transfer of the seat. A similar issue is addressed by art. 8 of the SE Regulation (2157/2001), pursuant to which an SE that has transferred the registered office to another Member State is considered, with respect to any dispute prior to the transfer, as having its registered office in the Member State in which the SE was registered before the transfer, even if the latter is sued after the transfer. The provision sets the registration in the register of the Member State of destination as the relevant moment for the change of the jurisdiction. It is to be assessed whether a similar provision should be added. Also, it is to be made clear whether any such provision applies only to commercial obligations involving the company or also company law obligation such as debt issuance.

In general, there is the need for a coordination with national measures protecting members and creditors in case of domestic conversions.

Employee participation (art.86l)

As it is the case under the existing cross-border merger regime, in principle, the company will have to follow the rules of the MS of destination, unless the national law of that MS does not provide for the same level of the employees' participation in the company's management or supervisory bodies.

This article adds a further exception to the above referred to principle where the number of employees exceeds four fifths of the threshold set out in the departure MS and triggering the employee participation right. In such a case the company will have to enter into negotiations with the employees to determine their participation. This negotiation will have to result either in a bespoke arrangement or, in case of failure, the standard rules of participation as laid down in Directive 2001/86 will apply.

There is no clear justification for the difference with the existing cross-border merger regime, which restricts the scope of the exceptions to the principle under which the company will have to follow the rules of the MS of destination, to companies having an average number of employees exceeding 500, whereas the draft directive does not provide for such a limitation.

We wonder whether the risk of a circumvention of a particularly generous participation regime could be better handled by a less burdensome requirement, for instance, by abiding to the national specific measures intended to prevent or penalise fraud (see Centros case). This would prove more workable than requiring the commencement of negotiations as soon as the fourth fifths of the national threshold for triggering the application of the participation regime is exceeded.

We regret that the Commission has not taken this opportunity to simplify the mechanism instead of adding new layers of rules rather unclear which highlight the Commission bias against conversions. We especially deem the risk of circumvention of employee participation rules by way of conversion very low in cases, where companies are about to breach the legal threshold triggering employee participation, such as contemplated in Article 86l (an average number of employee equivalent to four fifths of the applicable threshold). To initiate the above described burdensome conversion process only for the reason to “escape” the entry level of employee participation seems far-fetched and unrealistic. In companies of that size, other, economically more important factors determine the entrepreneurial decision to convert cross-border.

- *In-depth assessment by a competent authority*

One of the most delicate issue is that of the evaluation of the effectiveness of the transformation, to avoid the risk that it is a merely artificial construction.

In the Polbud case decision, the Court made it clear that the freedom of establishment guaranteed by the Treaty includes the right for a company constituted in accordance with the law of a Member State to become a company governed by the law of another Member State. This is provided that they are satisfied with the conditions established by the legislation of that latter State, favoring a broad concept of establishment that does not involve the actual transfer of economic activities

The proposal sets two phases of verification:

- A verification of the legality of the cross-border conversion as regards the part of the procedure which is governed by the law of the departure Member State. The authority appoints an independent expert which besides evaluating the veracity of the reports and information communicated by the company, must also describe all the facts that allow the authority to carry out an in-depth analysis of the operation;
- In case the competent authority has serious concerns that the cross border conversion constitutes an artificial arrangement within the meaning of Article 86c(3), it may decide to carry an in-depth assessment.

We want to raise concerns as to the wording in Article 86c (3): According to this Article, conversions shall not be authorised if they constitute an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members.

The directive sets a presumption of fraud which, in our view, contradicts the freedom of establishment. In addition, the term "undue" lacks legal clarity as well as certainty and is therefore not appropriate for the determination of whether an artificial arrangement is at stake. Indeed, the English legal term" undue" does not necessarily mean "illegal" and hence leaves a wide margin of interpretation and as a consequence uncertainty for companies undergoing the process of a cross-border conversion (we therefore ask for legal clarification and want to hint to the German translation of the EU Commission proposal, which translates "undue" as "*unrechtmäßig*", which means "illegal"). We also have doubts as to whether any national competent authority undertaking the in-depth assessment under Article 86n (other than national tax authorities) will be competent to determine whether "undue" tax advantages are pursued by the conversion.

Instead, we would rather advocate for the directive setting a presumption of non-artificial arrangement in particular when the company carries out a cross-border conversion in a destination Member State where it intends to develop its activities. In accordance with settled case-law, the possibility to restrict the right of establishment should be limited only to cases where transfer constitutes a *"wholly artificial arrangement which does not reflect economic reality".* In a recently handed down decision, (see for example VALE, C-378/10, paragraph 34) the Court of Justice gives a broad interpretation of the concept of economic reality: it suffices that the converted company establishes itself in another MS with a view to developing its activity.

As for the role of the independent expert, we already expressed our concerns (see above).

As for the choice by the Member State, which is the national authority competent to carry out this assessment, it is to be noted that, with reference to the characteristics of the establishment in the destination Member State, different standards could be set by different Member States regarding interpretation and evaluation of the characteristics of the establishment for the purpose of legitimacy of the transformation. In this respect, it would be probably useful to provide for common guidelines, based on the ECJ case law to avoid uncertainty.

- *Consequences of the cross-border conversion (article 86 s §3)*

The proposal provides that company being divided is liable for any losses arising from any differences in national legal systems of the Member States involved, where no contracting party has been informed about the cross-border conversion prior to concluding that contract.

This provision in not clear and it is not easy to assess its impact. It could be useful to provide that the law applicable to contracts entered into by the company is the one applicable one before the conversion of the company itself, the relevant moment being the registration of the destination Member State. It should be made clear whether any such provision applies only to the commercial obligations involving the company or also to company law obligation such as debt issuance.

The rules concerning cross-border mergers and divisions call for similar comments to the extent they take into account the issues raised above.

2. Cross-border divisions

We appreciate the provision for a legal framework to perform cross-border divisions which is in line with the procedure set for cross-border mergers and conversions. In this respect, we do not share the view expressed by the JURI Committee Draft Report suggesting deleting the chapter on cross-border divisions.

As to the current proposal, we suggest the following improvements:

- the definition of cross-border division should be included also the case of transfer of assets to the existing companies, not only to the newly formed ones;
- a simplified procedure for intra-group operations should be provided for, as it is the case for cross-border mergers. With the EC's proposal to extend the simplified formalities to situations in which a cross-border merger is carried out by companies in which one person holds all shares, the EC recognized and addressed the need for less complex cross-border mergers within a group of companies. The same need exists with respect to intra-group cross-border divisions. As outlined above we would propose to harmonize the procedures also in this respect.

Finally, we have the same preliminary remarks regarding cross-border divisions as for cross-border conversions and the procedure related to them.

3. Cross-border mergers

Despite the positive assessment on the application of the cross-border mergers directive (Directive 2005/56), obstacles remain to the full effectiveness and efficiency of those rules. We therefore support the proposal which facilitates cross-border mergers and in that respect addresses the main shortcomings of Directive 2005/56.

However, we would like to put forward some additional amendments:

- we would like to underline that, according to companies, further harmonization is needed as to the procedural aspect and terms of a cross-border merger, where there still are significant differences at national level which may hamper carrying out of the operation. In this respect, several companies called for the need of a final act of merger – different from the draft act - where the latest details of the merger would be defined. Also, no peremptory terms for the conclusion of the merger should be provided for, as they could negatively impact mergers carried out by companies – such as banks - which need an authorization by the competent supervisory authority.
- overall, we appreciate the provision for online disclosure of draft terms of mergers. In this case, however, it is important to ensure the integrity and immutability of the document as well as its security and authenticity. This comment also applies to cross-border division and cross-border conversion.
- as to the regime for protection of creditors, it should be clarified how the possibility to apply to the appropriate administrative or judicial authority for adequate safeguards, relates to the safeguards already provided for domestic mergers at national level. A coordination is probably needed.
- as to the consequences, it should be clear that the cross-border merger is immediately effective towards third parties and that no more formalities are required (such as notification requirements).

Finally, the same preliminary remarks stated for cross-border conversions and its procedure in the paragraph above should apply to cross-border mergers.

4. Use of digital tools and processes in company law

We support the proposal of a directive on the use of digital tools and processes in company law which introduces an on-line business registration and enables companies to set up new branches or file documents to the business registers online.

We are in favour of the "once-only principle" which should ensure that companies are not required to submit the same information several times to different authorities in a company life-cycle.

Also, we support the proposal for the requirements on registration and filling of information, which provides for the use of templates, authentication of documents and means of identification.

However, Member states option to provide for the circumstances in which online registration may be excluded where the share capital of a company is to be paid by way of contributions in kind, is questionable. This option should be repealed as no particular problem has been detected in MS where this option is already in place. Besides, protective measures dealing with the evaluation of contribution in kind are taken before the company's registration at the time of the constitutive meeting.

The proposal sets forth a legal framework for Member States to request information from other Member States on disqualified directors. In addition, the proposal allows Member States to refuse the appointment of a person as a director of a company where this person is currently disqualified from acting as a director in another Member State.

However, since the notion of director disqualification is not harmonised at EU level, it is important to ensure that a disqualification in one Member State does not automatically lead to disqualification in all other Member State(s), regardless of the rules locally in place for director disqualification. We therefore object the Member State competence conferred by the EU Commission proposal to allow Member States to refuse the appointment of a person as a director of a company or branch who is currently disqualified from acting as a director in another Member State. Safeguards need to be provided that allow for a case by case assessment taking into consideration local rules on disqualification. Otherwise, the provision lacks proportionality.

Article 16 paragraph 3 on disclosure in the register implies that besides ensuring that companies' information is made available in the register, MS can still maintain its publication in the national gazette, which, if it takes place in paper form, might prove costly and would anyway run counter the stated aim of already enacted EU legislation of prioritizing electronic communication.

The issue of the legal value of the digital copy of a company's document is not addressed in the proposal. We hear from companies that different national regimes may hinder recognition of the legal value of the digital copy in a Member State different from the one where the document was issued. Therefore, the legal validity of the documents issued by the national registries throughout the Community area should be recognized. At the same time, maximum harmonization of the formalities related to the electronic copies of the company documents ensures authenticity and integrity (with reference to the standards safety).

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