

# **New Developments in Companies' Cross-border Transactions: Regulating Necessities or Eventualities?**

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# INTRODUCTION

Cross-border (CB) mobility of companies:

- one of the most commonly considered issues of the EU companies' law
- EC and EP „*a prerequisite for further economic growth within the EU*“
- companies CB mobility:

MERGERS & ACQUISITIONS of companies

DIVISIONS & CONVERSIONS - regulated by secondary legislation (directives) which is implemented in national laws

- ? the fundamental issue of the transfer of the seat
  - not harmonized at EU level
  - still based on the practice of the European Court of Justice

## **ANALYSIS OF THE CURRENT SITUATION:**

- EC and EP: need for a further harmonization based on the analysis:
  - around 24 million companies at the territory of the EU, out of which approximately 80% are limited liability companies and around 98-99% of limited liability companies are SMEs
  - their CB mobility is limited due to the different reasons among which is that company law is not sufficiently adapted to CB mobility in the EU.

The discussion and analysis will be based on the existing possibilities for the companies in relation to CB mergers and acquisitions in order to compare them with Proposal and analytical overview on possible obstacles and limits within the national legislations.

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# COMPANY LAW PACKAGE (2018)

EC: 25 April 2018

- ▶ It aims to establish “*simpler and less burdensome rules for companies*” regarding incorporation and cross border transactions.
- ▶ consists of two proposals:
  - Proposal 2018/0113 - DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law
  - Proposal 2018/0114 - DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

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- Idea behind the proposals:

**To enable and foster CB activities on one side with adequate safeguards against abuse on the other side.**

**How will that be accomplished?**

- on-line creation of the company
- CB movement of the company without burdens and costs
- protection against abuse and artificial operation, protection of all stakeholders (employees, shareholders, creditors)

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# PROPOSAL 2018/0113

- **use of digital tools and procedures in company law**
  - for the registration of new companies and of branches of other companies fully online procedure. Incorporation without the physical presence of the members before any public authority in all MS.
- fraud and abuse - the proposal “sets safeguards against fraud and abuse such as mandatory identification control, rules on disqualified directors and a possibility for MSs to require the involvement of a person or body in the process, such as notaries or lawyers”.
- free access to the most relevant information of companies in the Companies Registers.
- need for changes in national legislations and its implementation: technological challenge for the MSs that want to preserve the present level of control in the incorporation of companies.

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# PROPOSAL 2018/0114

- CB conversions, mergers and divisions (amendments to the Directive 2017/1132 as regards CB conversions, mergers and divisions)
- minor changes in the existing regulation of CB mergers:
  - new report for the information of employees
  - right for non-conforming shareholders to exit the company.

## NEW!

- common procedures for CB divisions and conversions (cross border transfers of seat)
  - CB conversions Court of Justice of the EU cases:
    - C-210/06 – Cartesio,
    - C-378/10 – VALE Építési,
    - C-106/16 – POLBUD.
  - CB divisions Court of Justice of the EU case C-411/03 – SEVIC Systems

- The crucial reason for amendments: to foster CB mobility of SMEs
- Cross border mobility of SMEs will contribute to the enhanced economic activity in EU
- The idea is that corporate restructuring and transformations (cross border conversions, mergers and divisions represent a natural way for companies to grow, adopt to changing environment and explore opportunities in new markets) 

is there a need for amendments or is old regulation enough?

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## NO HARMONIZED REGULATION! → UNCERTAINTIES: NEED FOR COMMON REGULATION?

- The proposal: uniform procedure to facilitate CB transactions while at the same time protecting the rights of minority shareholders, creditors and employees.
- The procedure for CB conversions and divisions follows the existing procedure for CB mergers.
- Steps:
  - ▶ drawing up of the draft terms and the administrator's and expert's reports
  - ▶ disclosure of these documents
  - ▶ shareholder approval
  - ▶ examination by the competent authority of the home MS
  - ▶ registration in the host MS.

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- Difference from the „old” directive:
    - ▶ a new requirement aimed at avoiding the abusive use of CB transactions
    - ▶ conversions and divisions: an independent expert must express an opinion on “**the accuracy of the reports and information submitted by the company**” (Art 86.g) with the purpose to enable the authority of the country of origin to control not only the formalities of the operation – as it does in mergers- but also whether the transfer or division is “**an artificial arrangement** aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members” (Article 86c(3) page 47) → **ex ante control**: is it efficient way for preventing the abuse?
    - ▶ Obligatory content of the report:
      - ▶ the characteristics of the establishment in the destination MS, 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 MS and the departure MS”(article 86-g).

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- **Ex ante control** given by the independent expert:

Procedure - expensive and time consuming ?!

- complexity of the expert report's content
  - 1 month: MS competent authority determines, based on the report, if the operation “constitutes an artificial arrangement” that unduly avoids tax or harms stakeholders
  - + 2 additional months: in case of serious doubts an in-depth investigation (Exemption)
  - + time for the judicial review of the decision (if the authority is not a judge)

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- the concept of “**artificial arrangement**” – problem to determine the intention to defraud tax or other stakeholders before the transaction is effective (ex ante).
  - How to define and recognise the „artificial arrangement”?
  - CB transactions include groups of companies. For this purpose the whole corporate structure should be analyzed (also subsidiaries and branches) - time consuming, deeper analysis (time proposed is to short)

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- SMEs: no need for the report (86.g.6):  
In case of abusive nature of the operation - the competent authority must make judgement in any case (difficulties: authority has to give an opinion with no expert's report)
  - arbitrary decisions - judging ex ante the intentions of the company  
- national implementation no in cause: strict MS authorities?
  - risks for stakeholders - procedure establishes that the operations that have “taken effect in compliance with the procedures transposing this Directive may not be declared null and void” (Article 86.u and 160.w). -  
- ex ante control should offer a total guarantee that the operation complies with the law and is not fraudulent, and therefore should not be challenged → what if the company has been able to hide its real intentions from the expert and the competent authority?

Analysis companies cross-border mobility based on two opposite interests:

- the potential of the Internal Market by breaking down barriers to CB trade and facilitating access to markets by increasing confidence and stimulating competition;
- in the same time offering effective and proportionate protection to all stakeholders (particular employees, creditors or minority shareholders).

Is the proposed Amending Directive actually necessary to enable CB conversions, mergers and divisions or the legal consequences of aforementioned CB transactions may be achieved the other way?

Possibility: Application of the existing ECJ practice

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# CROSS BORDER CONVERSIONS

- ▶ Efficient solution for companies that wish to move to another MS without losing their legal personality or having to re-negotiate their business contracts.
- ▶ Particularly attractive for small companies – cheap, no need for legal advice
- ▶ ECJ – Cartesio case C-210/06; VALE case C-378/10: Art 49 TFEU – entails the right for companies established in MS to transfer their seat to another MS through cross-border conversion without losing their legal personality
- ▶ Polbud C-106/16 – confirmation of the right of company to carry out CB conversion on the basis of the freedom of establishment

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# CONCLUSION

What would be the impact of the proposed amendments? Would they really raise the business activities of the SMEs?

How will the implementation in MS be realised?

Will the need for harmonisation by the ECJ case law still exist?

What would be the impact of the proposal to the freedom of establishment and CB movement of the company seat?