

European Commission Proposal on Corporate Mobility and Digitalization: Between Enabling (Cross-Border Corporate) Freedom and Fighting the ‘Bad Guy’

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On 25 April 2018, the European Commission has published the perhaps longest awaited legislative proposal in European company law, covering amongst other topics cross-border company conversions.¹ That is a corporate operation in which a company transfers its company seats, forming the connecting factor to its applicable company law, to a different Member State and making through this operation a different company law applicable. A German GmbH can in that way become a Dutch BV or a French S.à r.l.

Particularly since the first case on such topic handed down by the Court of Justice of the European Union in 1988, *Daily Mail*,² the topic had been constantly on the agenda of policy makers and academics and has arguably been one of the topics most published on in EU company law.

After a long political struggle, in April 2018, the European Commission has thus drafted a proposal on how cross-border seat transfers should be harmonized on the EU level. Attempting to approach the topic in a broader sense, the Commission has done so together with a proposal on cross-border company divisions, an operation which has equally not been harmonized at the EU level so far. That has been complemented with a proposal for a modified regime for cross-border mergers as well as a directive on digitalization in company law.³ The latter particularly aiming at introducing technological developments into areas such as company registrations and publications.

The perhaps most remarkable feature of the legislative proposal is the introduction of a provision intended to combat artificial arrangements aimed at obtaining undue tax advantages or unduly

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1 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.

2 Case C-81/87 *Daily Mail* [1988], ECLI:EU:C:1988:456.

3 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.

prejudicing the legal or contractual rights of employees, creditors or minority members into the legislation on cross-border conversions and cross-border divisions. The provision takes the form of documents, which the company seeking to carry out a cross-border conversion or a cross-border division has to submit to an independent expert appointed by a competent authority of the Member State where such company has its registered office.⁴ The independent expert has to provide on such basis a report enabling the competent authority of the Member State to carry out an in-depth assessment whether the operation (cross-border conversion or division) is an artificial arrangement. If that is not the case, the operation is authorized by such competent authority.⁵

Such mechanism can be regarded as a novelty in corporate law and reflects two different streams. On the one side, the European Commission sought to finally enable cross-border corporate mobility throughout the European Union, including cross-border conversions and cross-border divisions. On the other side, the European Commission tried to counter the critique that such operations would predominantly be used for tax planning or in other ways to prejudice third-parties such as creditors or employees.

Whether the legislative proposal will be adopted in such way by the European Parliament and the Council remains to be seen. Considering for example the mechanism for artificial arrangements, on the one side, it is highly positive that the European Commission provides a proposal enabling strong stakeholder protection. On the

other side, the mechanism seems to be contrary to the Commission's own objective to make cross-border conversions and divisions efficient and less costly. Considering the complexity and unclarity of examining whether an operation constitutes an artificial arrangement, the timeline for obtaining authorization by the competent authority might in many cases not be respected and the legislative proposal does not provide consequences if a Member State's authority does not stick to the deadlines provided by the proposal. Moreover, unless clearer details are provided for artificial arrangements, such a mechanism risks leading to different standards applied by different Member States and to a number of court cases to test Member State legislation on such topic against (existing) case law of the Court of Justice of the European Union.

At the same time, certain stakeholder protections might also have to be remodelled. For example the lack of a statutory right of the works council to receive the independent expert report assessing the draft terms of the conversion, undermines the position of works councils intended to be strengthened by the aforementioned provision.

As a final point it remains to be seen whether the empirical estimates the European Commission bases itself upon in respect to cross-border conversions and cross-border divisions turn out to be correct.⁶ The numbers so far cannot fully be confirmed by the data collected in the Cross-Border Corporate Mobility in the EU project.⁷

⁴ Art. 86g.

⁵ Art. 86m.

⁶ Commission Staff Working Document, Impact Assessment, Accompanying the document 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 and 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, at 177 et seq.

⁷ See T. Biermeyer & M. Meyer, *Cross-border Corporate Mobility in the EU: Empirical Findings 2017* (1 Feb. 2018), available at SSRN: <https://ssrn.com/abstract=3116042>.