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CCBE comments on the Proposal for a Directive amending Directive 2017/1132 as regards cross border conversions, mergers and divisions

29/06/2018

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members on policy issues which affect European citizens and impact on lawyers' practice.

On 25 April 2018, the European Commission presented its proposal for a Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. This proposal is part of the Commission's 'Company Law package', which also presented a proposal for a Directive on the use of digital tools and process in company law.

The proposal was accompanied by a press release and a Staff Working Document on the results of the Impact Assessment. The CCBE was invited by the Commission to participate in various stakeholders' meetings in 2017 where the CCBE was representing the views of the legal profession.

With this paper the CCBE wishes to share its observations in relation to the proposed Directive. The CCBE has identified several provisions where it believes some changes should be made to the text or where it has a specific query about the method proposed. The CCBE would welcome the opportunity to discuss these provisions.

As a preliminary observation, we believe that the proposed Directive is not sufficiently clear as to the precise legal effect that is proposed where a company undergoes a conversion procedure. Is it intended that the existing company is the same legal entity once it becomes a company in the destination Member State, albeit subject to the legal rules that apply to a company of the form chosen in the Member State? Or is the intention that there are two different companies: one in the Member State of departure and another in the Member State of destination and that the company in the Member State of destination is established by means of a capital contribution in kind of the ongoing business of the company in the existing Member State, with that company ceasing to exist without going into liquidation? This will be important for the laws of the destination Member State e.g. where there are rules on valuations of capital contributions in kind. It would be helpful to clarify this so Member States know whether they should apply these rules to a company undergoing a conversion process. It may also be important in cases where the company's net assets are lower than the amount of its share capital in the departure Member State.

It is also relevant to contracts and other rights which are personal to the existing company. If the legal personality of the company is preserved, these should not be affected by the conversion but they may be affected if the business of the company is transferred to a new company in the destination Member State. It is also relevant to the question of whether the Directive on Transfer of Undertakings (Directive 2001/23/EC) applies. If the undertaking of the existing company is contributed to a new company in the destination Member State, we believe the Directive will apply to that transfer. However, if the company is the same legal entity and the employees remain employees of the existing legal entity

which becomes subject to the laws of the destination Member State, then there is no transfer to which the Directive would apply.

Article 106 of Directive 2017/1132 requires the laws of Member States at least to lay down rules governing the civil liability, towards the shareholders of the company being acquired, 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 merger. We think that there should be an equivalent provision requiring Member States to lay down rules governing civil liability of the members of the administrative or management bodies of a company that is being converted and of such members of the administrative or management bodies of a company that is being divided.

- We would also like to provide the following comments on several articles of the proposed legislative text:

Art. 86c.3: We suggest that 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 abuse of law or fraudulent act. We think this suggested approach follows the decision of the European Court of Justice, for example in the *Centros* and *Cadbury* cases, and does not require a competent authority to determine whether there is an "undue" tax advantage or prejudice. The wording used in the draft proposal seems to suggest that something less than an abuse would satisfy the test.

Article 86d.1(c): This should refer to the instrument or instruments proposed for the constitution of the company in the destination Member State (as the constitution will only become the company's constitution when the conversion takes effect).

Article 86g: This does not make clear how quickly the independent expert must prepare their report (assuming that the company provides all relevant information and relevant documents from the company promptly when requested). There should, at least, be an obligation to provide the report without undue delay.

Article 86h.5: Where the register transmits the relevant information to the national gazette, will the Member State still be able to charge a fee for publication in the national gazette?

Article 86i.3: We assume this should say "Member States shall ensure that the approval or any amendment" (not approval of any amendment). We think paragraph 4 would be clearer if it said "The general meeting shall also decide on any amendments to the instruments of constitution of the company carrying out the conversion."

Article 86j.1: We think the first line should read "Member States shall ensure that the following members of a company carrying out a cross-border conversion…"

Article 86j.3: In line 7, we think this should read "Member States shall further ensure that the company may receive acceptance of an offer to be communicated electronically to an address provided by the company for that purpose." What is important is that the shareholder who wants to accept an offer to buy their shares can do so electronically if the company has provided an address for shareholders to do so.

Article 86j.5: Companies may have provisions in their articles of association allowing for arbitration in such cases. Our understanding is that a company would still be able to include such provisions and that shareholders would be free to use arbitration if they wish to do so, but are also free to demand compensation before a national court as this article provides. It would be helpful for the Recitals to clarify that companies may still have such provisions on arbitration in their articles, provided they are not mandatory.

Article 86o: It would be helpful for this to set out a maximum time period (which should not be too long) that can be set for the pre-conversion certificate to become effective.

Article 86p.4: It would be helpful to include a maximum time period for the competent Member State to decide whether to approve the cross-border conversion.

Article 86q.3: Where a Member State removes a company whose conversion has become effective, there should also be an obligation to notify any Member State where the company has a branch that the conversion has taken effect.

Article 86s.1(a) and (c): If the intention is that the company subject to the conversion is the same legal entity, we do not think it is correct to refer to assets and liabilities or rights and obligations being "transferred" to the converted company. A reference to continuing to exist is better. However, if the intention is that the business of the company is contributed to the new company in the destination Member State, we think it would be better to make it clear that the company's entire business is transferred, including all contracts, permits, licences, credits, rights and obligations and goodwill. We also think it would be helpful to make it clear that any transfer operates as a general succession by operation of law. In paragraph 3, we assume that the converted company's liability for losses arising from differences in the national legal system should only arise for contracts entered into after the company has announced that it is proposing to convert where the other party has not been informed of the proposed conversion. It would be extremely onerous (and make conversion very unattractive or impossible) if this were to apply to contracts before this time, as the company would not have been able to inform the contracting party or counterparty of the cross-border conversion before concluding contracts. It will also be difficult to identify what losses arise from the difference in the legal systems. The governing law of the contract will not be changed by the conversion.

Article 122a.1: paragraph 2 states that the accounting date provided in the common draft terms of the cross-border merger shall be the date on which the cross-border merger takes effect unless the merging companies determine another date which satisfies paragraphs (a) and (b). We believe that this second paragraph is intended to apply whether or not the company resulting from the cross-border merger prepares its financial statements in accordance with international accounting standards or not. If this is not the intention, we think this needs to be clarified. Is the intention that IFRS should apply to determine the accounting date for accounting purposes, but that this paragraph applies for company law purposes? This may be important e.g. for tax purposes. We think it would be helpful if this were clarified. In paragraph (b) the reference to "the balance sheet date immediately after the date upon which the cross border merger takes effect" is not very clear. We think this is intended to mean that the company resulting from the merger must choose an accounting date which enables it to comply with the national law of the Member State where it is incorporated when it draws up its annual financial statements and must draw up its annual financial statements at the balance sheet date chosen in accordance with the law of the Member State where it is incorporated (so, for example, if the merger takes effect on 1 June 2020 and the accounting date chosen in accordance with the relevant Member State law is 31 December, the company would draw up its annual financial statements at the 31 December 2020 after the merger takes effect). The reference to "immediately " after the date upon which the cross-border merger takes effect may cause some confusion and suggest that the balance sheet must be drawn up on the day after the merger takes effect. It might be clearer to refer to the balance sheet date "which first occurs" after the date upon which the cross-border merger takes effect.

Article 123.2 paragraph 2: We think the word "unless" should be deleted.

Article 123.6: Where the register transmits the relevant information to the national gazette, will the Member State still be able to charge a fee for publication in the national gazette?

Article 126a.2: We think the words "one or more of" should be inserted at the beginning of paragraphs (a) and (b). Paragraph 2 allows shares to be sold to remaining members of the merging companies or third parties in agreement with the company. However, paragraph 3 only refers to the merging companies making an offer. The wording should be extended to deal with a case where the merging companies arrange for members of the company or third parties to make the offer to pay adequate

cash compensation for the shares. In line 9, this should require Member States to ensure merging companies may receive an acceptance of an offer that is communicated electronically to an address provided by those companies for that purpose. In the last paragraph, it should read "However, the acquisition of a merging company".

Article 126a.5: We think the words "for the relevant merging company" should be inserted in line 2 after "of the cash compensation".

Article 126a.6: Companies may have provisions in their articles of association allowing for arbitration in such cases. Our understanding is that a company would still be able to include such provisions and that shareholders would be free to use arbitration if they wish to do so, but are also free to demand compensation before a national court as this article provides. It would be helpful for the Recitals to clarify that that companies may still have such provisions on arbitration in their articles, provided they are not mandatory.

Article 126a.8: In line 5, we think this should read "not later than" one month (rather than within one month), so as to allow members to bring proceedings before the cross-border merger takes effect, rather than having to wait until it has taken effect. We think it would be helpful to allow this both for members and for merging companies, as the merging companies will want to know as early as possible of any such challenge.

Article 133.8: We think line 3 should say "negotiations with the special negotiating body" (not within).

Article 160b(2): We think line 1 should say " "company being divided" means a company which initiates a process" (not which in a process).

Article 160b(3)(a): in line 1, this should say "a company being divided, which on being wound up without going into liquidation" (not which has been wound up without going into liquidation), as the winding up will only happen when the division takes effect. There should be an "or" at the end of paragraph (a).

Article 160e.3: We think the words ", and where it is to continue to exist" should be inserted before "the company being divided" in line 3. We think the last sentence should read "The amount of any such liability which is joint and several shall, for each company, be limited to the value of the net assets allocated to that company at the date of the division." This is to make it clearer that the limit only applies to joint and several liabilities which have not been explicitly allocated.

Article 160f: We do not understand why this does not include any reference to IFRS (but Article 122a does). Our comments on Article 122a are also relevant here.

Article 160i: Our comments on Article 86g are also relevant here. In Article 160i.3(f) the references should be to the proposed establishments, the proposed net turnover and profit, the proposed composition of the balance sheet and the place where social contributions are expected to be due for the recipient companies etc. – as none of these will exist at the time the report is made.

Article 160i.2: in line 3 of the second paragraph, we believe the word "unless" should be deleted.

Article 160j.1: in the first line, it should say "Member States shall ensure that the Member State" (not Member States).

Article 160j.5: Where the register transmits the relevant information to the national gazette, will the Member State still be able to charge a fee for publication in the national gazette?

Article 160k.1: in line 3, we suggest inserting "the" before "cross-border division".

Article 160k.3: line 1 should read "approval or any amendment" (not approval of any amendment).

Article 160k.4: We think paragraph 4 would be clearer if it said "The general meeting shall also decide on any amendments to the instruments of constitution of the company carrying out the conversion."

Article 160l.3: This should allow the company to procure that a third offer is made by the remaining members or a third party (see comment on Article 126a.2). In line 7, this should require Member States to ensure merging companies may receive an acceptance of an offer that is communicated electronically to an address provided by those companies for that purpose. In the last paragraph, it should read "However, the acquisition by the dividing company".

Article 160l.7: In line 4, we think this should read "not later than" one month (rather than within one month), so as to allow members to bring proceedings before the cross-border division takes effect, rather than having to wait until it has taken effect. We think it would be helpful to allow this both for members and for the companies involved in the division, as the companies will want to know as early as possible of any such challenge.

Article 160k.8: line 2 and line 7: we think this should refer to "a" recipient (not the recipient).

Article 160l.5: Companies may have provisions in their articles of association allowing for arbitration in such cases. Our understanding is that a company would still be able to include such provisions and that shareholders would be free to use arbitration if they wish to do so, but are also free to demand compensation before a national court as this article provides. It would be helpful for the Recitals to clarify that that companies may still have such provisions on arbitration in their articles, provided they are not mandatory.

Article 160m.3(b): line 3, we think this should be "the" company being divided (not a company being divided).

Article 160p.1: the list of things the competent authority must consider should make it clear that many of these will be proposed or expected (as the recipient companies will not yet be carrying on business).

Article 160q.1: It would be helpful to include a maximum time period for the pre-division certificate to become effective.

Article 160r.4: It would be helpful to state a maximum period in which the decision to approve a cross-border division must be made.

Article 160s.3: We think in line 5, it should refer to the latest of those notifications to deal with a case where the notifications from the competent authorities for the recipient companies are made on different dates. It would also be helpful for the register of the company being divided to notify the register(s) of any branches that the division has taken effect.

Article 160u.1(b): We think line 2 should refer to "one or more" recipient companies, as the members of the company being divided may become a member of only one of the recipient companies or, if there are many recipient companies, some but not all of them.

Article 160u.2: in line 5 of the second paragraph, we think this should only apply to contracts entered into after the proposed division has been announced (see our comment on Article 86s.1(a) and (c)).

Article 160u.3(b): in line 2, we think this should refer to "one or more" recipient companies.

Article 160u.3(c): We think this should be more like the wording in Article 160u1(c) – the rights and obligations of the company being divided arising from contracts of employment or from employment relationships and existing at the date on which the cross-border division takes effect shall be transferred to the respective recipient company or companies or remain with the dividing company on the date on which the cross-border division takes effect.