Contribution ID: 40845cdf-785f-4165-8620-e54c03cdcec6
Date: 04/08/2017 13:20:30

EU Company law upgraded: Rules on digital solutions and efficient cross-border operations

Fields marked with * are mandatory.

Introduction

The Commission work programme for 2017[1] announced an initiative on company law to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions. This consultation seeks views on the scope and content of such an initiative.

The results of previous consultations[2] have shown strong support among stakeholders for promoting the use of digital tools in company law and for addressing the issue of cross-border operations of companies.[3] The 2015 Conference on Company Law in the Digital Age[4] confirmed this.

All the main groups of stakeholders have, in particular, made strong calls for EU action on cross-border conversions, including in the 2009 and 2012 European Parliament Resolutions. Conflict-of-law rules already exist in civil and commercial law for contract, tort and delict, and insolvency, but an important gap remains for the law applicable to companies. The European Council has also identified this gap. Already in the Stockholm programme of 2009 it identified company law as an area where the process of harmonising conflict-of-law rules at EU level should continue.

The aim of this public consultation is to collect input from stakeholders on problems in company law, gather what evidence they have of such problems and hear their possible solutions on how to address the problems at EU level. The consultation is divided into four parts:

- Part 1: The reasons to act
- Part 2: The use of online tools throughout the companies' lifecycle
- Part 3: The cross-border mobility of companies (mergers, divisions, conversions)
- Part 4: The conflict-of-law rules for companies

More detailed explanations about each part precede the questions. In addition, the inception impact assessment explaining in more detail the context, problems and objectives can be found on http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm.

Please click on one or more responses (in case of the multiple choice questions). In addition, we encourage you to explain your views or provide additional information or explanations in the free text boxes. You may also provide additional information or views by uploading a separate document at the end of the questionnaire in Section 5. The responses will be taken into account when preparing the 2017 initiative on company law.

If you have any specific questions or feedback on this questionnaire, please write to just-company-law@ec.europa.eu.

Target Groups:

- industry and business, including all types of companies or entrepreneurs from all sectors;
- representative associations at EU and national level (for example, representing the interests of the business community, consumers, trade unions and the legal profession);
- investors and their associations;
- public authorities, including national business registers and judiciary;
- individuals (e.g. consumers); and
- research and academia.

Specific Privacy Statement:
Received contributions will be published on the Internet. It is important to read the specific privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

Disclaimer:
This document is a Commission services working document for consultation and does not in any way prejudge the Commission's decisions on the scope and content of the future initiative.

---

1. COM(2016) 710 final, 25.10.2016

2. For instance, the 2014 public consultation on cross-border mergers and divisions; the 2013 public consultation on cross-border transfers of registered offices; the 2012 consultation on the future of EU company law.↩

3. For the purposes of this consultation, cross-border operations of companies include cross-border divisions, cross-border mergers and cross-border conversions (i.e. transfers of companies' registered offices to another Member State).↩

4. http://ec.europa.eu/justice/events/company-law-2015/index_en.htm ↩

Specific Privacy Statement:

Specific_Privacy_Statement.doc

Information about the respondent

You are welcome to answer the questionnaire in any of the 24 official languages of the EU. Please let us know in which language you are replying.

English

* You are replying as:

- ○ As an individual in your personal capacity
- ◉ In your professional capacity or on behalf of an organisation

*Respondent's first name:

Rients

*Respondent's last name:

Abma

*Respondent's professional email address:

rients.abma@eumedion.nl

*Name of the organisation:

Eumedion

*Postal address of the organisation:

Zuid Hollandlaan 7
2596 AL THE HAGUE
THE NETHERLANDS

*Type of organisation:

- ○ Private enterprise

- ○ Professional consultancy, law firm, self-employed consultant
- ◉ Trade, business or professional association
- ○ Non-governmental organisation, platform or network
- ○ Research and academia
- ○ Regional or local authority (public or mixed)
- ○ International or national public authority
- ○ Other

* Please specify the type of organisation:

- ○ Chamber of commerce
- ◉ Business organisation (including investors, shareholders or creditors' organisations)
- ○ Trade Union/employee body or similar
- ○ Represenative of professions or crafts
- ○ Other

* Is your organisation registered in the EU transparency register? (If not, you are encouraged to register here, although you do not have to be registered to reply to this consultation.)

- ◉ Yes
- ○ No
- ○ Not applicable

* Please indicate your ID number:

65641341034-11

* Please indicate in which country your organisation's headquarters is located:

- ○ Austria
- ○ Belgium
- ○ Bulgaria
- ○ Croatia
- ○ Cyprus
- ○ Czech Republic
- ○ Denmark
- ○ Estonia
- ○ Finland
- ○ France
- ○ Germany
- ○ Greece
- ○ Hungary
- ○ Ireland
- ○ Italy
- ○ Latvia
- ○ Lithuania
- ○ Luxembourg
- ○ Malta
- ◉ Netherlands

- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

* Your contribution:

Note that, whatever option chosen, your answers may be subject to a request for public access to documents under Regulation (EC) N°1049/2001

- **Can be published with your organisation's information** (I consent the publication of all information in my contribution in whole or in part including the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication)
- **Can be published provided that your organisation remains anonymous** (I consent to the publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that it is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent the publication.

1. Reasons to Act

The new company law initiative would aim to make the best use of digital solutions in companies' interactions with public authorities but also with companies' shareholders, and to provide efficient rules for cross-border mobility of companies which could include mergers, divisions, conversions and uniform conflict-of-law rules for companies. The questions below seek your views on the problems, their seriousness and the need for EU action. A number of problems faced by companies and stakeholders have already been identified in previous public consultations and studies on company law. We now ask that you bring to our attention any recent developments on problems already identified and other problematic areas. Please also provide evidence or examples of any problems that exist and indicate how serious they are. More detailed explanations on what is meant by digitalisation and cross-border mobility rules are provided in sections 2 and 3.

A recent Study on the Law Applicable to Companies[5] found that in many Member States there is considerable legal uncertainty surrounding the law applicable to companies. The main finding is that differences between Member States' conflict-of-law rules lead to significant practical obstacles to corporate mobility in Europe. This limits the possibility of companies of making effective use of the freedom of establishment. In a context where the substantive laws of the Member States have not been fully harmonised, uniform conflict-of-law rules could give companies and Member States' authorities more legal certainty, promote cross-border mobility in the EU

and remove obstacles for them stemming from the potential for conflicts of laws. Any such uniform rules could build on the existing case-law of the Court of Justice of the EU in the area of freedom of establishment promoting choice of law. More detailed explanations are provided in section 4.

---

5. https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/

1.1 To what extent do the differences between Member States' laws or the overall lack of legal framework, in the areas mentioned below, constitute obstacles for the proper functioning of the single market? *(please choose all that apply)*

	to a very large extent	to a large extent	to some extent	not at all	no opinion
a. Digital processes or tools for companies to interact with Member States (registration, filing, publication)	○	◉	○	○	○
b. Digital processes or tools for companies to interact with shareholders	◉	○	○	○	○
c. Cross-border mergers	○	○	◉	○	○
d. Cross-border divisions	○	◉	○	○	○
e. Cross-border conversions	○	○	◉	○	○
f. Conflict-of-laws for companies	○	○	○	○	◉
g. Other areas (please explain)	○	◉	○	○	○

Which areas:

The protection of the interests of minority shareholders, particularly in the context of controlled companies.

1.1.1 What evidence, including practical examples, could you provide to demonstrate the existence of the problem and its size?

The report of the CFA Institute about Corporate Governance policy in the European Union - Through an Investor's Lens (p. 3) calls for some measures to uphold minority investor protections, including not promoting differential ownership rights and dual class share structures. In various Member States - for example in the Netherlands - the interests of minority shareholders are under pressure. For example it is still common that a company "bundles" voting on separate matters in relation to a cross-border merger. In our opinion, the shareholders of both the acquirer and the target company should be able to vote separately on a material change in the acquirer's governance, in addition to voting on whether to approve the cross-border merger. Altice and Fiat Chrysler Automobiles are recent examples of companies that materially changed their corporate governance structure (by introducing dual-class shares and loyalty shares respectively) in connection with or on the occasion of the cross-border merger.

1.2 Which of the issues mentioned below could be addressed as a priority by the EU? *(please choose all that apply)*

	top priority	priority	low priority	this issue should not been addressed at all	no opinion
a. Rules for the use of digital processes or tools by companies to interact with Member States (registration, filing, publication)	○	◉	○	○	○
b. Rules for the use of digital processes or tools by companies to interact with shareholders	◉	○	○	○	○
c. Rules for cross-border mergers	○	◉	○	○	○
d. Rules for cross-border divisions	○	◉	○	○	○
e. Rules for cross-border conversions	○	◉	○	○	○
f. Rules on conflict of laws applicable to companies	○	○	○	○	◉
g. Other rules related to companies	○	◉	○	○	○

Please comment:

Eumedion participants try to act as engaged share-owners, but cannot succeed if they are still confronted with various legal and operational barriers in exercising their (cross-border) voting rights. As already stated in our response to the consultation document on the Capital Markets Union mid-term review 2017, we believe that 'distributed ledger technology' (also known as blockchain technology) could potentially facilitate the voting process. We agree with the remark in the consultation document that such a tool could reduce the costs and improve the efficiency of voting and the exercise of other shareholder rights, in particular in a cross-border context. This is also demonstrated by the IOSCO Research Report on Financial Technologies (Fintech) which elaborates on the use of blockchain technology for corporate actions processes such as proxy voting (p. 53-54). According to ESMA's report 'The Distributed Ledger Technology Applied to Securities Markets´ (p. 16-18) there are several legal issues, such as company law, that may have an impact on the deployment of distributed ledger technology. We believe that solving these issues should be a top priority for the European Union.

2. The use of digital processes or tools throughout the companies' lifecycle

The use of digital processes or tools for interaction between companies and Member States

There exists only a limited EU legal framework to allow the use of digital processes or tools in company law and no obligation as such on the online registration of companies[6] .For example, at national level, several Member States already allow full online registration of companies, whereas the EU legal framework allowing it cross-border does not exist. This means that in those Member States founders/representatives can register a new limited liability company in the business register in a fully online process, without having to be physically present before an authority for the act of registration or beforehand. In a number of other Member States, fully online registration is still not available and is, in any event, often difficult in cross-border situations. Moreover, not all information or documents from business registers provided electronically are considered authentic, because they do not have the same value as paper documents. Therefore, electronic versions are often not recognised and accepted in the same way as paper copies of documents. In addition, the information is often not easily accessible. The situation is very similar when registering a branch in another Member State and filing or publishing information.

We seek your views as to whether current company law rules need to be modernised to ensure that everyone involved in the lifecycle of a company could benefit from digital technologies. We would also like to know which safeguards would be needed to ensure that digital procedures are secure and do not lead to fraud.

6. i.e registration of an entity in the business register

2.1 What are the main issues that could be addressed for the use of digital processes or tools by companies in their interaction with national business registers? *(please choose all that apply)*

- [x] a. Make it possible to register, file and publish information on companies and branches fully online in a short time
- [ ] b. Provide for appropriate safeguards to make the online registration, filing and publication trustworthy
- [ ] c. Provide structured online templates and forms, in particular for the registration of companies and their instruments of constitution
- [ ] d. Ensure the recognition of documents/information issued by business registers, including the acceptability of electronic copies which should be accepted as 'true copies'
- [ ] e. Ensure that companies do not have to provide the same information more than once nationally and, where possible, cross-border
- [ ] f. Other issues
- [ ] g. No need for EU measures in this area
- [ ] h. No opinion

Please comment:

Nowadays not all information can be provided electronically.

Use of online tools for interaction between companies and shareholders

Digital tools (such as e-mail, messaging applications, audio and video conferencing software, digital information exchange platforms, electronic signature, blockchain voting facilities) could make the interaction between companies (listed and non-listed) and their shareholders significantly easier. Such tools could reduce costs and improve the efficiency of voting and the exercise of other shareholder rights, in particular in a cross-border context. However, it appears that the use of digital tools is not always allowed. Limitations may exist in some Member States for certain situations and different types of companies. In addition, Member States' different rules and lack of standardisation may also create barriers to the effective use of digital tools in company law.

2.2 In which areas could companies (listed and non-listed) be encouraged to use digital tools when interacting with their shareholders? *(please choose all that apply)*

- [x] a. Communication between companies and shareholders on general meetings
- [x] b. Participation and voting in general meetings
- [x] c. Communication outside the general meetings (for example, relating to payments of dividends, issuance of new shares or takeover bids)
- [ ] d. Adoption of shareholder resolutions without a physical meeting
- [ ] e. Other areas
- [ ] f. No need for EU measures in this area
- [ ] e. No opinion

Please comment:

We agree with the remark in the consultation document that digital tools, such as block chain voting facilities, audio and video conferencing software and online voting, could make the interaction between listed companies and their shareholders easier. Nowadays the full potential of the use of digital tools is not achieved. For example in The Netherlands scarce use is made of online voting. And as already mentioned in our answer to question 1.2 there are several legal issues, also in relation to company law, that may have an impact on the deployment of distributed ledger technology. We believe that the obstacles that listed companies face when they want to use digital tools to interact with their shareholders should be identified and resolved.

In this respect we would like to note that the revised Shareholder Rights Directive (SRD II) is already a step in the right direction, since it facilitates the communication between listed companies and shareholders and facilitates (cross-border) voting in general meetings. Nevertheless, the directive itself does not encourage the use of digital tools. Last April, ESMA has published a report on shareholder identification and communication systems (ESMA31-54-435). According to this report (p. 5/6) it would be useful, for shareholders in particular, to harmonise key aspects of the transmission of information and shareholder communication. Furthermore, it follows from this report that SRD II implementing measures could be particularly helpful if they facilitate a wider use of electronic means and thereby streamline and reduce the burden of communication duties for issuers and shareholders. We believe that attention should be paid to this topic.

While we welcome and encourage the use of digital tools to expand shareholder participation and voting in general meetings, we strongly believe that so-called virtual general meetings should supplement – not replace – physical meetings. Such hybrid general meetings allow shareholders to attend a physical meeting in person, but also provide a means for remote attendance, e.g. via teleconference or web-based portal. Physical meetings ensure that shareholders have a face-to-face opportunity to engage and ask questions to management and directors at least once a year. The long history of physical general meetings has given shareholders the ability to communicate – in an unfiltered and in a real-time way – to company management and boards as well as to fellow shareholders, which shareholders believe plays an important role in holding management and boards accountable to shareholders. Virtual-only meetings, by contrast, not only deny shareholders this long-held right, but also allow companies:

- filter company exchanges with shareholders;
- ‘cherry-pick’ the shareholders that are allowed to ask questions;
- Insulate management and directors from investor frustration on such issues as executive remuneration or environmental or social or other controversies with a potentially significant adverse impact on long-term value creation; and
- prevent shareholder proposal proponents from presenting their resolutions directly to management, boards and fellow shareholders.

Put simply, shareholders should have the choice of whether to attend the general meeting in person or virtually.

3. Cross-border mobility of companies (mergers, divisions, conversions)

The EU company law already provides a framework for cross-border mergers of limited liability companies (Directive 2005/56/EC), but there are currently no harmonised EU rules for cross-border conversions and divisions.

Cross-border mergers

The introduction of harmonised rules on cross-border mergers (Directive 2005/56/EC) made it possible to carry out cross-border mergers and resulted in a substantial increase in cross-border merger activity. At the same time, according to a recent study on the application of this Directive[7], there are still some problems with its practical implementation and functioning in practice.

For example, the current rules specify that creditors should be protected according to national rules. However, research shows that the diversity of national safeguards leads to practical difficulties. In the 2014 consultation, 80% of respondents were in favour of harmonising the rules on creditors' rights. This included a preference for granting guarantees/securities to creditors[8] and for having the creditor protection period start before the cross-border merger becomes effective ('ex-ante')[9].

Minority shareholders can also be affected by a cross-border merger. The current EU framework lays down minimum rules and gives Member States the possibility to provide additional protection to minority shareholders under national rules. However, Member States' rules on minority protection vary across the EU. The 2014 consultation showed that 65% of respondents supported harmonisation of minority shareholders' rights. This included a preference for allowing minority shareholders to request compensation and for harmonising the starting date of the protection period[10].

---

7. http://ec.europa.eu/justice/civil/files/131007_study-cross-border-merger-directive_en.pdf↩

8. 83% of respondents who were in favour of harmonisation supported providing creditors with a right to request a company to provide a guarantee or security; 54% were in favour of asking the court to require the company to provide such a guarantee or security.↩

9. 86% of respondents were in favour of harmonising the date determining the beginning of the protection period and 75% of those supported an "ex ante" starting date.↩

10. 70% of respondents in favour of harmonisation supported providing minority shareholders with a right to request compensation. 75% of respondents were in favour of harmonising the date of the beginning of the protection period.↩

3.1 What are the main issues that could be addressed with respect to cross-border mergers? *(please choose all that apply)*

- [x] a. Provide cross-border safeguards for creditors
- [ ] b. Provide for specific cross-border safeguards for public authorities (other than for creditors)
- [x] c. Provide for cross-border safeguards for minority shareholders
- [ ] d. Further facilitate a cross-border merger procedure (e.g. provide possibility to waive the management report)
- [ ] e. Other measures
- [ ] f. No need for further EU measures in this area

- [ ] g. No opinion

3.1.1 What kind of safeguards could be provided? *(please choose all that apply)*

- [x] Safeguards for the procedural aspects of protection (deadlines)
- [x] Safeguards for the material aspects of protection (creditors' rights)
- [ ] Safeguards for the definition of creditors that would require protection (for example safeguards only covering creditors who could demonstrate that their claims would be endangered according to an independent expert report or following a court proceeding)
- [ ] Other solutions
- [ ] No opinion

Please comment:

As already stated in our response to the consultation document on Cross-border mergers and divisions (2014), Eumedion believes that procedural aspects should be harmonised. This concerns harmonisation of the requirements with respect to creditors' meetings and guarantees/securities but also setting the date following which creditors of the merging companies are protected. Furthermore, Eumedion is in favour of maximum harmonisation of the rights of creditors in all Member States. In this respect creditors should have the right to ask the court to require that a company provides a guarantee or security. There is no justification why the protection of creditors should differ from Member State to Member State. For the avoidance of doubt we would like to note that further harmonisation should lead to a high standard of protection (instead of the lowest common dominator).

3.1.3 What kind of safeguards could be provided?

- [x] Safeguards for opposing a merger (for example, an exit right)
- [x] Safeguards for opposing a share exchange (for example, a possibility of extra compensation)
- [x] Other solution
- [ ] No opinion

Please comment:

As already stated in our response to the consultation document on Cross-border mergers and divisions (2014), Eumedion is in favour of maximum harmonisation of the rights of minority shareholders in all Member States. Minority shareholders should have the right to block the merger and the right to request compensation. There is no justification why the protection of minority shareholders should differ from Member State to Member State. For the avoidance of doubt we would like to note that further harmonisation should lead to a high standard of protection (instead of the lowest common dominator). Furthermore, Eumedion believes that also ‘more’ procedural aspects should be harmonised, such as setting the date following which minority shareholders of the merging companies can exercise their rights and determining the length of that period.

Cross-border divisions

Current EU company law sets out a procedure for public limited liability companies to divide at national level (domestic divisions). There is currently no EU procedure to directly divide any limited liability company on a cross-border basis, and only some Member States provide for such rules at national level. Therefore, companies wishing to divide cross-border have to perform several operations (for instance, a national division and a cross-border merger), which involve costly additional procedures.

Due to the fact that many Member States do not have rules on cross-border divisions or when they do, those rules differ, the position of stakeholders (in particular employees, creditors or minority shareholders) is unclear and their interests might not be effectively protected. Also it is not always clear for public authorities, including business registers, tax authorities or social security institutions, how to treat such operations.

3.2 What are the main issues that could be addressed for cross-border divisions? *(please choose all that apply)*

- [ ] a. Set out a cross-border division procedure (leaving the question of safeguards for stakeholders to Member States)
- [x] b. Set out a cross-border division procedure and provide for uniform safeguards for stakeholders across all Member States
- [x] c. Set out a procedure with minimum safeguards for stakeholders (Member States could enact or maintain more protective rules)
- [ ] d. No need for EU measures in this area
- [ ] e. Other measures
- [ ] f. No opinion

3.2.1 For which stakeholders or interest groups could safeguards be provided? *(please choose all that apply)*

- [x] Creditors
- [x] Employees, including employee participation in the boards of companies
- [x] Minority shareholders
- [ ] Public authorities (special rules other than for other creditors)
- [ ] Other stakeholders
- [ ] No opinion

Please explain what type of safegaurds should be provided:

We are of the opinion that the existing rights of creditors, employees and minority shareholders should be protected. The harmonised rules on cross-border divisions should be integrated in the framework established in the Directive on cross-border mergers.

Cross-border conversions

There is currently no EU procedure for the direct cross-border conversion of a company, i.e. for companies to move at least their registered office[11] to another Member State. Only some Member States provide for such rules at national level. Also, where such rules exist, the conditions under which such a cross-border conversion can be carried out (e.g. whether the companies need to transfer only their registered offices or also their "real seat") differ[12]. In practice, in most cases, companies need to wind up in one Member State and dissolve all their contracts, and a new company has to be set up in another Member State. Alternatively, companies can convert and transfer their registered office indirectly — by becoming a European Company (SE)[13] or by creating a subsidiary abroad and merging with it via EU cross-border merger rules. Both cases involve additional procedures and costs which deter the vast majority of companies from using them. Due to the fact that many Member States do not have rules on cross-border conversions or when they do, those rules differ, the position and rights of stakeholders (in particular employees, creditors or minority shareholders) are often unclear in case of a cross-border conversion. Also it is not always clear for public authorities, including business registers, tax authorities or social security institutions, how to treat such operations.

---

11. The registered office refers to the address of a company as registered in the business register. It establishes an important link between a company and the legal order of the country in which it was formed and registered.

12. Member States apply their own laws with regard to the establishment of companies on their territory. Many Member States only require a registered office. Other Member States require more, for instance a "real seat" – i.e. central administration, headquarters or principal place of business – in their territory as a condition for establishment.

13. A specific European legal form of Societas Europea, SE, for which transfers are allowed in EU law.

3.3 What are the main issues that could be addressed for cross-border conversions? *(please choose all that apply)*

- [ ] a. Set out only a cross-border conversion procedure (leaving the question of safeguards for different stakeholders and the question of seat of companies to Member States)
- [x] b. Set out a cross-border conversion procedure and provide for uniform safeguards for different stakeholders across all Member States (leaving the question of seat of companies to Member States)
- [x] c. Set out a cross-border conversion procedure with minimum safeguards for different stakeholders (Member States could enact or maintain more protective rules, but leaving the question of seat of companies to Member States)
- [ ] d. Cover the question of stakeholders' protection through conflict-of-law rules in cases of cross-border conversions (see also Question 4.7)
- [ ] e. Set out a cross-border conversion procedure which lays down specific rules to deal with the seat of companies
- [ ] f. No need for EU measures in this area
- [ ] g. Other measures
- [ ] h. No opinion

3.3.1 For which stakeholders or interest groups could safeguards be provided and which kind of safeguards? *(please choose all that apply)*

	Safeguards that make it possible to block the conversion by each Member State concerned	Safeguards for information and consultation of employees before the conversion	Safeguards to protect existing rights (e.g. financial guarantee for outstanding claims, exit rights for minority shareholders, special negotiating body to conduct negotiations on employee participation rights)	Safeguards provided by conflict-of-law rules (i.e. application of the overriding mandatory provisions of the forum or of another Member State with which the company is closely connected)	Other safeguards	No opinion
Creditors	☐	☐	☑	☐	☐	☐
Employees, including employee participation in the boards of companies	☐	☑	☑	☐	☐	☐

Minority shareholders	☐	☐	☑	☐	☐	☐
Public authorities (special rules other than for other creditors)	☐	☐	☐	☐	☐	☑
Other stakeholders	☐	☐	☐	☐	☐	☑
No opinion	☑	☐	☐	☑	☑	☑

Please comment:

As already mentioned in our response to the Consultation on the future of European Company Law (2012), we are in favour of an EU procedure for the transfer of a listed company's registered office to another Member State without loss of legal personality. Such an EU procedure should contain safeguards to protect the existing rights of creditors, minority shareholders and employees. Given Eumedion's objective, we have no opinion on the desirability of safeguards for other parties, like public authorities and other stakeholders. In addition to those safeguards we believe that an EU framework for cross-border conversions should provide for the conditions under which a conversion can be carried out. We are of the opinion that a cross-border conversion should not be possible if proceedings for winding up, liquidation, insolvency, suspension of payments or similar proceedings have been brought against the company. Furthermore, we believe that the transfer of the company's registered office to another Member State should be carried out if that transfer is not accompanied by the transfer of the company's headquarters or principal place of business.

4. Conflict-of-law rules for companies

Many companies have operations in several Member States. Sometimes they are incorporated in one Member State but set up main operations in other Member States. This is an expression of the freedom of establishment guaranteed in the Treaty on the Functioning of the EU. With an ever more integrated single market, this trend is likely to continue. Despite this cross-border phenomenon, at present, conflict-of-law rules in the area of company law are regulated exclusively by Member States. Thus the content of these rules may differ substantially.

There have been various practical obstacles reported from the countries that have retained an aspect of the real seat theory, for instance problems in identifying the place of the real seat. The case- law of the European Court of Justice has not yet led to a convergence of national conflict-of-law rules applicable to companies. Companies may encounter problems and difficulties such as problems with the boundary between the applicable law and other fields of law, possible application of two or more Member States' company laws or may even be faced with the impossibility to carry-out cross-border conversions

4.1 What problems arise when national conflict-of-law rules for companies differ? *(please choose all that apply)*

- ☐ a. Problems with identifying the place of the "real seat" or the place of incorporation of a company
- ☐ b. Problems related to the divergent or conflicting provisions in different national company laws
- ☐ c. Cross-border conversions are made virtually impossible
- ☐

d. Problems with the boundary between the applicable company law and other fields of law (for instance insolvency, tort, contract law)

- [ ] e. Problems with the application of overriding mandatory rules of domestic law that may interfere with foreign company law
- [ ] f. Other
- [ ] g. None
- [x] h. No opinion

Connecting Factor

The connecting factor determines which national substantive company law applies. For the connecting factor, traditionally, some Member States follow the real seat theory, i.e. the law governing a company is determined by the place where the central administration of that company is located. Other Member States follow the incorporation theory, i.e. the law governing a company is determined by the place of its incorporation.

The case-law of the Court of Justice of the EU has considered that certain practices in Member States imposing their company law rules on companies incorporated in other Member States on the basis of the real seat approach are an unjustified restriction to the freedom of establishment. Against that background, today in all Member States, the place of incorporation is used de facto as the sole or the main connecting factor to determine the applicable law (lex societatis) in intra-EU cases. A significant number of companies have made use of the resulting corporate mobility and choice of law.

The law of the place of incorporation is not applied without exceptions. The laws of all Member States provide that certain provisions of their substantive company law apply to companies that are incorporated under the law of another jurisdiction (so-called "overriding mandatory provisions", i.e. provisions which are crucial to safeguard a country's public interest, such as its political, social or economic organisation). This indicates a country's strong desire to retain an appropriate degree of control over foreign companies operating within its territory when public interests are at stake. While this broad consensus should be taken into account in the context of a possible future harmonisation, the jurisprudence of the European Court of Justice, which sets limits to the application of overriding mandatory provisions in order to give effect to the principle of freedom of establishment, must be observed at the same time.

4.2 By which law should a company be governed?

- (•) a. By the law of the country where the company was incorporated or has its registered office, subject to overriding mandatory provisions and public policy exceptions
- ( ) b. By the law of the country where the company has its real seat, subject to overriding mandatory provisions and public policy exceptions. Please specify in the free-text box below which elements for the determination of the 'real seat' you have in mind, e.g. central administration, main operations.
- ( ) c. Other (please specify in the free-text box below)
- ( ) d. I don't know

Please comment:

–

Matters governed by the lex societatis

Most existing conflict-of-law rules for companies provide for a non-exhaustive enumeration of matters which are governed by the lex societatis (i.e. the law governing a company). Also a possible EU instrument could contain such a non-exhaustive enumeration of matters governed by the lex societatis. These matters could include both the internal aspects of the company (in particular the rights and obligations among the members of the company, its functioning and organisation, or the directors' liability towards the members of the company and the company itself) and the external aspects of the company (i.e. the existence of the company as a legal entity, its general capacity and the separation between the members´ and the company´s property). The governance of all these matters by the same law could ensure consistency and predictability.

Certain matters do not only address the internal affairs of the company. They reflect wider policy goals and choices, as these rules seek to balance the interests of different social players within the society where a company operates. This may for instance concern rules on employee participation. Two options could be considered: the first option would be to exclude such rules from the scope of an EU instrument and leave such matters to the national conflict-of-law rules. The second option would be to include such rules in the scope of the instrument. This would be based on the consideration that Member States can protect such social policy goals, also in relation to companies governed by a foreign lex societatis, by relying on overriding mandatory provisions.

Matters which are not of a company law nature will be in any case excluded from the scope of an EU instrument on conflict-of-law rules on company law. These matters include revenue, customs and administrative matters; insolvency; contractual and non-contractual obligations, rights in rem, trusts and labour law.

4.3 What matters could the *lex societatis* cover? *(please choose all that apply)*

- [x] a. Internal matters
- [x] b. External matters
- [ ] c. No opinion

4.3.1 Please specify which internal matters should be covered by the *lex societatis*:

- [x] The rights and obligations among the members of the company
- [x] The functioning and organisation of the company
- [x] The liability of directors towards the members of the company and the company itself
- [ ] Other internal matters *(please specify in the free-text box below)*

Please comment:

–

4.3.2 Please specify which external matters should be covered by the *lex societatis*:

- [x] The existence of the company as a legal entity
- [x] The general capacity of the company
- [x] The separation between the members´ and the company´s property
- [ ] Other external matters *(please specify in the free-text box below)*

Please comment:

4.4 Could certain matters be excluded from the scope of a uniform conflict-of-law instrument reflecting wider policy goals and choices?

- ( ) a. Yes
- ( ) b. No
- (•) c. No opinion

Universal or intra-EU application

Conflict-of-law rules usually have universal application. For instance, when determining the law applicable to contracts or torts, it is irrelevant whether the law of a Member State or a non-Member State is designated as applicable. Therefore, one option is to provide for universal application also of a future instrument on company law. There are, however, also EU conflict-of-law rules without universal application, for example, in insolvency proceedings.

Including companies established under the law of a non-EU country in the scope of a future instrument on the law applicable to companies could have far-reaching implications, for instance, for the protection of shareholders, other stakeholders and society at large. Therefore, taking into account such specificities of company law, excluding companies incorporated in third countries from the scope of a future EU instrument could also be considered. A more limited scope of application of this kind would correspond to the scope and impact of the current case-law of the Court of Justice which, in the absence of EU conflict-of-law rules, is based on the freedom of establishment and therefore addresses only intra-EU cases.

4.5 Could EU-level conflict-of-law rules for company law have universal application, i.e. should they also apply to companies incorporated in non-EU countries with operations in the EU?

- a. Yes
- b. No
- c. No opinion

Change of applicable law

In accordance with the case-law of the European Court of Justice, the possibility for a company established in one Member State to convert to a company governed by the national law of another Member State, i.e. to change the applicable law while keeping its legal personality, without prior winding-up or liquidation, is guaranteed by the freedom of establishment in certain circumstances. Specifically, a Member State which enables companies established under its national law to convert, cannot exclude or unduly inhibit, in a general manner, companies initially governed by the law of another Member State from converting to companies governed by its own national law and thus exercising mobility. However, the company that wishes to change its applicable law must satisfy the requirements applicable to national companies for incorporation in the new host Member State (e.g. registration, effective residence requirements, minimum capital, disclosure, internal structure or number of members). The Court has clarified that in this regard the principles of equivalence and effectiveness apply.

The old home Member State's law could continue to govern the rules on the protection of minority shareholders and creditors of the company.

However, not all Member States' laws explicitly allow the cross-border relocation of the statutory seat of companies or have rules on its effects on the applicable law.

4.6 Should a possible future instrument on conflict-of-laws in cross-border operations of companies specifically address the possibility of a change of the applicable law through a cross-border conversion to another Member State without loss of legal personality?

- a. Yes
- b. No
- c. No opinion

Please explain further:

As already mentioned in our answer to question 3.3, we are in favour of an EU procedure for the transfer of a listed company's registered office to another Member State without loss of legal personality.

4.7 Should a possible future instrument on conflict-of-laws specify which matters should be covered by the 'old law' and which by the 'new law'?

- (●) Yes
- ( ) No
- ( ) No opinion

Please comment:

As already stated in our answer to question 4.2, we are of the opinion that a company should be governed by the law of the country where the company is incorporated or has its registered office. In case of a cross-border conversion of a company the registered office of that company is transferred to another Member State. As a consequence the law by which that company is governed is changed. In order to avoid legal uncertainty it should be specified which matters are governed by the 'old law' and which by the 'new law'.

Other comments

Are there any other relevant issues about the subject matter of this consultation that should be taken into consideration?

- [ ] Yes
- [x] No
- [ ] No opinion

Please comment further:

Please upload your file:

Thank you very much for your contribution!

Background Documents

Specific Privacy Statement-bg.docx (/eusurvey/files/70e168cb-259d-4202-9a6c-9008b842008e)

Specific Privacy Statement-cs.docx (/eusurvey/files/c5df0167-11fb-40bb-8a2d-29211665a6a8)

Specific Privacy Statement-da.doc (/eusurvey/files/ea6f4e7a-c058-4f60-88f2-e2fb8fdf4e33)

Specific Privacy Statement-de.docx (/eusurvey/files/81ef0b61-2def-4fe7-9207-80fa0ffc307a)

Specific Privacy Statement-el.docx (/eusurvey/files/f378c606-328a-4a9c-b95a-2f9d1b62d3ee)

Specific Privacy Statement-es.docx (/eusurvey/files/02fb719c-2a87-4acb-b402-64af7f22eb83)

Specific Privacy Statement-et.docx (/eusurvey/files/48cc6e99-62ab-41f1-b86e-dfd5f16d4e6b)

Specific Privacy Statement-fi.docx (/eusurvey/files/f08b1b28-63a5-40ed-9481-1ec3bbf52f9c)

Specific Privacy Statement-fr.docx (/eusurvey/files/ca9e8c15-b473-49ec-99e7-14ec80de443b)

Specific Privacy Statement-hr.docx (/eusurvey/files/085d8e39-b821-4e81-b261-030a82836a9f)

Specific Privacy Statement-hu.docx (/eusurvey/files/f9782500-9fad-4317-b316-ce21c1866f29)

Specific Privacy Statement-it.docx (/eusurvey/files/0729e316-1cfa-44c5-8e87-e15a28ce0f42)

Specific Privacy Statement-lt.docx (/eusurvey/files/c93c179d-35b8-45e5-9011-aca7041ab79d)

Specific Privacy Statement-lv.docx (/eusurvey/files/39e599e9-6897-4328-a033-ab0cd17af57b)

Specific Privacy Statement-mt.docx (/eusurvey/files/198a4264-5910-4ad2-8ca5-a174dbc9d5c1)

Specific Privacy Statement-nl.docx (/eusurvey/files/9a47556c-9de5-40e6-bff3-e0399d3178a7)

Specific Privacy Statement-pl.docx (/eusurvey/files/9905b526-ba19-4fd7-b2e5-6f86aa36dac4)

Specific Privacy Statement-pt.docx (/eusurvey/files/94842ea8-1e15-4edd-b14a-1a32309842d9)

Specific Privacy Statement-ro.docx (/eusurvey/files/e255ba73-fe82-4827-83ad-cb8971ea5207)

Specific Privacy Statement-sk.docx (/eusurvey/files/9d0e3ff5-4d72-4602-bfad-96d601b3027c)

Specific Privacy Statement-sl.docx (/eusurvey/files/40fb039d-c83c-4387-bcac-cfb7ff032eed)

Specific Privacy Statement-sv.docx (/eusurvey/files/ee2472c3-8727-4fa2-aa82-e2dffe3af02c)

Contact

just-company-law@ec.europa.eu
