

## Cross-border mobility of companies and use of digital solutions in company law

Impact assessment (SWD(2018) 141, SWD(2018) 142 (summary)) accompanying Commission proposals for (1) 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](#)) and (2) 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](#))

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above-mentioned proposals, submitted on 25 April 2018 and referred to Parliament's Committee on Legal Affairs (JURI).

The issues addressed by the IA and the proposals have been the subject of calls for action by both the European Parliament and the Council. In 2017 Parliament called on the Commission 'to consider further ways to promote digital solutions for formalities throughout a company's lifecycle'.<sup>1</sup> It has also made repeated calls and detailed recommendations for a legislative proposal on cross-border conversions.<sup>2</sup> It has also drawn attention 'to the importance of establishing a framework which regulates comprehensively the mobility of undertakings at European level in order to simplify the procedures and requirements applicable to transfers, divisions and mergers and to prevent abuses and fictitious transfers for the purposes of social or fiscal dumping'.<sup>3</sup>

For its part, the Council encouraged the Commission to use the digital single market package 'to address relevant and important issues', amongst which it includes the online registration of companies.<sup>4</sup> This is in line with the commitment subsequently undertaken in the [Tallin Declaration](#) to the digital-by-default principle providing 'citizens and businesses with the option to interact digitally with public administrations'.<sup>5</sup>

The Commission's intention to take action in this area has been signalled in several instruments. In its single market strategy, the Commission stated that SMEs complain that uncertainties over company law hinder their growth beyond the local or regional market and it committed itself to consider further means to relieve the regulatory burden on companies throughout their lifecycles. It also undertook to consider updating the rules on cross-border mergers and complementing them with new rules on cross-border divisions.<sup>6</sup> In its 2017 work programme, the Commission announced its intention to present initiatives to facilitate the use of digital technologies throughout companies' lifecycles and on cross-border mergers and divisions.<sup>7</sup> This intention was confirmed in its communication on the start-up and scale-up initiative.<sup>8</sup>

### Problem definition

The IA starts by outlining its scope, identifying five policy issues to be examined in the EU and Member States' company law framework: (i) use of digital tools and processes throughout a company's lifecycle; (ii) cross-border mergers; (iii) cross-border divisions; (iv) cross-border conversions; and (v) conflict of law rules (IA, pp. 8-9).

For each of these policy issues the IA makes a very well structured analysis of the status quo, exploring first any underlying problem drivers, and then proceeding to identify the resultant problems, firstly for companies themselves and secondly for other stakeholders (such as creditors, minority shareholders, employees, etc.).

One of the pillars upon which this problem definition is based is an analysis of the prevailing national and EU legal regimes and any pending relevant proposals for each of the five policy issues. Some of these areas (cross-border divisions and conversions) are unregulated at EU level and a situation of divergent, incompatible or non-existent national rules is prevalent. The IA explains that in the area of digital solutions the proposal for a single digital gateway<sup>9</sup> and the directive on the interconnection of business registers (BRIS)<sup>10</sup> have limited scope and the area still suffers from divergent, incompatible or non-existent national rules. The area of cross-border mergers is the area that enjoys the best regulatory coverage with the Cross-Border Mergers Directive,<sup>11</sup> but still suffers from 'persistent issues that are frustrating the full effectiveness and efficiency of the Directive' (IA, p. 18). The evaluation of the Cross-Border Mergers Directive is included as Annex 5 to the IA.

The several stakeholder consultation exercises conducted by the Commission since 2012 form another important pillar supporting the problem definition.

The IA describes how the current legal framework creates a situation where companies are forced to bear unnecessary costs and burdens while other stakeholders are ineffectively protected in situations with cross-border elements. Thus, for example, according to a support study for the IA,<sup>12</sup> a national conversion in the UK would cost around €10 000, while an indirect procedure to achieve the same result as a cross-border conversion (because cross-border conversions are not authorised in the UK) could cost over €100 000. The consequence of the problems, according to the IA, is a loss of opportunity for companies to carry out business and to operate more efficiently using digital tools across the single market.

The problem definition appears to be well supported by evidence. Apart from the evidence put forward in the main body of the IA, additional complementary evidence and concrete examples to support the problem definition are presented in its Annex 4. Further legal analysis to support the problem definition is provided in Annex 6, which gives an overview of the case-law of the European Court of Justice on cross-border mobility of companies.

## Objectives of the initiative

The IA clearly identifies the objectives of the initiative (IA, pp. 40-41). The general objective is to make the single market deeper and fairer, enhancing the responsible use by companies of the opportunities that it offers. The specific objectives outlined by the IA, addressing directly the identified problems, are (i) to cut unnecessary costs and burdens for companies, and (ii) to offer effective cross-border protection for the other stakeholders. These objectives appear to be measurable, achievable and relevant, while the proposal provides a timeframe for the application of its provisions. Contrary to the recommendation in [tool 16](#) of the Commission's better regulation 'toolbox', the IA does not set operational objectives, with the result that, overall, the objectives do not seem to be sufficiently specific as required under the same tool.

## Range of options considered

On the basis of the stakeholder consultation activities and other preparatory work undertaken, the IA identifies a number of topics which need to be addressed. Each one of these topics falls under one of the five policy issues mentioned under the heading 'Problem definition' above. Thus, each of the five policy issues has a number of topics falling under it, and for each of these topics the IA puts forward a set of policy options. For every set of policy options the IA provides a description of the options, an analysis of their impacts and a comparison of the options and then chooses the preferred option. All the preferred options are finally presented and assessed as an overall package.

It might be argued that the IA is short on details in setting out the alternative policy options, though such conciseness might be a side effect of the wide scope and the sheer number of policy options involved.

Below is a simplified presentation of the topics and the respective policy options and preferred option for each such topic as set out in the IA. The IA explains that the complementarity of the options means that the maximum impact could be achieved if the package would be composed of the preferred options spanning all the five policy issues. However, it continues that, although the different elements of the

package interact, the five policy issues are self-standing and therefore the package could be composed of only some of them.

#### Policy issue 1: Use of digital tools and processes throughout a company's lifecycle

Online registration (creation of a company as a legal entity) and filing of documents to the business register

Option 0: baseline scenario with diverging rules or no rules about online registration of companies and branches and about the online submission of company information to the business register.

Option 1: rules on online registration of companies and branches and on the online filing of company documents, with Member States retaining the ability to decide whether the physical presence of the founder or representative is necessary. No harmonised provisions on safeguards for electronic identification at EU level.

Option 2: EU-wide rules entailing that in all Member States the physical presence of founders or representatives is not required when completing procedures online. Safeguards for electronic identification laid down at EU level.

Option 3 (**preferred option**): same as option 2, but allowing Member States to exceptionally require physical presence, on a case-by-case basis, when there is a genuine suspicion of fraud.

#### Multiple submission of the same information by companies

Option 0: baseline scenario with national rules requiring companies to file certain information with different authorities (business register and national gazette) or different registers (register of the company and register of the branch). Company information becomes legally effective only after its publication in the national gazette.

Option 1: rules requiring that information filed with the register is forwarded electronically to the national gazette for publication without the company having to submit the same documents twice. Likewise, information filed with the register of the company is forwarded to the register of the branch. Publication in the national gazette remains a requirement for company information to become legally effective.

Option 2 (**preferred option**): same as option 1, but the requirement for publication of company information in the national gazette becomes optional for the Member States, and in this case company information becomes legally effective once it is available in the business register.

#### Online access to company information held in business registers

Option 0: baseline scenario with only a limited set of company data available for free in all business registers, with most Member States continuing to charge fees for most of the data.

Option 1 (**preferred option**): widening of the data to be made available free of charge by all business registers, with the possibility for Member States to still charge fees for other information. Apart from being available on the individual registers, information would also be available through the European e-Justice portal which is the central access point for BRIS.

Option 2: requiring Member States to make available all company information free of charge for everyone. As in option 1, apart from availability on individual registers, information would also be available on the European e-Justice portal.

#### Policy issues 2, 3 and 4: Cross-border operations (cross-border mergers, cross-border divisions and cross-border conversions)

##### Procedural rules for cross-border divisions and cross-border conversions

Option 0: baseline scenario with no harmonised rules at EU level for cross-border divisions and cross-border conversions constraining companies that wish to divide cross-border or perform cross-border conversions to find alternative ways to perform the operation depending on the national legal frameworks within which they operate.

Option 1 (**preferred option**): introduction of harmonised EU procedures, in line with existent EU procedures on cross-border mergers but adapted as appropriate, to enable companies to carry out direct cross-border divisions and cross-border conversions.

#### Employee information consultation and participation in cross-border mergers, cross-border divisions and cross-border conversions

Option 0: baseline scenario retaining the existing rules on employee participation in the Cross-Border Mergers Directive and with no EU level employee participation rules for cross-border divisions and cross-border conversions. Annex 10 to the IA gives a brief overview of employee participation mechanisms in the Member States.

Option 1: applying the existing rules on employee participation in boards for cross-border mergers, set out in Council Directive 2001/86/EC, also to cross-border divisions and cross-border conversions. Currently, the rules on cross-border mergers lay down that companies that are subject to employee participation must either enter into negotiations with employees to determine specific rules of employee participation or choose to apply standard rules.

Option 2 (**preferred option**): build on option 1 by amending the existing cross-border merger rules to add a number of safeguards for employees, while also providing specific measures for employees in cross-border divisions and cross-border conversions.

#### Creditor protection

Option 0: baseline scenario retaining the existing provisions on creditor protection in the Cross-Border Mergers Directive, which do not provide any harmonised creditor protection rules but only require Member States to provide for creditor protection leaving the details to national law. No EU rules currently exist for creditor protection in cross-border divisions and cross-border conversions.

Option 1: modification of existing cross-border merger rules and new rules provided for cross-border divisions and conversions to achieve a set of similar harmonised rules for creditor protection in cross-border, mergers, divisions and conversions. These new rules would build on existing creditor protection mechanisms in national laws. Member States would not be able to provide any other safeguards other than those in the harmonised set of EU rules.

Option 2 (**preferred option**): same harmonised rules as option 1, but Member States would be able to provide for additional safeguards at their discretion.

#### Minority shareholder protection

Option 0: baseline scenario retaining the existing provisions on minority shareholder protection for cross-border mergers and retaining the current situation with no EU rules for cross-border divisions and conversions.

Option 1: building on the existing rules for cross-border mergers and creating equivalent protection in cases of cross-border divisions and conversions to achieve a substantive harmonisation of protection of minority shareholders for cross-border mergers, divisions and conversions. Member States would not be able to introduce additional safeguards.

Option 2 (**preferred option**): same harmonised rules as option 1, but Member States would be able to provide for additional safeguards.

#### Cross-border conversions – risk of abuse

Option 0: baseline scenario with no EU rules, with the situation regulated by divergent national rules, where they exist, and by case-law of the Court of Justice of the European Union.

Option 1 (**preferred option**): introduction of rules and procedures according to which Member States would need to assess on a case-by-case basis whether the cross-border conversion in question constitutes an artificial

arrangement aimed at obtaining undue tax advantages or unduly prejudicing the rights of employees, minority shareholders or employees.

#### Policy issue 5: Conflict of law rules

Connecting factor for determining the law applicable to a company's formation and internal functioning

Option 0: baseline scenario with no EU rules and with national conflict of law rules continuing to apply. Annex 7 to the IA gives an overview of the situation in Member States with regard to questions of seat and connecting factors.

Option 1: harmonised connecting factor on the basis of the incorporation theory (law applicable to a company is the law of the place of its registered seat).

Option 2 (**preferred option**): same as option 1, but with the inclusion also of specific rules pointing to the law of the real seat (the place where the central administration is located) in certain specific situations.

#### Change of applicable law

Option 0: baseline scenario with national applicable laws continuing to apply.

Option 1: uniform general conflict of laws safeguards, but no special rules on change of applicable law.

Option 2 (**preferred option**): same as option 1 but with the inclusion also of specific safeguards in case of a change of applicable law.

#### Conflict of law rules on employee participation

Option 0: baseline scenario with national applicable rules continuing to apply.

Option 1 (**preferred option**): Uniform rules on the national law that is applicable to companies, but excluding labour laws and worker representation.

Option 2: special conflict of laws rule for employee participation.

#### Territorial scope of application

Option 0: baseline scenario with national conflict of laws rules continuing to apply.

Option 1 (**preferred option**): instrument to cover only companies established in the EU.

Option 2: universal application, covering also companies established in third countries.

## Scope of the impact assessment

All of the options mentioned above are assessed individually for (i) their effectiveness in cutting unnecessary costs and burdens for companies, (ii) their effectiveness in offering cross-border protection for other stakeholders and third parties, (iii) their efficiency in relation to the compliance costs they generate for companies, and (iv) their impacts on Member States including on the national legal systems. The global analysis of the package of preferred options examines the overall economic impact, the impacts on SMEs, social impacts in matters relating to social rights, fraud and access to information, the impact on employees, creditors and minority shareholders, the impact on tax and state aid rules and other related policies, and the impact on fundamental rights and data protection. The IA also analyses the interlinkages between the five different policy issues.

## Subsidiarity / proportionality

The IA deals with subsidiarity and proportionality in Section 1.11 'Added value of EU action' and in Section 1.18 'Subsidiarity and proportionality of options'. The IA argues that the current situation, and attendant

problems, are 'mainly caused by divergent national rules, lack of appropriate rules or the need to modernise EU rules'. The IA continues that 'it is highly unlikely that [Member States] could introduce sufficiently similar rules and procedures to enable fully online cross-border registration, divisions or conversions of companies, to ensure smooth carrying out of such acts across the EU or to remove legal uncertainty created by divergent national conflict of laws rules'. It considers it equally unlikely that the Member States acting alone would set up safeguards for stakeholders in cross-border situations (IA, p. 39).

Having argued that the current situation cannot be adequately addressed by action at Member State level, the IA further justifies the need for EU action by referring to the repeated pronouncements by the European Court of Justice that the differences in national legislation are 'problems which are not resolved by the Treaty rules concerning freedom of establishment but would have to be dealt with by legislation or conventions'.<sup>13</sup> The IA also highlights that many stakeholders have expressed their view that the areas falling within its scope should be regulated by an EU instrument. In this regard, apart from the stakeholder consultation activities conducted, the IA mentions a letter received by the Commission from six Member States 'specifically calling for an EU instrument on conversions' (IA, p. 28).

The deadlines for submission of reasoned opinions by national parliaments with regard to respect of the principle of subsidiarity were 19 and 20 July 2018 respectively for the two proposals; no national parliament had issued a reasoned opinion by those dates.

### Budgetary or public finance implications

The explanatory memoranda of the proposals state that there are no budgetary implications for the EU budget. With regard to the Member States the IA and the explanatory memoranda note that in respect of the proposal on cross-border conversions, mergers and divisions Member States would have to bear costs for the introduction of legislative rules and the introduction of scrutiny procedures. In respect of the proposal on the use of digital tools and processes in company law, Member States would have to bear the costs of adapting their IT systems to support the new provisions. Member States would also have to bear the reduction in revenue from data that was previously made available at a fee and would now be provided free of charge. These costs would be set off to some extent by savings in time and resources. The extent of budgetary implications for Member States would vary according to the degree to which the Member States' current rules and procedures differ from the proposals.

### SME test / Competitiveness

The impacts on SMEs are consistently considered throughout the IA and Annex 11 to the IA produces a summary of the results of the SME test. Competitiveness is not directly analysed in the assessment of impacts, but it is a theme that underlies the analysis. In summing up the combined impact of the preferred options, the IA claims that the increased efficiency and better adaptability of companies to market realities that the preferred options would bring would, amongst other things, have a positive impact on the competitiveness of the EU (IA, p. 90).

### Simplification and other regulatory implications

The IA is at pains to point out how the objectives, the policy options and the proposals are coherent with and even build upon and further the objectives of existing EU policies and legislation, and of pending legislative proposals (such as on the single digital gateway).

### Quality of data, research and analysis

The IA is based upon a number of publicly accessible external studies and analysis performed for the Commission since 2013 and on other available data and studies, producing an assessment that combines to good effect qualitative analysis and quantitative analysis based on data, assumptions and estimations. Annex 8 outlines the methodology of key assumptions with regard to the assessment on the policy issue of cross-border divisions and conversions. Annex 9 to the IA gives an account of the data and methods used for calculating the potential savings that companies could make with new rules in respect of online registration and the multiple submission of the same information by companies. The assessments, assumptions and estimates appear to be based on sound research and analysis, with clear acknowledgement of the limitations of the available data and of the estimations.

## Stakeholder consultation

The IA identifies the stakeholders affected by the problem and assesses what impact the different policy options have on the different stakeholders. Annex 3 gives an overview of the stakeholders affected and how they are impacted. Annex 2 gives an outline of the stakeholder consultation strategy conducted in connection with the IA in line with the Commission's [Better Regulation Guidelines](#). Amongst the stakeholder consultation activities conducted was an online public consultation entitled 'Company law upgraded: rules on digital solutions and efficient cross-border operations'. The consultation period was between 10 May 2017 and 6 August 2017. 207 responses were received from various stakeholder groups, including national and regional public authorities, business organisations, the notarial profession, trade unions, private businesses, national business registers, legal academics and private individuals. Other open public consultations were held in 2015, on cross-border mergers and division; in 2013, on the cross-border transfers of registered offices of companies; and in 2012, to assess the key interests of stakeholders in European company law and determine where the future priorities of EU company law should lie. Other stakeholder consultation activities were targeted consultations through expert groups, meetings with interest groups and conferences. Stakeholder views are reflected throughout the IA.

## Monitoring and evaluation

The IA outlines how the Commission intends to monitor the implementation of the proposals, first by following the transposition and implementation process by the Member States, while also providing assistance and guidance, and secondly by monitoring the effects of the proposals, in particular the extent to which they meet the objectives identified in the IA. The IA establishes two sets of indicators: one to evaluate the extent of cost-cutting and burden-cutting for companies, and another to evaluate the extent of protection afforded to other stakeholders.

According to the IA and the proposals, evaluation will be performed through an evaluation report by the Commission to be issued five years after the end of the transposition period.

## Commission Regulatory Scrutiny Board

The Commission's Regulatory Scrutiny Board (RSB) initially issued a [negative opinion](#) on a draft version of the IA on 13 October 2017. Following the submission of a revised version, the RSB issued a [positive opinion](#) with reservations on 7 November 2017.

In its second opinion, the RSB acknowledges the substantial improvements made to the IA in response to the recommendations it had made in its first opinion, but points out that it still contains 'significant shortcomings that need to be addressed'. In its second opinion the RSB observes that the IA should take into account the *Polbud* judgement<sup>14</sup> delivered by the CJEU in the intervening period between the issuing of the first and second RSB opinions. Other observations are that the IA does not explain the links between the five policy issues, that it needs to clarify certain aspects on the practical implementation of the policy options and that it should clarify the criteria for the selection of the preferred policy options. The final version of the IA appears to address these issues to some extent, though it still seems rather challenging to grasp the practical implementation of the policy options from the description offered in the IA.

## Coherence between the Commission's legislative proposal and IA

With regard to the policy areas concerning the use of digital tools and processes throughout a company's lifecycle and cross-border operations the proposals appear to follow the recommendations expressed in the IA. In respect of the policy issue of conflict of laws the IA states that the appropriate legal instrument to implement the preferred options is a regulation. However, the explanatory memorandum accompanying the proposal relating to cross-border conversions, mergers and divisions explains that 'given that the instances in which clarity is most needed, namely specific issues related to the law applicable to limited liability companies in cross-border situations, will be addressed in the proposed legislation on cross-border conversions, mergers and divisions, it was decided not to propose a specific legislative act on conflict-of-laws at this point in time.' (COM(2018) 241, p. 20).

## Conclusions

The IA seems to cope reasonably well with the complexity engendered by its very wide scope. However, the breadth of scope does create some challenges for the reader, in particular in understanding the practical implications of the policy options. Ultimately, however, the IA appears to make a persuasive case in support of the regulatory action proposed.

## ENDNOTES

- <sup>1</sup> European Parliament resolution of 16 May 2017 on the EU eGovernment Action Plan 2016-2020 ([P8\\_TA\(2017\)0205](#)).
- <sup>2</sup> European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats. An earlier call had been made in European Parliament [resolution](#) of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company ([P7\\_TA\(2012\)0019](#)).
- <sup>3</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions ([P8\\_TA\(2017\)0248](#)).
- <sup>4</sup> See [Outcome of the Council Meeting](#), 6715/15, 2-3 March 2015 and [Council Conclusions on Single Market Policy](#), 6197/15, 2-3 March 2015.
- <sup>5</sup> Ministerial Declaration on eGovernment signed by the Member States and EFTA countries at the ministerial meeting during the Estonian Presidency of the Council of the EU on 6 October 2017.
- <sup>6</sup> Communication on upgrading the single market: more opportunities for people and business, [COM\(2015\) 550](#), European Commission, October 2015.
- <sup>7</sup> Communication on the Commission work programme 2017: Delivering a Europe that protects, empowers and defends, [COM\(2016\) 710](#), European Commission, October 2016
- <sup>8</sup> Communication on Europe's next leaders: the start-up and scale-up initiative, [COM\(2016\) 733](#), European Commission, November 2016.
- <sup>9</sup> Proposal for a regulation on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, [COM\(2017\) 256](#), European Commission, 2017.
- <sup>10</sup> [Directive 2012/17/EU](#) of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers.
- <sup>11</sup> [Directive 2005/56/EC](#) of 26 October 2005 on cross-border mergers of limited liability companies.
- <sup>12</sup> [Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies](#), Ernst & Young, 2018.
- <sup>13</sup> Judgment in Case C-208/00 – *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, European Court of Justice, November 2002, para. 69. See also judgement in Case C-81/87 – *The Queen v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC*, and judgement in Case C-210/06 *Cartesio Oktató és Szolgáltató bt*.
- <sup>14</sup> Judgment in [Case C-106/16 – Polbud – Wykonawstwo sp. z o.o.](#), Court of Justice of the European Union, October 2017. It states that a general requirement of winding-up of companies before carrying out a cross-border conversion is an unjustified restriction to the freedom of establishment.

This briefing, prepared for the Committee on Legal Affairs (JURI), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

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