



2018/0114(COD)

19.7.2018

DRAFT OPINION

of the Committee on Economic and Monetary Affairs

for the Committee on Legal Affairs

on the 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)0241 – C8-0167/2018 – 2018/0114(COD))

Rapporteur for opinion: Olle Ludvigsson

PA_Legam

SHORT JUSTIFICATION

The proposal to amend Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions aims to foster cross-border mobility for companies while, at the same time, offer company stakeholders adequate protection in order to safeguard the fairness of the Single Market.

The rapporteur agrees that there is a need to stimulate cross-border movement of companies in the Single Market and by doing this making better use of the potential of the Single Market. However, it is essential that any measures aimed at facilitating cross-border movement go hand in hand with strong safeguards, preventing abuses and fictitious transfers for the purpose of social or fiscal dumping.

The proposal from the European Commission is important, especially following the Polbud-ruling from the European Court of Justice, and gives a good base for further discussion. However, within the remit of the ECON Committee, it is clear there is room for simplifications and further clarifications in the proposal, while at the same time strengthening safeguards and closing any potential loopholes, making sure that the new directive does not facilitate for instance circumvention of taxation and social security obligations.

In this respect, the rapporteur proposes to insert a definition for determining artificial arrangements. In the absence of a clear definition, there is a risk that Member States interpret the rules in an inconsistent way. It is important to avoid that the definition is contestable in order to prevent the set-up of more letterbox companies. Moreover, the proposal is also amended by extending the concept of artificial arrangements to cross-border mergers. This is about ensuring harmonised rules for the different cross-border operations as well as closing a potential loophole and create greater clarity.

Linked to artificial arrangements, there is also an amendment in Article 86c introducing the requirement of a real economic connection with the State of registration, a genuine link, in order to further strengthen legal certainty and prevent the abuse of the freedom of establishment with regard to for instance tax avoidance.

The proposal from the European Commission foresees in Article 86g an examination by an independent expert. This is an important provision, however, the examination should be undertaken as an exercise of a public authority. There are therefore several amendments addressing this issue, changing the concept from an examination by an independent expert to an examination by the competent authority.

The proposal does not foresee any possibilities for ex-post monitoring and enforcement. This is important, considering that it might be problematic to detect or discover artificial arrangements in advance. There is therefore an amendment introducing the concept of ex-post monitoring for cross-border conversions, including sanctions where requirements are not met.

Finally, the rapporteur is not convinced of including cross-border divisions in the proposal. The division proposal only covers a limited range of divisions, that is splitting up the firm into two or more newly created companies. There are doubts about the need for divisions to be included, as well as concerns about the risks and dangers of doing it, and it is therefore suggested to delete this part from the proposal.

AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The Directive (EU) 2017/1132 of the European Parliament and of the Council⁴¹ regulates cross-border mergers of limited liability companies. These rules represent a significant milestone in improving the functioning of the Single Market for companies and firms and to exercise the freedom of establishment. However, evaluation of these rules shows that there is a need for modifications in cross-border merger rules. Furthermore, it is appropriate to provide for rules regulating cross-border conversions **and divisions**.

⁴¹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

Amendment

(1) The Directive (EU) 2017/1132 of the European Parliament and of the Council⁴¹ regulates cross-border mergers of limited liability companies. These rules represent a significant milestone in improving the functioning of the Single Market for companies and firms and to exercise the freedom of establishment **and provide strong protection for stakeholders**. However, evaluation of these rules shows that there is a need for modifications in cross-border merger rules. Furthermore, it is appropriate to provide for rules regulating cross-border conversions.

⁴¹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

Or. en

Amendment 2

Proposal for a directive

Recital 6

Text proposed by the Commission

(6) It is appropriate therefore to provide procedural and substantive rules on cross-border conversions which would **contribute to the abolition of restrictions on** freedom of establishment and **provide** at

Amendment

(6) It is appropriate therefore to provide procedural and substantive rules on cross-border conversions which would **facilitate** freedom of establishment and at the same time **provide strong** protection for

the same time *adequate and proportionate* protection for stakeholders such as employees, creditors and minority shareholders.

stakeholders such as employees, creditors and minority shareholders.

Or. en

Amendment 3

Proposal for a directive

Recital 7

Text proposed by the Commission

(7) The right to convert an existing company formed in a Member State into a company governed by another Member State may *in certain* circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors', minority shareholders' rights or rules on employees participation. In order to combat such possible abuses, a general principle of Union law, Member States are required to ensure that companies do not use the cross-border conversion procedure in order to create artificial arrangements *aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In so far as it constitutes a* derogation from a fundamental freedom, the fight against abuses must be interpreted strictly and be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approach by Member States whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.

Amendment

(7) The right to convert an existing company formed in a Member State into a company governed by another Member State may *not under any* circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors', minority shareholders' rights or rules on employees participation. In order to combat such possible abuses, a general principle of Union law, Member States are required to ensure that companies do not use the cross-border conversion procedure in order to create artificial arrangements. *The procedure set out in this Directive aims at protecting the discretion of the Member States to impose tax and employee representation obligations on companies. Member States should be allowed to block conversions and mergers where these would amount to artificial arrangements entered into by companies with the intention of evading future obligations resulting from national rules on taxation and employee participation. Any* derogation from a fundamental *right* or freedom, the fight against abuses must be interpreted strictly and be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approach by Member States

whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.

Or. en

Amendment 4

Proposal for a directive Recital 7 a (new)

Text proposed by the Commission

Amendment

(7 a) This Directive does not exert downward pressure on national corporate tax rates, national taxation systems and mandatory board-level employee representation, which is fundamental to many Member States' systems of corporate governance. It aims at facilitating freedom of establishment conditioned by a genuine economic activity in the destination Member State. Where a company cannot prove a genuine economic activity in the destination Member State, or where the intention is to reduce tax or evade board-level employee representation, a Member State may rule that the conversion constitutes an artificial arrangement and may decide not to authorise it.

Or. en

Amendment 5

Proposal for a directive Recital 7 b (new)

Text proposed by the Commission

Amendment

(7 b) This Directive aims to protect abuse of the company pension funds and

guarantee rights to representatives of the company pension funds to submit their views with regard to a cross-border conversion or a cross-border merger.

Or. en

Amendment 6

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) To allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border conversion, the company should disclose the draft terms of the cross-border conversion containing the most important information about the proposed cross-border conversion, including the envisaged new company form, the instrument of constitution and the proposed timetable for the conversion. Members, creditors and employees of the company carrying out the cross-border conversion should be notified in order that they can submit comments with regard to the proposed conversion.

Amendment

(10) To allow all stakeholders' legitimate interests to be taken into account in the procedure governing a cross-border conversion, the company should disclose the draft terms of the cross-border conversion containing the most important information about the proposed cross-border conversion, including the envisaged new company form, the instrument of constitution and the proposed timetable for the conversion. Members, creditors, ***company pension funds, trade unions*** and employees of the company carrying out the cross-border conversion should be notified in order that they can submit comments with regard to the proposed conversion.

Or. en

Amendment 7

Proposal for a directive

Recital 12

Text proposed by the Commission

(12) In order to provide information to its employees, the company carrying out the cross-border conversion should prepare a report explaining the implications of the proposed cross-border conversion for

Amendment

(12) In order to provide information to its employees, the company carrying out the cross-border conversion should prepare a report explaining the implications of the proposed cross-border conversion for

employees. The report should explain in particular the implications of the proposed cross-border conversion on the safeguarding of the jobs of the employees, whether there would be any material change in the employment relationships and the locations of the companies' places of business and how each of these factors would relate to any subsidiaries of the company. This requirement should not however apply where the only employees of the company are in its administrative organ. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Directive 2002/14/EC of the European Parliament and of the Council⁴³ or Directive 2009/38/EC of the European Parliament and of the Council⁴⁴.

⁴³ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

⁴⁴ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, p. 28).

employees. The report should explain in particular the implications of the proposed cross-border conversion on the safeguarding of the jobs of the employees, whether there would be any material change in the employment relationships, *including collective agreements*, and the locations of the companies' places of business and how each of these factors would relate to any subsidiaries of the company. This requirement should not however apply where the only employees of the company are in its administrative organ. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Directive 2002/14/EC of the European Parliament and of the Council⁴³ or Directive 2009/38/EC of the European Parliament and of the Council⁴⁴.

⁴³ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L 80, 23.3.2002, p. 29).

⁴⁴ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, p. 28).

Or. en

Amendment 8

Proposal for a directive Recital 13

(13) In order to assess the accuracy of the information contained in the draft terms of conversion and in the reports addressed to the members and employees and to provide factual elements necessary to assess whether the proposed conversion constitutes an artificial arrangement, ***an independent expert report*** should be required ***to be prepared in order*** to assess the proposed cross-border conversion. In ***order to secure the independence of the expert, the expert should be appointed by the competent authority, following an application by the company.*** In this context, the ***expert report*** should present all relevant information to enable the competent authority in the departure Member State to take an informed decision as to whether or not to issue the pre-conversion certificate. To this end, the ***expert*** should be able to obtain all the relevant company information and documents and carry out all necessary investigations in order to gather all the evidence required. The ***expert*** should use information, in particular net turnover and profit or loss, number of employees and the composition of balance sheet collected by the company in view of the preparation of financial statements in accordance with Union law and the law of Member States. However, in order to protect any confidential information, including business secrets of the company, such information should not ***form part of the expert's final report which itself would*** be publically available.

(13) In order to assess the accuracy of the information contained in the draft terms of conversion and in the reports addressed to the members and employees and to provide factual elements necessary to assess whether the proposed conversion constitutes an artificial arrangement, ***the competent authority*** should be required to assess the proposed cross-border conversion. In this context, the ***company*** should present all relevant information to enable the competent authority in the departure Member State to take an informed decision as to whether or not to issue the pre-conversion certificate. To this end, the ***competent authority*** should be able to obtain all the relevant company information and documents and carry out all necessary investigations in order to gather all the evidence required. The ***competent authority of the departure Member State may also in this regard ask questions to the competent authority in the Member State of destination.*** The ***competent authority*** should use information, in particular net turnover and profit or loss, number of employees, ***the place where social security payments or tax obligations are due on profits generated*** and the composition of balance sheet collected by the company in view of the preparation of financial statements in accordance with Union law and the law of Member States. However, in order to protect any confidential information, including business secrets of the company, such information should not be ***made*** publically available, ***but should nevertheless be at the disposal, under confidentiality requirements, to the competent authority as well as employee representatives.***

Or. en

Amendment 9

Proposal for a directive Recital 14

Text proposed by the Commission

(14) With a view to avoiding disproportionate costs and burdens for smaller companies carrying out the cross-border conversion, micro and small enterprises, as defined in the Commission Recommendation 2003/361/EC⁴⁵, should be exempted from the requirement to produce an independent expert report. However, these companies can resort to an independent expert report to prevent litigation costs with creditors.

⁴⁵ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

Amendment

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Or. en

Amendment 10

Proposal for a directive Recital 22

Text proposed by the Commission

(22) The issue of the pre-conversion certificate by the departure Member State should be scrutinised to ensure the legality of the cross-border conversion of the company. The competent authority of the departure Member State should decide on the issue of the pre-conversion certificate within **one month** of the application by the company, unless it has **serious** concerns as to the existence of an artificial arrangement **aimed at obtaining undue tax advantages or unduly prejudicing the legal or**

Amendment

(22) The issue of the pre-conversion certificate by the departure Member State should be scrutinised to ensure the legality of the cross-border conversion of the company. The competent authority of the departure Member State should decide on the issue of the pre-conversion certificate within **two months** of the application by the company, unless it has concerns as to the existence of an artificial arrangement. In such a case, the competent authority should carry out an in-depth assessment.

contractual rights of employees, creditors or members. In such a case, the competent authority should carry out an in-depth assessment. However, this in-depth assessment should not be carried out systematically, but it should be conducted on a case-by-case basis, where there are ***serious*** concerns as to the existence of an artificial arrangement. For their assessment, competent authorities should take into account at least a number of factors laid down in this Directive which however should be only considered as indicative factors in the overall assessment and not be considered in isolation. In order not to burden companies with an overly lengthy procedure, this in-depth assessment should in any event be concluded within ***two*** months of informing the company that the in-depth assessment will be carried out.

However, this in-depth assessment should not be carried out systematically, but it should be conducted on a case-by-case basis, where there are concerns as to the existence of an artificial arrangement. For their assessment, competent authorities should take into account at least a number of factors laid down in this Directive which however should be only considered as indicative factors in the overall assessment and not be considered in isolation. In order not to burden companies with an overly lengthy procedure, this in-depth assessment should in any event be concluded within ***four*** months of informing the company that the in-depth assessment will be carried out.

Or. en

Amendment 11

Proposal for a directive Recital 23

Text proposed by the Commission

(23) After having received a pre-conversion certificate, and after verifying that the incorporation requirements in the destination Member State are fulfilled, the competent authorities of the destination Member State should register the company in the business register of that Member State. Only after this registration should the competent authority of the departure Member State strike the company off its own register. It should ***not*** be possible for the competent authority of the destination Member State to ***challenge*** the accuracy of the information provided by the pre-conversion certificate. As a consequence of the cross-border conversion, the converted company should retain its legal personality,

Amendment

(23) After having received a pre-conversion certificate, and after verifying that the incorporation requirements in the destination Member State are fulfilled, the competent authorities of the destination Member State should register the company in the business register of that Member State. Only after this registration should the competent authority of the departure Member State strike the company off its own register. It should be possible for the competent authority of the destination Member State to ***contact and submit questions to the competent authority in the Member State of departure as to*** the accuracy of the information provided by the pre-conversion certificate, ***in particular***

its assets and liabilities and all rights and obligations, including rights and obligations arising from contracts, acts or omissions.

to avoid an artificial arrangement. The competent authority of the Member State of departure shall reply to such questions without undue delay. As a consequence of the cross-border conversion, the converted company should retain its legal personality, its assets and liabilities and all rights and obligations, including rights and obligations arising from contracts, acts or omissions.

Or. en

Amendment 12

Proposal for a directive Recital 26

Text proposed by the Commission

(26) The evaluation of the implementation of the cross-border merger rules in Member States has shown that the number of cross-border mergers in the Union has significantly increased. However, this evaluation has also revealed certain shortcomings in relation specifically to *creditor protection and shareholder protection* as well as to the lack of simplified procedures which impede the full effectiveness and efficiency of those cross-border merger rules.

Amendment

(26) The evaluation of the implementation of the cross-border merger rules in Member States has shown that the number of cross-border mergers in the Union has significantly increased. However, this evaluation has also revealed certain shortcomings in relation specifically to *the protection of creditors, shareholders and employees* as well as to the lack of simplified procedures which impede the full effectiveness and efficiency of those cross-border merger rules.

Or. en

Amendment 13

Proposal for a directive Recital 36

Text proposed by the Commission

(36) *The existing Union law does not provide for a legal framework for cross-border divisions of companies and firms,*

Amendment

deleted

since Directive (EU) 2017/1132 only provides rules in Chapter III for domestic divisions of public limited companies.

Or. en

Amendment 14

Proposal for a directive Recital 37

Text proposed by the Commission

Amendment

(37) The European Parliament has called upon the Commission to adopt harmonised rules on cross-border divisions. This harmonised legal framework would further contribute to the removal of restrictions on the freedom of establishment whilst at the same time providing adequate protection for stakeholders such as employees, creditors and members.

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Or. en

Amendment 15

Proposal for a directive Recital 38

Text proposed by the Commission

Amendment

(38) This directive lays down rules on cross-border divisions, both for partial and full divisions, but only through the formation of new companies. However, this directive does not provide a harmonised framework for cross-border divisions in which a company transfers assets and liabilities to more than one existing company as these instances had been viewed as being very complex, requiring the involvement of competent authorities from several Member States

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and entailing additional risks in terms of fraud and the circumvention of those rules.

Or. en

Amendment 16

Proposal for a directive Recital 39

Text proposed by the Commission

Amendment

(39) *In case of a cross-border division involving newly formed recipient companies, those recipient companies, which are governed by the laws of Member States other than those of the Member State of the company being divided, should be required to comply with the incorporation requirements of those Member States. Such conditions include those related to the disqualification of directors.* **deleted**

Or. en

Amendment 17

Proposal for a directive Recital 40

Text proposed by the Commission

Amendment

(40) *The right of companies to carry out a cross-border division may in certain circumstances be used for abusive purposes such as for the circumvention of labour standards, social security payments, tax obligations, creditors' or members' rights or rules on employees participation. In order to combat such abuses, as a general principle of Union law, Member States are required to ensure that companies do not use the cross-* **deleted**

border division procedure in order to create artificial arrangements aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In so far as it constitutes a derogation from a fundamental freedom, the fight against abuses must be interpreted strictly and must be based on an individual assessment of all relevant circumstances. A procedural and substantive framework which describes the margin of discretion and allows for the diversity of approaches by Member States whilst at the same time setting out the requirements to streamline the actions to be taken by national authorities to fight abuses in conformity with Union law should be laid down.

Or. en

Amendment 18

Proposal for a directive

Recital 41

Text proposed by the Commission

Amendment

(41) Given the complexity of cross-border divisions and the multitude of the interests concerned, it is appropriate to provide for an ex-ante control in order to create legal certainty. To that effect, a structured and multi-layered procedure should be set out whereby both the competent authorities of the Member State of the company being divided and of the Member State of the recipient companies ensure that a decision on the approval of a cross-border division is taken in a fair, objective and non-discriminatory manner on the basis of all relevant elements and by taking into account all legitimate public interests, in particular the protection of employees, shareholders and creditors.

deleted

Amendment 19**Proposal for a directive****Recital 42**

Text proposed by the Commission

Amendment

(42) *To allow all stakeholders' legitimate interests to be taken into account, the company being divided should disclose the draft terms of the division containing the most important information about the proposed cross-border division, including the envisaged the exchange ratio of securities or shares, the instruments of constitution of the recipient companies and the proposed timetable for the cross-border division. Members, creditors and employees of the company carrying out the cross-border division should be notified that they can submit comments with regard to the division.*

deleted

Amendment 20**Proposal for a directive****Recital 43**

Text proposed by the Commission

Amendment

(43) *In order to provide information to its members, the company being divided should prepare a report. The report should explain and substantiate the legal and economic aspects of the proposed cross-border division, in particular explaining the implications of the cross-border division for members with regard to the future business of the company and the management organs' strategic plan. It should also include explanations about*

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the exchange ratio, where applicable, the criteria to determine the allocation of shares and potential remedies available to members, where they do not agree with the decision to carry out a cross-border division.

Or. en

Amendment 21

Proposal for a directive Recital 44

Text proposed by the Commission

Amendment

(44) In order to provide information its employees, the company being divided should prepare a report explaining the implications of the proposed cross-border division for employees. The report should explain in particular the implications of the proposed cross-border division on the safeguarding of the jobs of the employees, whether there would be any material change in the conditions of employment and the locations of the companies' places of business, and how each of these factors would relate to any subsidiaries of the company. The provision of the report should be without prejudice to the applicable information and consultation proceedings instituted at national level following the implementation of Directives 2001/23/EC, 2002/14/EC or 2009/38/EC.

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Or. en

Amendment 22

Proposal for a directive Recital 45

(45) In order to ensure the accuracy of the information contained in the draft terms of division and in the reports addressed to the members and employees and to provide factual elements necessary to assess whether the proposed division constitutes an artificial arrangement which could not be authorised, an independent expert report to assess the division plan should be required to be prepared. In order to secure the independence of the expert, the expert should be appointed by the competent authority, following an application by the company. In this context, the expert report should present all relevant information to enable the competent authority of the Member State of the company being divided to take an informed decision as to whether or not to issue the pre-division certificate To this end, the expert should be able to obtain all the relevant company information and documents and carry out all necessary investigations in order to gather all the evidence required. The expert should use information, in particular net turnover and profit or loss, number of employees and the composition of balance sheet collected by the company in view of the preparation of financial statements in accordance with Union law and the law of Member States. However, in order to protect any confidential information, including business secrets of the company, such information should not form part of the expert's final report which itself would be publically available.

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Or. en

Amendment 23

Proposal for a directive Recital 46

Text proposed by the Commission

Amendment

(46) *With a view to avoiding disproportionate costs and burdens for smaller companies carrying out cross-border division, micro and small enterprises as defined in the Commission Recommendation 2003/361/EC of 6 May 2003 should be exempted from the requirement to have produce an independent expert.*

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Or. en

Amendment 24

Proposal for a directive Recital 47

Text proposed by the Commission

Amendment

(47) *On the basis of the draft terms of the cross-border division and the reports, the general meeting of the members of the company being divided, should decide on whether or not to approve those draft terms. It is important that, the majority requirement for such a vote should be sufficiently high in order to ensure that the decision to divide is a collective one.*

deleted

Or. en

Amendment 25

Proposal for a directive Recital 48

Text proposed by the Commission

Amendment

(48) It is appropriate that members who held voting rights and who did not vote to approve the draft terms of the cross-border division and those members without voting rights, who could not present their position, should be afforded the right to exit the company. Those members should be able to leave the company and receive cash compensation for their shares equivalent to the value of their shares. Furthermore, they should have a right to challenge the calculation and adequacy of that cash compensation offered and also the share exchange ratio where they wish to remain members of any of the recipient companies before a court. As part of those proceedings, the court should be able to order any company involved in the cross-border division either to pay additional cash compensation or to issue additional shares.

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Or. en

Amendment 26

Proposal for a directive Recital 49

Text proposed by the Commission

Amendment

(49) The company being divided should propose in the draft terms adequate means to protect creditors in view of the cross-border division. In addition, in order to strengthen the protection of creditors in case of insolvency following the cross-border division, Member States should be allowed to require the company to make a declaration stating that it is not aware of any reason why the converted company should not be able to meet its liabilities. Member States should be able

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to make management organ personally liable for the accuracy of the statement. Since legal traditions vary among Member States with regard to solvency declarations and their possible consequences, it should be up to Member States to draw appropriate consequences of false or misleading declarations, including sanctions and liabilities in compliance with Union law.

Or. en

Amendment 27

Proposal for a directive Recital 50

Text proposed by the Commission

Amendment

(50) In order to guarantee the appropriate protection of creditors in cases where they are not satisfied with the protection offered by the company in the draft terms of the cross-border division, creditors who are prejudiced by the cross-border division may apply to the competent judicial or administrative authority of the Member State of the company being divided for the safeguards they consider adequate. In order to facilitate the assessment of prejudice, certain presumptions should be laid down whereby creditors would be deemed not to be prejudiced by a cross-border division where the risk of loss to a creditor is remote. A presumption should arise where an independent expert report concludes that there is no reasonable likelihood that the creditors would be prejudiced or where creditors are offered a right to payment against the company resulting from the division or against a third party guarantee of equivalent value to the creditor's original claim and which can be brought in the same jurisdiction jurisdiction as the original claim. The

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creditor protection provided for in this Directive should be without prejudice to national laws of the Member State of the company being divided concerning payment to public bodies, including taxation or social security contributions.

Or. en

Amendment 28

Proposal for a directive Recital 51

Text proposed by the Commission

Amendment

(51) To ensure the proper allocation of tasks among Member States and an efficient and effective ex-ante control of cross-border divisions, the competent authority of the Member State of the company being divided should have the power to issue a pre-division certificate without which the authorities of the Member States of the recipient companies should not be able to complete the cross-border-division procedure.

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Or. en

Amendment 29

Proposal for a directive Recital 52

Text proposed by the Commission

Amendment

(52) The issue of the pre-division certificate by the Member State of the company being divided should be scrutinised to ensure the legality of the cross-border division. The competent authority should decide whether to issue a pre-division certificate within one month of the application by the company has

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been submitted, unless it has serious concerns as to the existence of an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or members. In such a case, the competent authority should carry out an in-depth assessment. However, this in-depth assessment should not be carried out systematically but it should be conducted on a case-by-case basis where there are serious concerns as to the existence of an artificial arrangement. For their assessment, competent authorities should take into account at least a number of factors laid down in this Directive which however should be only considered as indicative factors in the overall assessment and not be considered in isolation. In order not to burden companies with an overly lengthy procedure, this in-depth assessment should in any event be concluded within two months informing the company that the in-depth assessment will be carried out.

Or. en

Amendment 30

Proposal for a directive Recital 53

Text proposed by the Commission

Amendment

(53) After having received a pre-division certificate, and after verifying that the incorporation requirements of the Member State of the recipient company or companies are fulfilled, the authorities of the Member States of the recipient companies should register the companies in the business registers of that Member State. Only after this registration should the competent authority of the Member State of the company being divided strike

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the company off its own register. The accuracy of the information provided by the pre-division certificate cannot be challenged by the competent authorities of the Member States of the recipient companies.

Or. en

Amendment 31

Proposal for a directive Recital 54

Text proposed by the Commission

Amendment

(54) As a consequence of the cross-border division, the assets and liabilities of the company being divided shall be transferred to the recipient companies in accordance with the allocation specified in the draft terms of division and the members of the company being divided shall become members of the recipient companies or remain members of the company being divided or shall become members of both.

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Or. en

Amendment 32

Proposal for a directive Recital 55

Text proposed by the Commission

Amendment

(55) In order to ensure that employee participation is not unduly prejudiced as a result of the cross-border division where the company carrying out the cross-border division is operating under an employee participation system, the companies resulting from the division should be obliged to take a legal form

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allowing for the exercise of participation, including through the presence of representatives of the employees in the appropriate management or supervisory organs of the companies. Moreover, in such a case, a bona fide negotiation between the company and its employees should take place, along the lines of the procedure provided for in Directive 2001/86/EC, with a view to finding an amicable solution reconciling the right of the company to carry out a cross-border division with the employees' rights of participation. As a result of those negotiations, either a bespoke and agreed solution or, in the absence of an agreement, the application of standard rules as set out in the Annex to Directive 2001/86/EC should apply mutatis mutandis. In order to protect either the agreed solution or the application of those standard rules, the company should not be able to remove the participation rights through carrying out subsequent domestic or cross-border conversions, mergers or divisions within 3 years.

Or. en

Amendment 33

Proposal for a directive Recital 56

Text proposed by the Commission

Amendment

(56) In order to prevent the circumvention of the employee participation rights by means of a cross-border division, the company carrying out a division which is registered in the Member State which provides for the employee participation rights, should not be able to perform a cross-border division without first entering into negotiations with its employees or their representatives when the average number of employees

deleted

employed by that company is equivalent to four fifths of the national threshold for triggering such employee participation.

Or. en

Amendment 34

Proposal for a directive Recital 58

Text proposed by the Commission

(58) The provisions of this Directive do not affect the legal or administrative provisions, including the enforcement of tax rules in cross-border conversions, mergers *and divisions*, of national law relating to the taxes of Member States, or its territorial and administrative subdivisions.

Amendment

(58) The provisions of this Directive do not affect the legal or administrative provisions, including the enforcement of tax rules in cross-border conversions *and* mergers, of national law relating to the taxes of Member States, or its territorial and administrative subdivisions.

Or. en

Amendment 35

Proposal for a directive Recital 60

Text proposed by the Commission

(60) Since the objectives of this Directive, to facilitate and regulate cross-border conversions, mergers *and divisions* cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

Amendment

(60) Since the objectives of this Directive, to facilitate and regulate cross-border conversions *and* mergers cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.

Amendment 36**Proposal for a directive****Recital 63**

Text proposed by the Commission

(63) The Commission should carry out an evaluation of this Directive. Pursuant to paragraph 22 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016⁵² that evaluation should be based on the five criteria of efficiency, effectiveness, relevance, coherence and value added and should provide the basis for impact assessments of possible further measures.

⁵² OJ L123, 12.5. 2016, p. 1.

Amendment

(63) The Commission should carry out an evaluation of this Directive. ***The evaluation should in particular examine whether a positive impact has been achieved regarding eliminating artificial and/or harmful arrangements, and its impact on workers' rights. The Commission should consult the European social partners.*** Pursuant to paragraph 22 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016⁵² that evaluation should be based on the five criteria of efficiency, effectiveness, relevance, coherence and value added and should provide the basis for impact assessments of possible further measures.

⁵² OJ L123, 12.5. 2016, p. 1.

Or. en

Amendment 37**Proposal for a directive****Article 1 – paragraph 1 – point -1 (new)**

Directive (EU) No 2017/1132

Title I – Chapter I – Article 1 a (new)

Text proposed by the Commission

Amendment

(-1) In CHAPTER I, the following Article 1a is inserted:

"Article 1a

Interest of the company

The management or administrative organ of a company is responsible for managing the company in the best interest of the company, meaning that it considers the needs of the shareholders, the employees and other stakeholders, with the objective of sustainable value creation. "

Or. en

(<https://eur-lex.europa.eu/legal-content/frn/TXT/?uri=celex:32017L1132>)

Amendment 38

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86b – paragraph 1 – point 6 a (new)

Text proposed by the Commission

Amendment

(6a) ‘artificial arrangement’ means a company structure set up for abusive purposes, such as the circumvention of obligations arising from the legal and contractual rights of employees, creditors, or minority shareholders, the avoidance of rules on employee involvement, of social security payments, or of tax obligations due on profits generated, and that does not carry out a substantive or genuine economic activity supported by staff, equipment, assets and premises, such as, in particular, in the case of a ‘letterbox’ or ‘front’ subsidiary.

Or. en

Amendment 39

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132
Article 86c – paragraph 2 – point a a (new)

Text proposed by the Commission

Amendment

(aa) where there is a suspicion of social fraud or infringement of workers' rights;

Or. en

Amendment 40

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86c – paragraph 2 – point c a (new)

Text proposed by the Commission

Amendment

(ca) where the company has been implicated in tax fraud or tax evasion or engages in the setting up of harmful tax structures;

Or. en

Amendment 41

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86c – paragraph 2 – point c b (new)

Text proposed by the Commission

Amendment

(cb) where any of the directors of the company are subject to disciplinary proceedings linked to their professional activity in the company, including for tax offences or tax crimes, or subject to criminal sanctions in that regard, or have been disqualified as directors in any Member State in which the company has operations;

Amendment 42**Proposal for a directive****Article 1 – paragraph 1 – point 3**

Directive (EU) No 2017/1132

Article 86c – paragraph 3

Text proposed by the Commission

3. Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that 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.***

Amendment

3. Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement. ***The company carrying out the cross-border conversion shall demonstrate on the basis of ascertainable objective factors, that it is actually established and pursues substantive and genuine economic activity in the destination Member State for an indefinite period.***

The company carrying out the cross-border conversion shall be presumed to have an actual establishment and to pursue genuine economic activity in the destination Member State where it can demonstrate that, objectively, it has a permanent establishment in that State, has a management body and is materially equipped to conduct business with third parties so that the latter do not have to deal directly with the parent body, which is abroad, and are able to conduct business with the company at the place of business constituting the company's place of establishment.

Amendment 43

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86d – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) total turnover, total taxable turnover and all tax exemptions and/or deductions received in the last five accounting years;

Or. en

Amendment 44

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86d – paragraph 1 – point d a (new)

Text proposed by the Commission

Amendment

(da) detailed information on the transfer of the central administration or principle place of business;

Or. en

Amendment 45

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86e – paragraph 3

Text proposed by the Commission

Amendment

3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the members not less than two months before the date of the general meeting referred to in Article 86i. That report shall also be made similarly

3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the members not less than two months before the date of the general meeting referred to in Article 86i. That report shall also ***at the same time*** be

available to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves.

made similarly available to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves *and to the company pension funds*.

Where the management or administrative organ of the company carrying out the cross-border conversion receives an opinion from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, and from the company pensions funds, the members shall be informed thereof and that opinion shall be appended to that report.

Or. en

Amendment 46

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86e – paragraph 4

Text proposed by the Commission

Amendment

4. *However, that report shall not be required where all the members of the company carrying out the cross-border conversion have agreed to waive this requirement.*

deleted

Or. en

Amendment 47

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86f – paragraph 2 – point c

Text proposed by the Commission

(c) any material changes in the conditions of employment and in the location of the company's places of business;

Amendment

(c) any material changes in the conditions of employment, **including collective agreements**, and in the location of the company's places of business;

Or. en

Amendment 48

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86f – paragraph 2 – point d

Text proposed by the Commission

(d) whether the factors set out in points (a), (b) and (c) also relate to any subsidiaries of the company.

Amendment

(d) whether the factors set out in points (a), (b) and (c) also relate to any subsidiaries **or branches** of the company.

Or. en

Amendment 49

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86f – paragraph 3

Text proposed by the Commission

3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves not less than two months before the date of the general meeting referred to in Article 86i. That report shall also be made similarly available to the members of the company

Amendment

3. The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the representatives of the employees of the company carrying out the cross-border conversion or, where there are no such representatives, to the employees themselves **and to the company pensions funds** not less than two months before the date of the general meeting referred to in Article 86i. That report shall also be made similarly available to the

carrying out the cross-border conversion.

members of the company carrying out the cross-border conversion.

Or. en

Amendment 50

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86f – paragraph 4

Text proposed by the Commission

4. Where the management or administrative organ of the company carrying out the cross-border conversion receives, *in good time*, an opinion from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, the members shall be informed thereof and that opinion shall be appended to that report.

Amendment

4. Where the management or administrative organ of the company carrying out the cross-border conversion receives an opinion from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law *and from the company pensions funds*, the members shall be informed thereof and that opinion shall be appended to that report.

Or. en

Amendment 51

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – title

Text proposed by the Commission

Examination by *an independent expert*

Amendment

Examination by *the competent authority*

Or. en

Amendment 52

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 1 – subparagraph 1

Text proposed by the Commission

Member States shall ensure that the company carrying out the cross-border conversion applies not less than two months before the date of the general meeting referred to in Article 86i to the competent authority designated in accordance with Article 86m(1), **to appoint an expert to examine and** assess the draft terms of the cross-border conversion and the reports referred to in Articles 86e and 86f, subject to the proviso set out in paragraph 6 of this Article.

Amendment

Member States shall ensure that the company carrying out the cross-border conversion applies not less than two months before the date of the general meeting referred to in Article 86i to the competent authority designated in accordance with Article 86m(1), **for that authority to** assess the draft terms of the cross-border conversion and the reports referred to in Articles 86e and 86f, subject to the proviso set out in paragraph 6 of this Article.

Or. en

Amendment 53

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 1 – subparagraph 2

Text proposed by the Commission

The application for the **appointment of an expert** shall be accompanied by the following:

Amendment

The application for the **assessment** shall be accompanied by the following:

Or. en

Amendment 54

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 2

Text proposed by the Commission

Amendment

2. The competent authority shall appoint an independent expert within five working days from the application referred to in paragraph 1 and the receipt of the draft terms and reports. The expert shall be independent from the company carrying out the cross-border conversion and may be a natural or a legal person depending upon the law of the departure Member State. Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive 2006/43/EC.

deleted

Or. en

Amendment 55

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 3 – introductory part

Text proposed by the Commission

Amendment

3. The expert shall draw up a written report providing at least:

3. After consulting third parties with a reasoned interest in the conversion of the company, the competent authority shall draw up a written report providing at least:

Or. en

Amendment 56

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 3 – point b

Text proposed by the Commission

(b) a description of all factual elements necessary for the competent authority, designated in accordance with Article 86m(1), to carry out an in-depth assessment to determine whether the intended cross-border conversion constitutes an artificial arrangement in accordance with Article 86n, including at a minimum the following: the characteristics of the establishment in the destination Member State, including the intent, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.

Amendment

(b) a description of all factual elements necessary for the competent authority, designated in accordance with Article 86m(1), to carry out an in-depth assessment to determine whether the intended cross-border conversion constitutes an artificial arrangement in accordance with Article 86n, including at a minimum the following: the characteristics of the establishment in the destination Member State, including the intent, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due, ***impact on occupational pensions of employees*** and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.

Or. en

Amendment 57

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 4

Text proposed by the Commission

4. Member States shall ensure that the ***independent expert*** shall be entitled to obtain, from the company carrying out the cross-border conversion, all relevant information and documents and to carry out all necessary investigations to verify all elements of the draft terms or management reports. The ***expert*** shall ***also*** be entitled to receive comments and opinions from the

Amendment

4. Member States shall ensure that the ***competent authority*** shall be entitled to obtain, from the company carrying out the cross-border conversion, all relevant information and documents and to carry out all necessary investigations to verify all elements of the draft terms or management reports. The ***competent authority*** shall ***furthermore be able to, where necessary,***

representatives of the employees of the company, or, where there are no such representatives, from the employees themselves and also from the creditors and members of the company.

ask questions to the competent authority of the destination Member State, and be entitled to receive comments and opinions from the representatives of the employees of the company, or, where there are no such representatives, from the employees themselves and also from the creditors and members of the company *and from company pensions funds.*

Or. en

Amendment 58

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 5

Text proposed by the Commission

5. Member States shall ensure that information submitted to the ***independent expert*** can only be used for the purpose of drafting their report and that confidential information, including business secrets, shall not be disclosed. ***Where appropriate, the expert may submit a separate document containing any such confidential information to the competent authority, designated in accordance with Article 86m(1) and that separate document shall only be made available to the company carrying out the cross-border conversion and not be disclosed to any other party.***

Amendment

5. Member States shall ensure that information submitted to the ***competent authority*** can only be used for the purpose of drafting their report and that confidential information, including business secrets, shall not be disclosed.

Or. en

Amendment 59

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86g – paragraph 6

Text proposed by the Commission

Amendment

6. Member States shall exempt 'micro' and 'small enterprises' as defined in Commission Recommendation 2003/361/EC () from the provisions of this Article.**

deleted

Or. en

Amendment 60

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86h – paragraph 1 – point c

Text proposed by the Commission

Amendment

(c) a notice informing the members, creditors and employees of the company carrying out the cross-border conversion that they may submit, before the date of the general meeting, comments concerning the documents referred to in points (a) and (b) of the first subparagraph to the company and to the competent authority designated in accordance with Article 86m(1).

(c) a notice informing the members, creditors, **company pension funds, trade unions** and employees of the company carrying out the cross-border conversion that they may submit, before the date of the general meeting, comments concerning the documents referred to in points (a) and (b) of the first subparagraph to the company and to the competent authority designated in accordance with Article 86m(1).

Or. en

Amendment 61

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86h – paragraph 4 – subparagraph 2

Text proposed by the Commission

Amendment

However, Member States may, in cases of **genuine** suspicion of fraud based on reasonable grounds, require a physical

However, Member States may, in cases of suspicion of fraud based on reasonable grounds, require a physical presence before

presence before a competent authority.

a competent authority.

Or. en

Amendment 62

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86k – paragraph 1

Text proposed by the Commission

1. **Member States may require that** *the* management or administrative **organ** of the company carrying out the cross-border conversion **provides** a declaration accurately reflecting the financial status of the company as part of the draft terms of cross-border conversion referred to in Article 86d. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company at the date of the declaration, and after having made reasonable enquiries, they are unaware of any reason why the company should, after the conversion takes effect, be unable to meet the liabilities when those liabilities fall due. The declaration shall be made no earlier than one month before the draft terms of the cross-border conversion are disclosed in accordance with Article 86h.

Amendment

1. Management or administrative **organs** of the company carrying out the cross-border conversion **shall provide** a declaration accurately reflecting the financial status of the company as part of the draft terms of cross-border conversion referred to in Article 86d. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company at the date of the declaration, and after having made reasonable enquiries, they are unaware of any reason why the company should, after the conversion takes effect, be unable to meet the liabilities when those liabilities fall due. The declaration shall be made no earlier than one month before the draft terms of the cross-border conversion are disclosed in accordance with Article 86h.

Or. en

Amendment 63

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86k – paragraph 3 – point a

Text proposed by the Commission

(a) where the company discloses together with the draft terms of conversion an independent expert report, which concluded that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert should be appointed or approved by the competent authority and shall *fulfil the requirements laid down in Article 86g(2)*;

Amendment

(a) where the company discloses together with the draft terms of conversion an independent expert report, which concluded that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert should be appointed or approved by the competent authority and shall *be independent from the company carrying out the cross-border conversion, no conflict of interest shall be present, and may be a natural or a legal person depending upon the law of the departure Member State*;

Or. en

Amendment 64

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86m – paragraph 3 – subparagraph 1

Text proposed by the Commission

However, in cases of *genuine* suspicion of fraud based on reasonable grounds Member States may require a physical presence before a competent authority where relevant information and documents are required to be submitted.

Amendment

However, in cases of suspicion of fraud based on reasonable grounds Member States may require a physical presence before a competent authority where relevant information and documents are required to be submitted.

Or. en

Amendment 65

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86m – paragraph 6

Text proposed by the Commission

6. Member States shall ensure that competent authorities designated in accordance with paragraph 1 may consult other relevant authorities with competence in the different fields concerned by the cross-border conversion.

Amendment

6. Member States shall ensure that competent authorities designated in accordance with paragraph 1 may consult other relevant authorities ***both in the departure Member State and in the destination Member State*** with competence in the different fields concerned by the cross-border conversion.

Or. en

Amendment 66

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86m – paragraph 7 – introductory part

Text proposed by the Commission

7. Member States shall ensure that the assessment by the competent authority is carried out within ***one month*** of the date of receipt of the information concerning the approval of the conversion by the general meeting of the company. It shall have one of the following outcomes:

Amendment

7. Member States shall ensure that the assessment by the competent authority is carried out within ***two months*** of the date of receipt of the information concerning the approval of the conversion by the general meeting of the company. It shall have one of the following outcomes:

Or. en

Amendment 67

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86m – paragraph 7 – point c

Text proposed by the Commission

(c) where the competent authority has serious concerns that the cross-border conversion constitutes an artificial

Amendment

(c) where the competent authority has serious concerns that the cross-border conversion constitutes an artificial

arrangement *referred to in Article 86c(3)*, *it may* decide to carry out an in-depth assessment in accordance with Article 86n and shall inform the company about its decision to conduct such an assessment and of the subsequent outcome.

arrangement, *it shall* decide to carry out an in-depth assessment in accordance with Article 86n and shall inform the company about its decision to conduct such an assessment and of the subsequent outcome.

Or. en

Amendment 68

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86n – paragraph 1 – subparagraph 1

Text proposed by the Commission

Member States shall ensure in order to assess whether the cross-border conversion constitutes an artificial arrangement *within the meaning of Article 86c(3)*, that the competent authority of the departure Member State carries out an in-depth assessment of all relevant facts and circumstances and shall take into account at a minimum the following: the characteristics of the establishment in the destination Member State, including *the intent*, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.

Amendment

Member States shall ensure in order to assess whether the cross-border conversion constitutes an artificial arrangement, that the competent authority of the departure Member State carries out an in-depth assessment of all relevant facts and circumstances and shall take into account at a minimum the following: the characteristics of the establishment in the destination Member State, including the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State.

Or. en

Amendment 69

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive 2017/1132/EC

Article 86n – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that where the competent authority referred to in paragraph 1 decides to carry out an in-depth assessment, it is able to hear the company and all parties that have submitted observations pursuant Article 86h(1)(c) in accordance with national law. The competent authorities referred to in paragraph 1 may also hear any other interested third parties in accordance with national law. The competent authority shall take its final decision regarding the issue of the pre-conversion certificate within *two* months from the start of the in-depth assessment.

Amendment

2. Member States shall ensure that where the competent authority referred to in paragraph 1 decides to carry out an in-depth assessment, it is able to hear the company and all parties that have submitted observations pursuant Article 86h(1)(c) in accordance with national law. The competent authorities referred to in paragraph 1 may also hear any other interested third parties in accordance with national law. The competent authority shall take its final decision regarding the issue of the pre-conversion certificate within *four* months from the start of the in-depth assessment.

Or. en

Amendment 70

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86o – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that the decision to issue the pre-conversion certificate is sent to the authorities referred to in Article 86m(1) and that the decisions to issue or refuse to issue a pre-conversion certificate are available through the system of interconnection of registers set up in accordance with Article 22.

Amendment

2. Member States shall ensure that the decision to issue the pre-conversion certificate is sent to the authorities referred to in Article 86m(1), *to all parties that have submitted observations pursuant Article 86h(1)(c)* and that the decisions to issue or refuse to issue a pre-conversion certificate are available through the system of interconnection of registers set up in accordance with Article 22.

Amendment 71

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86p – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, in cases of *genuine* suspicion of fraud based on reasonable grounds, Member States may require a physical presence before a competent authority of a Member State where relevant information and documents are required to be submitted.

Amendment

However, in cases of suspicion of fraud based on reasonable grounds, Member States may require a physical presence before a competent authority of a Member State where relevant information and documents are required to be submitted.

Or. en

Amendment 72

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86p a (new)

Text proposed by the Commission

Amendment

Article 86pa

Right of appeal

The company and all parties that have submitted observations pursuant Article 86h(1)(c) may appeal a decision on conversion of a competent authority in accordance with national law.

Or. en

Amendment 73

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86s a (new)

Text proposed by the Commission

Amendment

Article 86sa

Civil liability of members of the administrative or management bodies of the company being converted

The laws of the Member States shall at least lay down rules governing the civil liability, towards the shareholders of the company carrying out a cross-border conversion, of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the conversion.

Or. en

Amendment 74

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86t – paragraph 1

Text proposed by the Commission

Amendment

Member States shall lay down rules governing at least the civil liability of the independent experts responsible for drawing up the *reports* referred to in *Articles 86g and 86k(2)(a)*, including in respect of any misconduct on their part in the performance of their duties.

Member States shall lay down rules governing at least the civil liability of the independent experts responsible for drawing up the *report* referred to in *Article 86k(3)(a)*, including in respect of any misconduct on their part in the performance of their duties.

Or. en

Amendment 75

Proposal for a directive

Article 1 – paragraph 1 – point 3

Directive (EU) No 2017/1132

Article 86u a (new)

Text proposed by the Commission

Amendment

Article 86ua

Ex-post monitoring

During five years after the entry into force of a decision on cross-border conversion all parties that have submitted observations pursuant to Article 86h(1)(c) may request a competent authority of the destination Member State to undertake an inspection of the company whether conditions referred to in Article 86c are met.

A competent authority may impose a fine in accordance with national law in case of a proven wrongdoing.

Or. en

Amendment 76

Proposal for a directive

Article 1 – paragraph 1 – point 4 a (new)

Directive (EU) No 2017/1132

Article 119 – paragraph 1 – point 2 a (new)

Text proposed by the Commission

Amendment

(4 a) In Article 119, the following point is added:

(2a) ‘artificial arrangement’ means a company structure set up for abusive purposes, such as the circumvention of legal and contractual rights of employees, creditors’, or minority shareholders’, avoidance of rules on employee involvement, social security payments or tax obligations normally due on profits generated, through for example a

fictional establishment not carrying out any substantive or genuine economic activity supported by staff, equipment, assets and premises, in particular in the case of a 'letterbox' or 'front' subsidiary.

”

Or. en

(<https://eur-lex.europa.eu/legal-content/frn/TXT/?uri=celex:32017L1132>)

Amendment 77

Proposal for a directive

Article 1 – paragraph 1 – point 5

Directive (EU) No 2017/1132

Article 120 – paragraph 4 – point a a (new)

Text proposed by the Commission

Amendment

(aa) there is a suspicion of social fraud or infringements of workers' rights;

Or. en

Amendment 78

Proposal for a directive

Article 1 – paragraph 1 – point 5

Directive (EU) No 2017/1132

Article 120 – paragraph 4 – point c a (new)

Text proposed by the Commission

Amendment

(ca) the company has been implicated in tax fraud or tax evasion or engages in the setting up of harmful tax structures;

Or. en

Amendment 79

Proposal for a directive

Article 1 – paragraph 1 – point 5

Directive (EU) No 2017/1132
Article 120 – paragraph 4 – point c b (new)

Text proposed by the Commission

Amendment

(cb) any of the directors of the company are subject to disciplinary proceedings linked to their professional activity in the company, including for tax offences or tax crimes, or subject to criminal sanctions in that regard, or have been disqualified as directors in any Member State in which the company has operations;

Or. en

Amendment 80

Proposal for a directive

Article 1 – paragraph 1 – point 7 – point -a (new)

Directive (EU) No 2017/1132

Article 122 – paragraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(-a) after point b, the following point is inserted:

“(ba) total turnover, total taxable turnover and all tax exemptions and/or deductions received in the last five accounting years;”

Or. en

Amendment 81

Proposal for a directive

Article 1 – paragraph 1 – point 9

Directive (EU) No 2017/1132

Article 123 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Amendment

However, Member States may, in cases of

However, Member States may, in cases of

genuine suspicion of fraud based on reasonable grounds, require a physical presence before a competent authority.

suspicion of fraud based on reasonable grounds, require a physical presence before a competent authority.

Or. en

Amendment 82

Proposal for a directive

Article 1 – paragraph 1 – point 9

Directive (EU) No 2017/1132EC

Article 124 – paragraph 3

Text proposed by the Commission

3. The report shall be made available, at least electronically, to the members of each of the merging companies not less than one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the representatives of the employees of each of the merging companies, or where there are no such representatives, to the employees themselves. However, where the approval of the merger is not required by general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available, at least one month before the date of the general meeting of the other merging company or companies.

Amendment

3. The report shall be made available, at least electronically, to the members of each of the merging companies not less than one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the representatives of the employees of each of the merging companies, or where there are no such representatives, to the employees themselves ***and to the company pension funds***. However, where the approval of the merger is not required by general meeting of the acquiring company in accordance with Article 126(3), the report shall be made available, at least one month before the date of the general meeting of the other merging company or companies.

Where the management or administrative organ of one or more the merging companies receives an opinion from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, and from the company pensions funds, the members shall be informed thereof and that opinion shall be appended to that report.

Or. en

Amendment 83

Proposal for a directive

Article 1 – paragraph 1 – point 9

Directive (EU) No 2017/1132

Article 124 – paragraph 4

Text proposed by the Commission

Amendment

4. However, the report referred to in paragraph 1, shall not be required where all the members of the merging companies have agreed to waive this requirement.;

deleted

Or. en

Amendment 84

Proposal for a directive

Article 1 – paragraph 1 – point 10

Directive (EU) No 2017/1132

Article 124a – paragraph 2 – point c

Text proposed by the Commission

Amendment

(c) any material changes in the conditions of employment and in the locations of the companies' places of business;

(c) any material changes in the conditions of employment, **including collective agreements**, and in the locations of the companies' places of business;

Or. en

Amendment 85

Proposal for a directive

Article 1 – paragraph 1 – point 10

Directive (EU) No 2017/1132

Article 124a – paragraph 2 – point d

Text proposed by the Commission

Amendment

(d) whether the factors set out in points (a), (b) and (c) also relate to any

(d) whether the factors set out in points (a), (b) and (c) also relate to any

subsidiaries of the merging companies.

subsidiaries *or branches* of the merging companies.

Or. en

Amendment 86

Proposal for a directive

Article 1 – paragraph 1 – point 10

Directive (EU) No 2017/1132

Article 124a – paragraph 3 – subparagraph 1

Text proposed by the Commission

The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the representatives of the employees of each of the merging companies or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the members of each of the merging companies.

Amendment

The report referred to in paragraph 1 of this Article, shall be made available, at least electronically, to the representatives of the employees of each of the merging companies or, where there are no such representatives, to the employees themselves *and to the company pensions funds*, not less than one month before the date of the general meeting referred to in Article 126. The report shall also be made similarly available to the members of each of the merging companies.

Or. en

Amendment 87

Proposal for a directive

Article 1 – paragraph 1 – point 10

Directive (EU) No 2017/1132

Article 124a – paragraph 4

Text proposed by the Commission

4. Where the management or administrative organ of one or more of the merging companies receives, *in good time*, an opinion from the representatives of their employees, or, where there are no such representatives, from the employees themselves, as provided for under national

Amendment

4. Where the management or administrative organ of one or more of the merging companies receives, an opinion from the representatives of their employees, or, where there are no such representatives, from the employees themselves, as provided for under national

law, the members shall be informed thereof and that opinion shall be appended to the report.

law *and from the company pensions funds*, the members shall be informed thereof and that opinion shall be appended to the report.

Where the management or administrative organ of one or more the merging companies receives an opinion from the representatives of their employees or, where there are no such representatives, from the employees themselves, as provided for under national law, and from the company pensions funds, the members shall be informed thereof and that opinion shall be appended to that report.

Or. en

Amendment 88

Proposal for a directive

Article 1 – paragraph 1 – point 10 a (new)

Directive (EU) No 2017/1132

Article 125 – paragraph 1

Present text

1. An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 126 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons.

Amendment

(10a) In Article 125, the first paragraph is replaced by the following:

"1. An independent expert report intended for members and made available not less than one month before the date of the general meeting referred to in Article 126 shall be drawn up for each merging company. Depending on the law of each Member State, such experts may be natural persons or legal persons *and shall be independent from the companies carrying out the merger and no conflict of interest shall be present.* "

Or. en

(<https://eur-lex.europa.eu/legal-content/frn/TXT/?uri=celex:32017L1132>)

Amendment 89

Proposal for a directive

Article 1 – paragraph 1 – point 11

Directive (EU) No 2017/1132

Article 125 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive 2006/43/EC.;

Amendment

Member States shall take into account, in assessing the independence of the expert, the framework established in Articles 22 and 22b of Directive 2006/43/EC **as well as whether any tax advice or other strategic advice is already provided for the merging companies by the independent expert or their employees.**;

Or. en

Amendment 90

Proposal for a directive

Article 1 – paragraph 1 – point 13

Directive (EU) No 2017/1132

Article 126b – paragraph 1

Text proposed by the Commission

1. **Member States may require that the** management or administrative **organ** of the merging company **provides** a declaration accurately reflecting the financial status of the company as part of the common draft terms of cross-border merger referred to in Article 122. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company at the date of that declaration, and having made reasonable enquiries, they are unaware of any reason why the company resulting from the merger would be unable to meet the liabilities when those liabilities fall due. The declaration shall be made no earlier than one month before the common draft terms of the cross-border

Amendment

1. Management or administrative **organs** of the merging company **shall provide** a declaration accurately reflecting the financial status of the company as part of the common draft terms of cross-border merger referred to in Article 122. The declaration shall declare that, on the basis of the information available to the management or administrative organ of the company at the date of that declaration, and having made reasonable enquiries, they are unaware of any reason why the company resulting from the merger would be unable to meet the liabilities when those liabilities fall due. The declaration shall be made no earlier than one month before the common draft terms of the cross-border merger are disclosed in accordance with

merger are disclosed in accordance with Article 123.

Article 123.

Or. en

Amendment 91

Proposal for a directive

Article 1 – paragraph 1 – point 14 – point -a (new)

Directive (EU) No 2017/1132

Article 127 – paragraph 1

Present text

1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law.

Amendment

(-a) paragraph 1 is replaced by the following:

"1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law. ***Member States shall ensure that the competent authority shall not authorise the cross-border merger where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement.*** "

Or. en

(<https://eur-lex.europa.eu/legal-content/frn/TXT/?uri=celex:32017L1132>)

Amendment 92

Proposal for a directive

Article 1 – paragraph 1 – point 14 – point a

Directive (EU) No 2017/1132

Article 127 – paragraph 1 – subparagraph 2

Text proposed by the Commission

However, in cases of ***genuine*** suspicion of fraud based on reasonable grounds Member States may require a physical

Amendment

However, in cases of suspicion of fraud based on reasonable grounds Member States may require a physical presence

presence before a competent authority where relevant information and documents are required to be submitted.;

before a competent authority where relevant information and documents are required to be submitted.;

Or. en

Amendment 93

Proposal for a directive

Article 1 – paragraph 1 – point 15 – point b

Directive (EU) No 2017/1132

Article 128 – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, Member States may take measures in cases of *genuine* suspicion of fraud based on reasonable grounds which could require a physical presence before a competent authority of a Member State in which the relevant information and documents are required to be submitted.

Amendment

However, Member States may take measures in cases of suspicion of fraud based on reasonable grounds which could require a physical presence before a competent authority of a Member State in which the relevant information and documents are required to be submitted.

Or. en

Amendment 94

Proposal for a directive

Article 1 – paragraph 1 – point 20

Directive (EU) No 2017/1132

CHAPTER IV

Text proposed by the Commission

[...]

Amendment

deleted

Or. en

Amendment 95

Proposal for a directive

Article 3 – paragraph 1

Text proposed by the Commission

1. The Commission shall, no later than **five** years after [OP please insert the date of the end of the transposition period of this Directive], carry out an evaluation of this Directive and present a Report on the findings to the European Parliament, the Council and the European Economic and Social Committee accompanied, where appropriate, by a legislative proposal. Member States shall provide the Commission with the information necessary for the preparation of that report, in particular by providing data on the number of cross-border conversions, mergers and divisions, their duration and related costs.

Amendment

1. The Commission shall, no later than **three** years after [OP please insert the date of the end of the transposition period of this Directive] **and subsequently every five years**, carry out an evaluation of this Directive and present a Report on the findings to the European Parliament, the Council and the European Economic and Social Committee accompanied, where appropriate, by a legislative proposal. **The evaluation shall in particular examine whether a positive impact has been achieved regarding eliminating artificial and/or harmful arrangements, and its impact on workers' rights. The European Commission shall consult the European social partners.** Member States shall provide the Commission with the information necessary for the preparation of that report, in particular by providing data on the number of cross-border conversions, mergers and divisions, their duration and related costs.

Or. en