BUSINESSEUROPE

POSITION PAPER

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Consultation on EU Company Law Upgraded

Background

The Commission work programme for 2017 announced an initiative on company law to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions.

The Commission is now consulting stakeholders to seek their views on the scope and content of such an initiative.

Given the importance of this issue for European businesses and for the internal market in general, BusinessEurope takes this opportunity to express its views on the way forward on mobility and digitalisation of company law as well as on conflict of laws.

Main messages

I. On digitalisation of company law and corporate governance

- BusinessEurope **supports** creating favorable conditions in Europe for further digitalisation in company law and corporate governance **for all types of companies**.
- Actions need to be **diverse in nature and scope.** There needs to be a **balance between legislative and non-legislative** action taking into account national tradition and legal features.
- **Rules** should primarily focus on the widespread of **tools for companies to interact with Member States** (e.g. registration, filling, publication, recognition and acceptability of electronic copies).
- **Safeguards to ensure trustworthiness** of these operations will need to be established.
- Because digitalisation is both a complex and a costly process, companies (in particular small and medium size ones) should be given the room and time to adapt which is why a **voluntary and step by step approach is preferable, especially**

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in the area of corporate governance. Companies must have the choice between using or not using digital tools.

- Digitalisation means a growing use of platforms, databases and cloud services. **Stepping up on cybersecurity and privacy of data** (e.g. coordination and education) will be necessary for the good functioning of the system and to inspire confidence amongst users of digital tools (both public and private).

II. On mobility of companies: mergers, divisions and conversions

The **Cross-border Merger Directive (CBMD)** alongside the **jurisprudence of the European Court of the European Union** (e.g. cases C-210/06 and C-378/10) were important steps to clarify the conditions and parameters in which companies can exercise their right of establishment within the Internal Market. However, further needs to be done to ensure companies can fully benefit from this fundamental freedom in Article 54 of the Treaty of the Functioning of the EU:

- Some **improvements will be necessary in the Cross-Border Mergers Directive**, namely, safeguards for creditors, the need to further extend simplified cross-border merger procedures and on minority shareholder protection periods.
- **Europe needs a specific framework on cross-border divisions**. The lack of rules at European level on these operations can be considered a barrier for businesses wishing to undergo this type of operations.
- Europe also **clearly lacks a specific EU procedure for cross-border conversions.** In practice, it may occur that upon a conversion, a company forcefully loses its legal personality or gets dissolved in the process which disproportionally affects the interests of the owners (shareholders), creditors and employees. A clear and safe legal framework consolidating the European Court jurisprudence would be an enabler to exercise the fundamental EU right of establishment.

III. On conflict of law-rules for companies

- Although we acknowledge that the European legal landscape and jurisprudence would deserve more attention when it comes to conflict of rules framework **we do not think an EU legislative initiative is a priority**.
- We would be skeptical that a satisfactory solution could be found at European level on different dimensions of this issue, in particular, on the question of real seat *versus* incorporation seat.

Further detail on these messages can be found in the annex which addresses the relevant questions in the European Commission Public Consultation on EU company Law Upgraded.

ANNEX: Reply to the Commission online questionnaire

Reasons to act

1.1 - To what extent do the differences between Member States' laws or the overall lack of legal framework, in the areas mentioned below, constitute obstacles for the proper functioning of the single market?

a. Digital processes or tools for companies to interact with Member States (registration, filing, publication) – **to a very large extent**

b. Digital processes or tools for companies to interact with shareholders - **to a large extent**

c. Cross-border mergers - **to a very large extent**

d. Cross-border divisions– **to a very large extent**

e. Cross-border conversions– **to a very large extent**

f. Conflict-of-laws for companies – **not at all**

g. Other areas

Explanation: *Regarding points a and b, although we consider that further progress is essential in these areas, the decision on whether to use digital tools in their interaction with shareholders and authorities (Member states), should ultimately be left to companies.*

1.2 - Which of the issues mentioned below could be addressed as a priority by the EU?

a. Rules for the use of digital processes or tools by companies to interact with Member States (registration, filing, publication) – **top priority**

b. Rules for the use of digital processes or tools by companies to interact with shareholders - **priority**

c. Rules for cross-border mergers - **top priority**

d. Rules for cross-border divisions – **top priority**

e. Rules for cross-border conversions – **top priority**

f. Rules on conflict of laws applicable to companies – **this issue should not be addressed**

g. Other rules related to companies

Explanation: *Regarding point b, although we consider that it is a priority, a non-legislative measure would be preferable.*

- **Use of digital processes or tools for interaction between companies and Member States**

2.1 - What are the main issues that could be addressed for the use of digital processes or tools by companies in their interaction with national business registers?

a. Make it possible to register, file and publish information on companies and branches fully online in a short time

b. Provide for appropriate safeguards to make the online registration, filing and publication trustworthy

d. Ensure the recognition of documents/information issued by business registers, including the acceptability of electronic copies which should be accepted as 'true copies'

e. Ensure that companies do not have to provide the same information more than once nationally and, where possible, cross-border

Explanation: *Any future initiative should aim at preserving legal certainty and the integrity of national business registers.*

The future initiative will also have to take into account the substantial differences between Member States regarding the issue of disqualification of directors given that this will be object of exchanges between national company registers. Any potential prejudice should be avoided against entrepreneurs who for reasons other than fraud, criminal actions or gross negligence have been deemed disqualified by their Member State of origin. Also, the length of disqualification periods should remain proportionate in order not to hinder entrepreneurial ventures domestically or across borders. This is in line with the objectives that the EU tries to achieve in its recent proposal on restructuring and second chance for entrepreneurs.

2.1.1 - What kind of safeguards would be needed?

a. Harmonised safeguards to verify the identity (including recognition of electronic IDs, application of the eIDAS Regulation and possible video-conferences)

b. Possibility for an exceptional face-to-face verification of identity in case there is a genuine suspicion of fraud

c. Harmonised safeguards for the electronic verification of the legality of information or documents

Explanation: *Several of these safeguards have already been agreed among Member States in the Council General Approach on the Single Member Company from May 2015 (currently blocked in the European Parliament). Also, new EU rules on anti-money laundering (4th AMLD revision) now in force also ensure transparency regarding ultimate beneficial owner of companies.*

- **Use of digital processes or tools for interaction between companies and shareholders**

2.2 - In which areas could companies (listed and non-listed) be encouraged to use digital tools when interacting with their shareholders?

a. Communication between companies and shareholders on general meetings

b. Participation and voting in general meetings

d. Adoption of shareholder resolutions without a physical meeting

e. Other areas

Explanation: *As explained in 1.1. and 1.2. BusinessEurope would be more favourable to a non-legislative initiative in this area (e.g. recommendation) which could set main principles for encouraging more use of digital tools not only regarding shareholders' interaction with the company but also at the level of the board. Here are some ideas:*

- Promotion at EU level of the voluntary use of digital tools for notification, documentation and voting in general shareholders meetings. It should not be forgotten that, especially in smaller companies, a physical meeting could still be considered as crucial by shareholders and companies themselves given it is an opportunity to have a more open face-to-face strategic discussion.

- In a context of crescent internationalisation (and diversity) of boards, the requirement of physical presence in board meetings can be cumbersome and non-compatible with the need to meet and decide swiftly. Use of digital tools could be promoted (e.g. use of video conference; possibility to electronically convening board meetings; access to common platforms with preparatory board meeting documents).

- In order to maximise trust in digitalisation (without which it becomes unworkable), cybersecurity and protection of privacy should not be forgotten.

- **Cross-border mergers**

3.1 - What are the main issues that could be addressed with respect to cross-border mergers?

a. Provide cross-border safeguards for creditors

c. Provide for cross-border safeguards for minority shareholders

d. Further facilitate a cross-border merger procedure (e.g. provide possibility to waive the management report)

e. Other measures

Explanation: *Regarding point e it is widely acknowledged that employee participation is listed amongst the elements which can hinder the full effectiveness of the directive. Reproducing the complex rules of Directive 2001/86/EC on involvement of employees in the creation of a European Company (SE) should not be the aim. Instead, a simplified framework enabling a faster procedure would be welcomed although we acknowledge the political sensitivity of this issue.*

3.1.1 - What kind of safeguards could be provided?

a. Safeguards for the procedural aspects of protection (deadlines)

b. Safeguards for the material aspects of protection (creditors' rights)

- **Cross-border divisions**

3.2 - What are the main issues that could be addressed for cross-border divisions?

a. Set out a cross-border division procedure (leaving the question of safeguards for stakeholders to Member States)

b. Set out a procedure with minimum safeguards for stakeholders (Member States could enact or maintain more protective rules)

Explanation*: *Europe needs a specific framework on cross border divisions*. The lack of rules at European level on these operations can be considered a barrier for businesses wishing to undergo this type of operations. The current provisions in the Cross-Border Mergers Directive could serve as an inspiration to define the framework for cross-border divisions.* Option a) above would be the priority. However, we would also welcome, if feasible, definition of minimum safeguards for stakeholders.

3.2.1 - For which stakeholders or interest groups could safeguards be provided?

a. Creditors

c. Minority shareholders

- **Cross-border conversions**

3.3 - What are the main issues that could be addressed for cross-border conversions?

a. Set out only a cross-border conversion procedure (leaving the question of safeguards for different stakeholders and the question of seat of companies to Member States)

g. Other measures

Explanation: *Europe also lacks a specific EU procedure for cross border conversions. It should be the aim at least to set out minimum procedural rules on procedure whilst also defining some of the main safeguards. As for other measures (point g) here are some ideas on the substance of the possible initiative that would make the framework workable from a company perspective:*

- The transfer should be tax neutral following the approach of Directive 90/434 applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States

- The possible initiative's provisions should not mirror worker participation arrangements of the SE directive (2001/86/EC), mostly taken up in the Cross-Border Mergers Directive.

- A conversion should not be possible if proceedings for winding up, liquidation, insolvency, suspension of payments or similar proceedings have been brought against the company

- A conversion should be accepted by all Member States even when not accompanied by the transfer of the company's headquarters or principal place of business.

- There should be no winding-up of the company in the home Member State.

- The company should not lose its legal personality.

Conflict-of-law rules for companies

4.1 to 4.7 - Conflict-of-law rules for companies

f. No need for EU measures in this area

Although we acknowledge that the European legal landscape and jurisprudence would deserve more attention when it comes to conflict of rules framework we do not think an EU legislative initiative is a priority.

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