

Cross-border transactions within the EU: Towards harmonized procedures and enhanced protection of stakeholders

Published on April 25, 2018, 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 has the objective to “*provide specific and comprehensive procedures for cross-border conversions, divisions and mergers to foster cross-border mobility in the EU while, at the same time, offering company stakeholders [i.e. employees, creditors and shareholders] adequate protection in order to safeguard the fairness of the Single Market.*”

This Article provides an overview of the contemplated procedures.

1. Cross-border conversions (transfers of registered office)

In line with the so-called Polbud judgment^[1], the Proposal aims at opening up cross-border conversions to Small- and Mid-sized Businesses (SMBs), while retaining their legal personality and introducing a harmonized procedure that protects the rights of the employees, creditors and shareholders of the relevant companies:

- First step: Preparation of the **draft terms of the cross-border conversion** and drawing-up of two **reports addressed to shareholders and employees**. In medium-size and large companies these documents would be submitted for verification to an **independent expert**. The draft terms of the cross-border conversion and the two reports would be **made publicly available**.
- Second step: **General meeting** of the company in order to launch the cross-border conversion process. The decision of the general meeting would then be submitted to the competent national authority of the Member State of departure which, after a first **legality check**^[2], would decide whether to issue a **pre-conversion certificate** or not.

- Third step: Transmission of the issued pre-conversion certificate to the competent authority of the Member State of destination for a **second legality check**.

Following the aforementioned checks, the cross-border conversion would then become legally effective from the date of registration of the converted company in the Member State of destination.

2. Cross-border mergers

The Proposal aims at remedying the shortcomings of the current rules derived from the 2005 Directive on cross-border mergers^[3] through (i) the harmonization of the rules governing the protection of employees, creditors and shareholders, and (ii) the introduction of simplified procedures:

- For employees: Provision of enhanced information on the impact of the contemplated merger.
- For creditors: Right to apply to the competent administrative or judicial authority for “*adequate*” **safeguards**.
- For shareholders: Creation of (i) a right **to exit** the company afforded to the shareholders holding voting rights who did not vote to approve the common draft terms of the cross-border merger and to the shareholders without voting rights, and (ii) a procedure **to challenge the proposed exchange ratio**.

3. Cross-border divisions

The Proposal aims at creating a new legal framework for cross-border divisions, inspired by that governing cross-border conversions:

- First step: Preparation of the **draft terms of the cross-border division** and drawing-up of two **reports addressed to shareholders and employees**. In medium-sized and large companies these documents would be submitted for verification to an **independent expert**. The draft terms of the cross-border conversion and the two reports would be **made publicly available**.
- Second step: **General meeting** of the company in order to launch the cross-border division process. The decision of the general meeting would then be submitted to the competent national authority of the Member State of the dividing company which, after a first **legality check**^[4], would decide whether to issue a **pre-division certificate** or not.
- Third step: Transmission of the issued pre-conversion certificate to the competent authority of the Member State of the recipient companies for a **second legality check**.

The cross-border division would become legally effective on a date fixed by the Member State of the dividing company and that would be necessarily after the aforementioned legality check.

Just like for cross-border mergers, the rules governing the protection of employees, creditors and shareholders would be harmonized:

- For employees: Provision of enhanced information on the impact of the contemplated division.
- For creditors: Right to apply to the competent administrative or judicial authority for “*adequate*”

safeguards.

- For shareholders: Creation of (i) a right **to exit** the company afforded to the shareholders holding voting rights who did not vote to approve the common draft terms of the cross-border division and to the shareholders without voting rights, and (ii) a procedure **to challenge the proposed exchange ratio**.

This Proposal should be adopted shortly.

[1] Polbud – Wykonawstwo Judgment, case C-106/16, ECLI:EU:C:2017:804: “1) Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company. [...] 2) Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.”

[2] “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.”

[3] Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005 (OJ L 310, 11/25/2005, p. 1) replaced and repealed on July 19, 2017 by Directive (EU) 2017/1132 of the European Parliament and of the Council of June 14, 2017 relating to certain aspects of company law (codified text) (OJ L 169, 6/30/2017, p. 46).

[4] Cf. note 2.

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