POSITION PAPER

28 June 2018

EU Company Law Package

Main messages

BUSINESSEUROPE welcomes the EU Company Law Package which aims to facilitate companies' use of digital technologies, whether in the creation of a new company or in updating business-relevant information in public registries. The new rules also intend to make it easier to perform essential cross-border operations such as mergers, divisions and conversions.

Access to digital tools to perform those key company operations is essential for entrepreneurs to move faster in a highly competitive and increasingly connected business environment.

The possibility of creating a company digitally, registering branches digitally or the "do it once only" principle have a clear added value.

The proposals need to remain focused on the right objectives (and feasible ones from a company law perspective) which are to ensure an effective right - clearly recognised by the EU treaties - of establishment in the EU as well as to bring company law into the 21st-century. These objectives should be met without prejudice to the rights of company stakeholders (shareholders, creditors and workers). However, company law is not the right tool to pursue objectives such as fight against tax evasion or avoidance and social dumping, which are already dealt with via more appropriate tools at EU and national level.

KEY FACTS
⇒ Up until now there are only **17 Member States that provide a fully online** procedure for registering companies.
⇒ Online registration takes on average **half of the time** and can be up to **3 times cheaper** than traditional paper-based formats
⇒ Today companies wishing to move to another Member State **risk having to dissolve first**
⇒ Savings for online registration and filing under the new rules are estimated to be **€42 – €84 million** per year for EU companies
⇒ The cross-border merger directive is a success story – 172 % more cross-border mergers since its adoption

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

BUSINESSEUROPE a.i.s.b.l.

WWW.BUSINESSEUROPE.EU

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
EU Transparency register 3978240953-79

The proposed (new) procedures for conversions and divisions still seem quite complex and filled with avoidable duplications. Conversions and divisions are treated the same whereas they differ: in case of conversions there is a universal transfer of assets. They also tend to place the company in a situation where by default it has to prove that it is not doing anything wrong with the cross-border operation. This is an unacceptable departure from the law and from the practice.

In its recent Polpud ruling the Court of Justice of the European Union strongly reaffirmed the freedom of establishment in the treaties. In the spirit of this ruling the objective of this proposal should be to make available procedures to perform cross-border mergers, divisions or conversions which are simple, clear and effective.

Protection for company stakeholders is necessary but it needs to remain reasonable and proportionate. It cannot become a *de facto* unsurpassable hurdle preventing the honest entrepreneur from expanding his business beyond borders.

I. Proposal for a Directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law - COM (2018)239

Scope

We welcome the proposal as it offers a simple way to register a company that meets the needs of both small and larger companies saving them precious time and costs.

As a general rule, both private and public limited liability companies are included in the scope of the directive (Article 13). However, according to Article 13f(1) Member States may decide *not* to provide fully online registration procedures for public limited liability companies (Annex I to the directive).

Given the objective of the proposal, BUSINESSEUROPE fails to understand, why it should be possible for Member States to exclude public limited liability companies from the benefits of digitalisation, especially considering that the EU registration and disclosure rules that are the substance of the digital update apply to *both* private and public limited liability companies.

In this regard, it should be noted that non-digital registration systems are not necessarily flawless. Digital registration, if properly designed, has security advantages such as digital footprint.

It is also proposed that Member States may decide to exclude online registration where the share capital of a company is to be paid by way of contributions in kind (Article 13f(4)f and Article 13f(7)b). BUSINESSEUROPE would like to draw the attention to the fact that there are Member States who for many years have had online registration also for these situations. Therefore, we encourage the EU to learn from and build on the positive experiences from these Member States in order to reap the full benefits of digitalisation.

- **Safeguards (Article 13b)**

Identification is **an essential element** to this proposal. Article13b covers which are the acceptable means to ensure the identification of citizens making use of the new online tools. The ability to verify the identity of the company founder or manager is very important.

Proportionate and effective means to ensure electronic identification need to be put in place as proposed. We accept that physical presence might be required in cases of genuine suspicion of fraud based on reasonable grounds requiring a tighter identity verification. Nevertheless, this should not be the rule, but rather a last resort measure. Otherwise it will contradict the purpose of the proposal. Therefore, in the spirit of legal certainty we suggest amending Recital 14 to better explain what “last resort measure” means.

- **Fees (Article 13c)**

BUSINESSEUROPE welcomes the principle of transparency and non-discrimination of business registers’ fees and a principle regarding available means of payment.

- **Availability of templates for registration (Article 13g)**

The proposal does not suggest European templates for registration. The notion of a harmonised template(s) for online registration would be difficult to achieve and agree at EU level. Nevertheless, giving some guidance (e.g. in the form of national templates) to inexperienced entrepreneurs using registration platforms would have some added value. In Estonia, for example, the vast majority of companies registering online use predefined templates of statutes or articles of association to

help them. We agree that, at least at Member State level, basic templates should be made available. If the entrepreneur wishes to create a more complex company structure, there is always the possibility to consult a legal professional (e.g. a lawyer).

Disqualified directors (Article 13h)

This article provides a legal framework for Member States to request information from other Member States concerning disqualified directors. The provisions allow Member States to check with other Member States if a person to be registered as a director of a company is disqualified from acting as a director in another Member State on the basis of the national law of that Member State. The provision obliges the other Member States to provide such information upon request. Member States may 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.

Because 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 States, regardless of the rules locally in place for director disqualification. Access to the grounds of disqualification is important to enable the Member State of registry to make up its own judgement on whether a director can be nominated.

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. This is in line with the objectives that the EU tries to achieve in its recent proposal on restructuring and second chance for entrepreneurs.

The deadlines for responses to cross-border requests about disqualification should remain short. Otherwise, the registration process will be unnecessarily delayed, lengthy and unpredictable, which would be detrimental to the objective of the proposal.

Making procedures digitally accessible only (Article 13i)

Digitalisation is a process which companies tackle at a different pace depending on their characteristics and financial/technical means. Although the future procedures

will become more digitally-based, for the moment, companies themselves need to be able to have the choice and the time to adapt. Therefore, the possibility of “digital only” should not go beyond an option for companies.

We are aware of Member States where for certain operations the digital route is now the only available option (after a long period where the companies had reasonable time to adapt). If this is the case the Member States should be allowed to keep the “digital only” process.

- **Unique company identifier (Article 16(1))**

A unique identifier number could have its merits. It will help to process requests more rapidly as well as helping with better identifying a company within an increasingly connected commercial registers system.

- **Machine-readable and searchable format or as structured data (Article 16(5))**

According to this article, documents and information provided to the competent authority as part of the online operations are stored by registers in a machine-readable and searchable format. This seems reasonable as long as this is not an attempt to oblige companies themselves to structure their data this way. We assume that this obligation is only addressed to Member States, otherwise it would go against the statement in the preamble of the proposal which states that “this proposal does not entail any additional obligations for citizens and businesses”.

- **“Once only principle” in relation to registration and disclosure of information (Article 16(3))**

BUSINESSEUROPE strongly supports the proposal to introduce a “once only principle” in this area. The current rules in some Member States still require publication – at the company’s expense – of certain acts and disclosures in multiple places (e.g. a national gazette or newspapers) which is unreasonable and unnecessary.

"Once only principle" in relation to changes of company relevant information and branches (Article 28b and 30a(1))

BUSINESSEUROPE welcomes the application of the "once only" principle in this area. We believe there is no reason why companies should register the same information in different business registers when the business registers are increasingly connected. Duplication can and needs to be avoided. Therefore, information requirements that have already been registered in the register of the company in accordance with Article 14 should not be required to be registered in the register of the branch in accordance with Article 30.

However, we do not understand why information on winding-up, insolvency proceedings etc. should be left out of the list of information that is automatically updated through the interconnection of business registers.

Information available free of charge through the interconnection of registers (Article 19(2))

BUSINESSEUROPE supports that more information becomes available free of charge through the system of interconnection of registers. The administrative burdens connected with finding, applying and paying for such information are often disproportionate to the relative small income it provides for business registers.
We have some suggestions on how to widen the list in paragraph 2 even further:

- It appears from the preamble that the intention behind point (a) is to make the historical names readily available. If that is the case, it should be made clearer in the text of the directive.
- Point (g): it does not appear appropriate to require availability of information on the number of employees of the company, where this is available in the company's financial statements as required by national law. Firstly, unlike all the other types of information proposed to be made available free of charge, this information often varies a lot making the information outdated very quickly. Secondly, all the other types of information in art. 19(2) are characterized by being available in the national register or else the obligation does not apply (cf. "where applicable"), whereas the information on employees refers to the financial statements. If the requirement to provide information on the number of

employees is to be upheld, it should be on the condition that this information is already available in the national register.

- Other potential items: auditor, financial year, the rules on who can represent the company alone or jointly, and, where applicable, information on mergers, divisions and conversions where the company had participated.

The implementation deadline of 5 years for this provision seems quite long.

II. Proposal for a Directive amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions COM (2018)241

II.A. BUSINESSEUROPE supports the following elements of this proposal:

- After 30 years, the EU is finally taking a step to make sure the freedom of establishment engraved in the EU Treaties is made a reality. Two new procedures for cross-border operations are proposed to fill the gap in the cases of cross-border conversions and divisions.
- Once implemented, these procedures could represent interest financial savings: around 12 000- 37 000 EUR when performing cross-border divisions or 12 000 – 19 000 EUR for cross border conversions.
- The proposals build on the existing case law of the European Court of Justice, in particular on the latest Polbud case.
- Several procedures around mergers, conversions and divisions will be able to be performed digitally, without the need for a physical presence (submission of information and documents online for the purposes of obtaining a pre-merger or pre-conversions certificates – Articles 123, 127 and 128).
- Some clarifications on accounting purposes are also a welcome addition (e.g. Articles 122a and 160f).
- Inclusion in the scope of mergers with transfer of all assets without liquidation and without the issue of any new shares by the acquiring company, provided that the company being acquired is wholly owned by the sole shareholder.

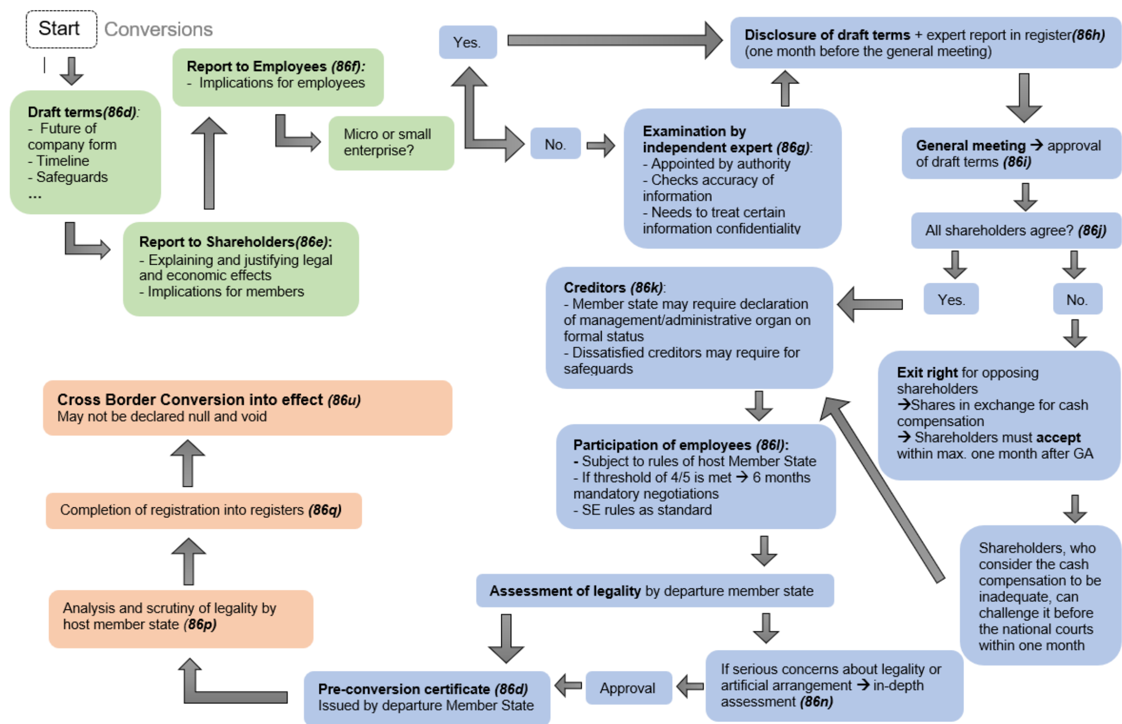
II.B. Elements of the proposal to be reconsidered, adjusted or deleted

II.B.1. Cross-border conversions

As seen in the table below, the procedure for conversions seems extremely complex and lengthy both for the involved companies and the involved authorities. Moreover, there are problems relating to business sensitive information, unpredictability and principles of legal certainty.

Even academia agrees that company law has its limits when it comes to pursuing objectives of other areas of law. For example, it is considered that further harmonisation of company law instruments will be tax neutral.

TABLE: Steps to take in a cross-border conversion



"Artificial arrangement" pre-judgement (Article 86c(3))

Article 86c (3) says that beyond formal and objective legal requirements, Member States should check whether this cross-border operation can be considered an artificial arrangement aimed at obtaining undue tax advantages or unlawfully prejudice the

rights of employees, creditors or shareholders. This should be rejected. It puts companies in a *guilty until proven innocent condition*.

Member States are already allowed in accordance with Article 86n to require or perform an in-debt assessment of the operation if there are strong suspicions that the operation is seeking to avoid or breach a particular law.

Making such a judgement by default is not proportionate nor adequate.

As an alternative, guidelines for Member States could be considered, based on the European Court of the EU jurisprudence, which would grant the operation with a positive presumption of correctness. This would create a better level playing field among Member States to determine in which situations a deeper analysis of the operation could be required.

The expression *artificial arrangement aimed at obtaining undue tax advantages or unlawfully prejudice the rights of employees, creditors or shareholders* finds no parallel in existing EU legislation. In addition, we question using a company law instrument to perform an assessment on tax issues which are better covered by other areas of EU law, i.e. the 2016 Anti-Tax Avoidance Directive.

Independent Expert Report (Article 86g)

Article 86g requires an examination of the accuracy of the information of the draft terms and management reports by an independent expert. For the same reasons, as with the "artificial arrangement", we believe that such a report should not be required by default. It should instead be an option for a company. The exemption for small and micro companies does not prevent this requirement to still hit a large number of companies with an expensive procedural step which might even endanger company confidential information.

The list of items which the expert must investigate appears very extensive. It should be considered if all those requirements are necessary, also when it comes to the content of the report. The distinction between what the expert should include in his investigation and what he should include in his report should be considered more closely. Also, the expert powers should be more appropriately defined.

The proposed protection of business sensitive information does not appear effective. For example, there does not seem to be a real protection when the provision requires that a number of explicit information requirements that could be business sensitive must be included in the report (e.g. “commercial risk” and “location of assets”) and made publicly available.

Management report to members and employees (Articles 86e and 86f)

BUSINESSEUROPE is not convinced about the need for a separate report for employees.

If two reports are required, it should not develop into an occasion to add additional information requirements onto companies. The proposal to add information on “the *implications [..] on the future business of the company and on the management’s strategic plan*” in the report to employees is superfluous since it is already a requirement in the report to the shareholders. The latter report is already available to the employees.

Furthermore, information requirements already exist in the EU Directives on information and consultation of workers.

Exit right for shareholders (art. 86j)

BUSINESSEUROPE is skeptical on the inclusion of this exit right which changes the current situation significantly in several Member States.

The current cross-border merger directive establishes that Member States may foresee protection for minority shareholders who opposed the merger, whereas the proposal is not clear on the scope of the application of the exit right.

Some clarifications on the scope of application of exit right are needed. For example, the proposal mentions “members not having voting rights” and “members who did not vote for the approval”. However, it is not clear if the last category includes also members who abstained or who did not attend the general meeting.

Providing an exit right for shareholders with a deadline for notice several weeks after the general meeting makes it challenging for companies to foresee how many shareholders will want to make use of the exit right, and, therefore, how much liquidity is needed. This could ultimately hinder the merger.

This was precisely one of the main weaknesses pointed out in the evaluation of the cross-border merger directive: some Member States had designed exit rights in such way that companies risked not being able to have enough liquidity to go through with the merger.

The proposal needs to be adapted to balance the interests of shareholders wishing to exit and the majority of shareholders wanting to go through with the cross-border merger/division.

In order to give the company and the majority of shareholders the opportunity to assess already at the general assembly how big the liquidity strain will be, "dissenting" shareholders must flag their intention to make use of the exit right already at the general meeting.

Protection of creditors (art. 86k)

We regret that a higher level of harmonisation is not achieved by this provision but understand the political difficulties behind.

The proposal lacks the relevant distinction between creditors whose rights originate earlier than the merger/division/conversion plan, and creditors whose rights originate after. Only the former creditors should be protected by law, since the latter are in a position to protect themselves.

The proposal also lacks the relevant distinction between creditors whose claims are due (should be able to demand fulfilment) and those whose claims are not due (should be able to ask for security).

Paragraph 3(b) is unclear as regards what it is meant by "immediately after the completion of the [conversion/merger/division]".

If the creditors can make their claims against the continuing company or a third-party guarantor with a credit quality at least commensurate with the creditor's original claim, it is difficult to see the need – or fairness – in providing the creditors a right to payment immediately after the completion of the conversion/merger/division, if this is not what has been agreed originally. The important thing for creditors is that the credit quality is not reduced and that they can enforce their claim in the Member State originally agreed.

We have some reservations on the “timing” for the financial declaration (1 month before the publication of the draft terms).

Finally, we have strong concerns on the general liability of the converted/merged/divided company for losses arising from any differences between the national legal systems of the Member States of departure and Member State of destination. This should be reassessed given the legal uncertainty this provision can create.

II.B.2. Cross-border divisions

As the procedure on conversions applies *mutatis mutandis* the comments above remain valid in the relevant articles.

The scope of the proposal is limited to cross-border divisions where the recipient companies are newly formed companies. It excludes cross-border divisions by acquisition (the situation where the recipient companies are existing companies), a restriction which is not applicable to cross-border mergers. Experience in some Member States shows that most domestic divisions are by acquisition. Thus, by restricting the scope of cross-border divisions, the proposal might not reach its objective to foster the cross-border mobility of companies since many transactions will fall outside its scope.

II.B.3. Cross-border mergers

- **Two times the reports**

BUSINESSEUROPE is not convinced about the need for a separate report for employees to avoid duplication of information.

- **Exit right for shareholders (NEW)**

See, above comment on article 86j.

- **Protection of creditors**

See, above comment on article 86k.

II.C Specific comments on workers acquired rights provisions

BUSINESSEUROPE advocates for simpler rules on employees' involvement and stresses that the proposed directive should not generate additional administrative burden for companies. We also insist on the need to ensure consistency for companies and workers and avoid duplication of existing EU legislation.

In our opinion, the Commission's proposal does not take into account the existing EU Directives on information and consultation:

- Directive 2002/14 on a general framework for informing and consulting employees;
- Directive 2001/23/EC on transfers of undertakings;
- and Directive 2009/38/EC on European Works Council.

These already include requirements on informing and consulting employees that apply in situations of cross-border conversions, mergers and divisions. These provisions are currently implemented with success into national legislative systems and used by companies and workers on a regular basis. Therefore, the proposal should refer to the existing Directives to avoid additional administrative burden and undermining the current mechanisms in place for information, consultation and participation of employees.

Regarding employees' participation, BUSINESSEUROPE asks that the rules applying for mergers (Directive 2017/1132), apply as well in case of conversions and divisions, in order to avoid the creation of new complicated rules for companies.

BUSINESSEUROPE asks to reconsider Article 86g and Article 160i, which inter alia foresees that an independent expert shall verify the report to the employees in case of conversions and divisions. In case of breaches, sanctions are foreseen by authorities and it should not be up to an external expert to monitor the respect of provisions on employees' information and consultation. In addition, this provision would be time-consuming for companies and have a negative impact on cross-border operations, by delaying them.

As mentioned above, BUSINESSEUROPE does not see a need for a separate management report to the employees (Article 86f, Article 124a and Article 160h). The publication of a unique report including the implication for employees in case of mergers, as well as provisions on information and consultation in the existing EU

directives, are sufficient to adequately inform employees in case of conversions and divisions. Existing directives also include the possibility for employees to express an opinion in good time.

Finally, we disagree with the new threshold for triggering employees' participation introduced in Articles 86l and 160n. Indeed, the new proposal does not respect thresholds decided at national level and it hinders the ability of these companies to perform cross-border conversions and divisions. BUSINESSEUROPE considers that the appropriate threshold for conversions and divisions of companies should be the same as the one laid down in the Cross-border mergers directive: 500 employees. In addition, BUSINESSEUROPE asks for negotiations not to be compulsory if the management agrees on *Societas Europaea* rules.

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