



**European Economic and Social Committee**

**INT/841  
European Company Law**

## **WORKING DOCUMENT**

Section for the Single Market, Production and Consumption

**a) Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law,**

[a] COM(2018) 239 final – 2018/0113 (COD)]

**b) Proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions**

[b] COM(2018) 241 final – 2018/0114 (COD)]

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For the attention of the study group members

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Consultation	a) European Parliament, DD/MM/2018 a) Council, DD/MM/2018 b) European Parliament, DD/MM/2018 b) Council, DD/MM/2018
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Section responsible	Section for the Single Market, Production and Consumption
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## 1. **Conclusions and recommendations**

(to be added after the first SG meeting)

## 2. **The Commission proposals**

- 2.1 The Commission has put forward a comprehensive set of measures<sup>1,2</sup> for fair, enabling and modern company law rules in the EU.
- 2.2 The e-Government Action Plan<sup>3</sup> specifically recognised the importance of improving the use of digital tools when complying with company law related requirements. The proposal for a Regulation on the **Single Digital Gateway**<sup>4</sup> emphasises the importance of digital tools and processes to help businesses to take full advantage of the Single Market and requires the full digitalisation of the most important administrative procedures for cross-border users.
- 2.3 Currently EU company law<sup>5</sup> includes certain elements of digitalisation such as the obligation for Member States to **make available online information about limited liability companies**. However, these requirements are limited and lack precision, leading to a very diverse implementation at national level.
- 2.4 The proposal<sup>6</sup> aims to **provide more digital solutions for companies in the Single Market and more equal opportunities for companies** in the EU while ensuring that Member States have the necessary flexibility to adjust their national systems and to maintain their legal traditions. They should enable and promote the use of digital tools and processes in company law.
- 2.5 The overall objective of this proposal is to ensure the smooth functioning of the Single Market for the whole duration of a **company's life-cycle** when in contact with authorities concerning company and branch registration and filing of information, covering the entire EU territory.
- 2.6 The **freedom of establishment** plays a crucial role in the development of the Single Market as it allows corporate entities to pursue economic activities in other Member States on a stable basis. In practice the exercise of this freedom by companies remains difficult, in particular for SMEs as recognised by the 2015 Single Market Strategy<sup>7</sup>. However, the legal uncertainty, partial inadequacy and also the lack of rules governing certain cross-border operations of companies means that **there is no clear framework** to ensure effective protection of these stakeholders.

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1 COM(2018) 239 final.

2 COM(2018) 241 final.

3 COM(2016) 179 final.

4 COM(2017) 256 final.

5 OJ L 169, 30.6.2017, p. 46.

6 COM(2018) 239 final.

7 COM(2015) 550 final.

- 2.7 A cross-border conversion offers an efficient solution for companies to **move to another Member State without losing their legal personality or having to re-negotiate** their business contracts. The Court of Justice of the European Union (ECJ) has considered that the freedom of establishment enshrined in Article 49 TFEU entails the right, for companies established in a Member State, to transfer their seat to another Member State through a cross-border conversion without losing their legal personality<sup>8</sup>. In its recent *Polbud*<sup>9</sup> judgement the ECJ confirmed the right of companies to carry out cross-border conversions on the basis of the freedom of establishment.
- 2.8 In line with the ECJ rulings<sup>10</sup>, the main objectives of the harmonised rules for cross-border conversions<sup>11</sup> are two-fold:
- enabling companies, particularly micro and small, to convert cross-border in an orderly, efficient and effective manner;
  - protecting the most affected stakeholders such as employees, creditors and shareholders in a suitable and proportionate manner.
- 2.9 This proposal also provides harmonised rules for protection of creditors and shareholders. The company would need to provide the envisaged protection of creditors and shareholders in the draft terms of the cross-border conversion. The rules also complement recent initiatives to strengthen the rules on posted workers and the fight against tax evasion and fraud as well as the Commission's proposal on a European Labour Authority.

### 3. General comments

- 3.1 Directive (EU) 2017/1132<sup>12</sup> of the European Parliament and of the Council codifies existing Directives on EU company law. The Directive entered into force on 20 July 2017 and before a year had passed, the European Commission submitted new proposals for the modernisation of EU company law.
- 3.2 The EESC welcomes these initiatives of the European Commission as well as the common agreement between the European institutions and the Member States that digitalisation must proceed in order to fulfil the 2015 Digital Single Market Strategy<sup>13</sup> and the 2016 e-Government Action Plan<sup>14</sup>.
- 3.3 The European Commission's proposals to amend Directive (EU) 2017/1132 take the necessary steps to put EU companies on a par with the companies of other industrialised states with a

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<sup>8</sup> Cartesio, C-210/06, EU:C:2008:723, paragraphs 109 to 112; VALE, C-378/10, EU:C:2012:440, paragraph 32.

<sup>9</sup> Polbud – Wykonawstwo, Case C-106/16, ECLI:EU:C:2017:804.

<sup>10</sup> Please see footnotes 8 and 9.

<sup>11</sup> COM(2018) 241 final.

<sup>12</sup> OJ L 169, 30.6.2017, p. 46.

<sup>13</sup> COM(2015) 192 final.

<sup>14</sup> COM(2016) 179 final.

strong digital tradition, like the US, Canada, and Australia. Companies need to operate in a certain legal and administrative environment which is adapted to face the new economic and social challenges of a globalised and digital world, while also pursuing other legitimate public interests such as the protection of employees, creditors and minority shareholders and providing authorities with all necessary safeguards to combat fraud or abuse.

3.4 However, certain amendments must be made in order to alleviate the administrative burden and cost for the implementation of the proposed initiatives for micro- or small and medium enterprises.

3.5 *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law – COM (2018) 239 final*

3.5.1 As stated above, Directive 2017/1132 of 14 June 2017 relating to certain aspects of company law (codification) allowed only certain elements of digitalisation such as the obligation for Member States to make available online information about limited liability companies registered in central, commercial and companies registers.

3.5.2 The EESC welcomes the overall objective of this legislative proposal<sup>15</sup> to ensure the smooth functioning of the EU Single Market for the whole duration of a company's life-cycle when in contact with authorities concerning company and branch registration and filing of information. Facilitating the digital interactions between companies and Member States' authorities was considered as a priority by most Member State authorities.

3.5.3 The EESC welcomes the recognition and proposed elimination by the European Commission of the existence of obstacles creating unnecessary administrative burden and cost to entrepreneurs who wish to set up a new business or to expand their business by registering subsidiaries or branches. These obstacles are:

- a) Online company or branch registration is not covered at all by EU law and is allowed, prohibited or imposed by national law causing a diversified picture, which is complex for SMEs<sup>16</sup>.
- b) Multiple publication of company data and filing of branch accounts in national gazettes in many Member States, where branches exist.
- c) Diversified conditions under which third parties (investors, citizens, other companies) **access company information in the national registers** (which information is supplied free of charge and which under payment).

3.5.4 The EESC considers that **furthering digitalisation** is very important since

- a) online registration processes are generally cheaper, quicker and more efficient than those where the applications are made in person and on paper.
- b) The initiative is fully coherent with and will build on existing digital elements of EU company law, in particular on the Business Registers Interconnection System (BRIS), which

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<sup>15</sup> COM(2018) 239 final.

<sup>16</sup> COM(2018) 241, p. 3.

is based on legal obligations set out by Directive 2012/17/EU<sup>17</sup> and the Commission Implementing Regulation (EU) 2015/884<sup>18</sup>.

- c) The current proposal will complement the Commission proposal for a Regulation on the establishment of a Single Digital Gateway, which covers the online general registration of business activity except for the constitution of limited liability companies. This proposal constitutes a "lex specialis" in relation to the Single Digital Gateway<sup>19</sup>.

3.5.5 The EESC understands that this is a first step towards digitalisation: The scope of the proposed amendment of the 2017 directive is limited to the company forms specified in the Annexes of the proposal (Art. 13). The proposal does not allow rules for online procedures to cover the constitution of companies within the meaning of Article 54 TFEU. However, in its Single Digital Gateway proposal<sup>20</sup>, the Commission committed itself to proposing specific rules for this area without delay.

3.5.6 **Concerns about fraud or abuse**, especially with letterbox companies, should not hinder support of the proposal for various reasons. Firstly, these concerns are left to the Member States to address by regulating the conditions under which companies are set up. Secondly, the proposal does not affect the national legal or administrative provisions, including the obligations for registration of companies, of tax measures of Member States. Thirdly, the Council has adopted a number of measures to counteract corporate tax avoidance since 2015 – Council Directive 2015/2376<sup>21</sup>, Council Directive 2016/881<sup>22</sup> and Council Directive (EU) 2016/1164<sup>23</sup> – while the Commission proposal for a Directive on mandatory disclosure by intermediaries for tax planning schemes<sup>24</sup> is expected to be adopted soon. Fourthly, the proposal ensures the mandatory recognition of e-IDAS compliant electronic identification means of Union citizens issued in another Member State and at the same time allows Member States to recognise other identification means (Art. 13(b)). Fifthly, as an ultimate safeguard to avoid fraud, the provision allows Member States to require the physical presence of relevant persons before a competent authority but **only in the case of genuine suspicion** based on reasonable grounds.

3.5.7 The EESC therefore supports the European Commission's approach to facilitating digitalisation in company law which will work on the basis of mutual trust between Member States.

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17 OJ L 156, 16.6.2012, p.1.

18 OJ L 144, 10.6.2015, p. 1.

19 COM(2017) 256 final.

20 COM(2017) 256 final.

21 OJ L 332, 18.12.2015, p. 1.

22 OJ L 146, 3.6.2016, p. 8.

23 OJ L 193, 19.7.2016, p. 1.

24 COM(2017) 335 final.

3.6 *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions – COM(2018) 241 final*

3.6.1 The proposal aims to establish clear rules and adjust company law to cross-border mobility of companies in the EU. The proposal strikes a careful balance between, on the one hand, specific rules and procedures on cross-border company operations that aim to exploit the potential of the Internal Market and, on the other hand, the protection against abuse of all stakeholders affected by company affairs, namely employees, creditors and minority shareholders.

3.6.2 The EESC supports in principle the EU cross-border conversions<sup>25</sup> and the incorporation by the proposal of the judgment by the Court of Justice of the EU issued in 2017 on the *Polbud* case<sup>26</sup>, in the context of the freedom of establishment. In *Polbud*, the Court ruled that a national rule which imposes mandatory liquidation as a prerequisite of cross-border transfer of a company is an unjustified and disproportionate restriction and thus incompatible with the freedom of establishment. The general obligation to implement a liquidation procedure imposed by the State amounts to establishing a general presumption of the existence of abuse; such legislation is therefore disproportionate. The transfer of the registered office of such a company, when there is no change in the location of its real head office, falls within the scope of the freedom of establishment protected by EU law. Therefore the ECJ confirmed the right of companies to transfer only their registered office, without the real head office, from one Member State to another, even though that company conducts its main, if not entire, business in the first Member State. The purpose of *Polbud* to enjoy the benefit of a more favourable legislation does not, in itself, constitute abuse of the freedom of establishment.

3.6.3 The EESC supports in principle the establishment of a procedure for making such conversions possible and the adoption of substantive conditions in order to stop the legal uncertainty of diversified national rules which negatively affects companies, stakeholders and Member States. National laws, where they exist, are often incompatible or difficult to combine with one other. Moreover, more than half of the Member States do not allow cross-border conversions. SMEs are in particular negatively impacted since they often lack resources to perform cross-border procedures through costly and complicated alternative methods.

3.6.4 The procedure begins with the competent authority of the *departure* Member State, which issues a *pre-conversion certificate* in one month; or, in the event of concerns, the authority

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<sup>25</sup> An operation whereby a company formed and registered in accordance with the law of a Member State converts into another company formed and registered in accordance with the law of another Member State retaining its legal personality and without being wound up or going into liquidation.

<sup>26</sup> Case C-106/16. ECLI:EU:C:2017:804. *Polbud* was a company established in Poland which decided to transfer its registered office to Luxembourg, without a change in the location of the real head office of the company. The opening of a liquidation procedure was recorded in the Polish commercial register and a liquidator was appointed. In 2013 the registered office of *Polbud* was transferred to Luxembourg. *Polbud* then became "Consoil Geotechnik Sàrl", a company under Luxembourg law. Further, *Polbud* lodged an application at the Polish registry court for its removal from the Polish commercial register. The registry court refused the application for removal. *Polbud* brought an action against that decision. The Supreme Court of Poland, before which an appeal has been brought, first asks the Court of Justice whether freedom of establishment is applicable to the transfer of only the registered office of a company incorporated under the law of one Member State to the territory of another Member State, where that company is converted to a company under the law of that other Member State, when there is no change of location of the real head office of that company. See also <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-10/cp170112en.pdf>.

proceeds with an in-depth examination for one more month. The procedure ends when the *destination* Member State, which in the light of all relevant facts and information registers the converted company, if the company fulfils its legislation on *registration and workers' protection*. Communication between competent authorities will be facilitated through the system of interconnection of business registers (BRIS). Concerns about worker participation are addressed through their right to be informed and consulted in due time by the company. Protection of workers may also be confirmed by the authority of the destination Member State.

3.6.5 The EESC would like to express its reservations about whether a lengthy and costly procedure fulfils the criteria and is compatible with the judgment of the Court of Justice of the EU in Case C-106/16, *Polbud*. It is important to emphasise that the Court interpreted Article 54 of the Treaty of the Functioning of the EU and applied the general principle of proportionality. Thus the right of a company for cross-border conversion derives from the Treaty itself and the Member States (and the EU institutions) must be careful not to infringe it. Therefore the EESC will scrutinise carefully this two stage procedure to confirm its compatibility with the EU Treaty and the EU general principle of proportionality, so that it will not impose unnecessary burdens beyond its stated aims.

3.6.6 **Cross-border mergers<sup>27</sup>**: The proposal builds on the positive experience with Directive 2005/56/EC<sup>28</sup> on cross-border mergers, which deals only with limited liability companies, and addresses its shortcomings. The proposal therefore introduces:

- a) Harmonised substantive rules on protection of creditors and shareholders: Directive 2005/56/EC provided only for procedural rules, e.g. for the obligation to inform the shareholders, leaving to the Member States the substantive protection. The proposal newly requests that the draft merger terms specify their protection with:
  - Safeguards for creditors: The proposal introduces the presumption that there is no prejudice if creditors are to be paid by a guarantor or by the resulting company, ascertained by an independent expert assessment of their situation.
  - The right to exit for shareholders who did not vote or have no voting rights and the right to receive adequate compensation. Right to challenge the proposed share-exchange ratio to national courts.
- b) Harmonised rules on employee information in a specific and comprehensive way about the implications – the 2005 Directive provided only for participation on the board and their situation to be reflected in the management report.
- c) Harmonised rules for a fast track procedure for less complex mergers or waiver of an independent expert report upon agreement of all shareholders or during a merger of a parent company with a subsidiary.
- d) Interconnection of business registers for exchange of information – use of digital tools.

3.6.7 **Cross-border divisions<sup>29</sup>**: These are subject to diverse or incompatible national rules in only 13 Member States, without any EU harmonisation despite their importance for growth. In order

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<sup>27</sup> An operation whereby two or more companies from two or more Member States transfer their assets and liabilities to an existing (acquiring) or a new company.

<sup>28</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. It is now part of the 2017 Codification Directive.

<sup>29</sup> An operation whereby a company splits and transfers all or some of its assets and liabilities to existing or new company/companies in another Member State.



to prevent abuse and protect stakeholders an EU legal framework must be introduced for limited liability companies, similar to cross-border conversions. A two stage procedure must be established. In the first stage the division terms are drafted together with two fully explained reports, on the implications of the division to creditors and to employees. In addition, an independent expert report is needed for medium and large enterprises.

This is only a first step and it does not cover cross-border division by acquisition of assets/liabilities of existing companies, but only the case where new companies are created.

3.6.8 Currently, national rules differ greatly between Member States or impose excessive administrative procedures which discourage businesses from pursuing new opportunities. Though the EESC is in support of the new rules and procedures, these must be carefully scrutinised so that they will not incur extra administrative burden and cost, which goes beyond the goals they serve on protection of employees, creditors and shareholders. Especially the cost for an independent expert report must not overburden micro- and small and medium enterprises.

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