

Cross-border conversions, mergers and divisions

2018/0114(COD) - 25/04/2018 - Legislative proposal

PURPOSE: to propose new company law rules to facilitate the conversions, mergers and divisions of companies within the Single Market.

PROPOSED ACT: Directive of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: there are around **24 million companies** in the EU, out of which approximately 80% are limited liability companies. Around 98-99% of limited liability companies are SMEs. 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. However, in practice the exercise of **the freedom of establishment by companies remains difficult**, in particular because company law is not sufficiently adapted to cross-border mobility in the EU.

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. In particular in its recent judgement Polbud, the ECJ confirmed **the right of companies to carry out cross-border conversions on the basis of the freedom of establishment**.

Currently, companies wishing to move their registered offices cross-border need to rely on Member States' laws. Such laws, where they exist, are often incompatible or difficult to combine with each other. Moreover, more than half of the Member States do not provide any specific rules allowing for cross-border conversions. SMEs are in particular negatively impacted since often they lack resources to perform cross-border procedures through costly and complicated alternative methods. This also means that the protection of stakeholders such as employees, creditors or minority shareholders is often ineffective or insufficient due to the lack of, overlapping or contradictory rules.

Therefore, the Commission considers that the EU legislator needs to step in and **provide for rules on cross-border conversion** with adequate and proportionate safeguards for employees, creditors and shareholders to create a dynamic and fair Single Market.

IMPACT ASSESSMENT: the chosen options consist in introducing:

- harmonised EU procedures to enable companies to carry-out direct cross-border conversions and divisions;
- harmonised rules throughout the single market to protect minority shareholders and creditors with the possibility for Member States to provide additional safeguards;
- targeted amendments to provide workers with the necessary protection, information, consultation and participation;
- rules and procedures whereby Member States would assess on a case-by-case basis whether the cross-border conversion constitutes an artificial arrangement designed to obtain undue tax advantages or to undermine the rights of employees, minority shareholders or creditors.

According to the Commission, the new common rules on cross-border conversions and divisions would result in **savings** of between EUR 12 000 and EUR 37 000 (for divisions) and between EUR 12 000 and 19 000 (for conversions) depending on the size of the companies and Member States concerned.

CONTENT: this proposal to amend [Directive \(EU\) 2017/1132](#) of the European Parliament and of the Council on cross-border mergers of limited liability companies introduces a new European legal framework for cross-border divisions of companies and firms.

The objective of this proposal is two-fold: **provide specific and comprehensive procedures** for cross-border conversions, divisions and mergers to foster cross-border mobility in the EU while, at the same time, offering company stakeholders **adequate protection** in order to safeguard the fairness of the Single Market.

(1) Cross-border conversions: the proposal should allow companies to carry out a cross-border conversion by converting the legal form they have in one Member State into a similar legal form in another Member State. This process should ensure: (i) that companies retain their legal personality throughout the procedure, without being obliged to dissolve or wind up in the departure Member State, and (ii) that they constitute a new entity in the Member State of destination.

A crucial element of the procedure is that it would **prevent a cross-border conversion** where it is determined that it constitutes an **abuse**, namely in cases where it constitutes 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 first step in the procedure would be the preparation of the draft terms of the cross-border conversion and two targeted reports addressed to shareholders and employees on the implications that the cross-border conversion will have.

Thereafter, the company is to take a decision at the general meeting on whether to pursue the cross-border conversion. That decision, together with the relevant information and documents, would then be submitted to the competent national authority of the Member State of departure which is responsible to decide whether to issue a **pre-conversion certificate or not**.

The authority would determine if all conditions for the cross-border conversion laid down in the Directive and in national law are fulfilled, including whether the company is solvent, the requisite majority of shareholders has approved the conversion at a general meeting and employees, minority shareholders and creditors are protected within the remit prescribed by the Directive. During this phase, the authority would also determine whether there is an artificial arrangement. If such an arrangement were to be established, the operation would be **interrupted** by the national authority of the Member State of departure even before the conversion may take place.

The pre-conversion certificate shall be sent without delay to the competent authority of the Member State of destination which should examine the legality of the processing. Once the legality check has been carried out, a company would be registered in the register of a Member State of destination and deregistered in the register of a Member State of departure. The conversion shall then become legally effective.

(2) Cross-border mergers: the proposal seeks to address the shortcomings in the existing texts by providing in particular for harmonised rules for the protection of creditors and shareholders.

The company should provide, in the cross-border transformation project, the protection it intends to provide to creditors and shareholders. Creditors not satisfied with the protection offered could apply to the

appropriate administrative or judicial authority for adequate safeguards. Shareholders who have not voted for cross-border mergers or do not have voting rights would have the right to leave the company (sell their shares) and receive adequate compensation.

Furthermore, the proposed rules ensure that **workers** shall be informed of the implications that the proposed cross-border merger will have for workers.

(3) Cross-border divisions: the proposal also simplifies the procedures allowing any capital company to carry out a cross-border division.

The objectives of the harmonised rules on cross-border divisions remain **similar to cross-border conversions**: (i) enable companies to divide cross-border in an orderly, efficient and effective manner; (ii) protect the most affected stakeholders such as employees, creditors and shareholders in a suitable and proportionate manner.

The procedure would ensure the scrutiny of legality of the cross-border division by the competent authority of the company being divided and by the authorities of the recipient companies in the light of all relevant facts and information. As in conversions, a crucial element of the procedure would be preventing a cross-border division where it is determined that it constitutes an abuse.