

CROSS-BORDER CONVERSION OF COMPANIES - TRANSFER OF THE REGISTERED SEAT, ESPECIALLY ACCORDING TO DIRECTIVE 2017/1132 AS AMENDED BY DIRECTIVE 2019/2121

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Two proposals of directives to amend the **Company Law Directive** (directive (EU) 2017/1132 of the European Parliament and the Council of 14 June 2017 relating to certain aspects of company law):

- Directive (EU) 2019/1151 of the European Parliament and the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (published on 11 July 2019) – **Digitalisation Directive**.
- Directive (EU) 2019/2121 of the European Parliament and the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (published on 12 December 2019, transposition by 31 January 2023) – **Mobility Directive**.

DEVELOPMENT OF THE MOBILITY DIRECTIVE I

- The **Directive on cross border mergers** (Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies) did not provide a legal framework for transferring the registered seat of a company to another state (now called **cross-border conversion**) or **cross-border divisions**.
- This lack of rules was a **cause of legal uncertainty** for those operations and lead to **barriers to the exercise of the freedom of establishment** within the EU.
- The **proposal of the European Commission** is built on the experience gathered on cross-border mergers and tried to establish similar procedures for cross-border conversions and divisions.

DEVELOPMENT OF THE MOBILITY DIRECTIVE II

- All three operations require similar steps and information:
 - Publication of the draft terms of the operation
 - Report for the shareholder and employees
 - Independent expert report
 - Approval by the general meeting
 - Obtaining a certificate confirming the compliance with all legal obligations
- The goal was to **harmonise the requirements** of the three operations to the highest degree possible, while identifying the **additional requirements** necessary to the more complex operations of mergers and divisions.

PROTECTION OF SHAREHOLDERS, EMPLOYEES AND CREDITORS

- **More information** required than so far in the common draft terms e.g. information on the impact of the operation on shareholders, employees and creditors.
- **Shareholders** and **employees** are allowed to present their observations to the general meeting deciding on the operation.
- **Shareholders** must be informed of:
 - Right to dispose of their share for an adequate cash compensation if they vote against the approval of the common draft terms.
 - Right to ask for a higher compensation.
 - Right to dispute the shareexchange ratio.
- **Safeguards for creditors** whose claims antedate the disclosure of the draft terms in the draft terms.

SCRUTINY OF THE LEGALITY OF CROSS-BORDER CONVERSIONS

- Designated competent authority of the departure state e.g. court, notary, issues a **pre-conversion certificate** attesting to compliance with all relevant conditions and to proper completion of all procedures and formalities (Art. 86m para 1).
- If the competent authority has **serious doubts** indicating that the cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes, a pre-conversion certificate must not be issued (Art. 86m para 9).

THE NEW RULES ON CROSS-BORDER CONVERSIONS:

Art. 86a – 86t

Art. 86a and 86b: Scope and Definition

- “**cross-border conversion**” means an operation whereby a company, without being dissolved or wound up or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality (Art. 86b para 2).
- **Scope:** conversions of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, into limited liability companies governed by the law of another Member State (Art. 86a para 1).
- **Exceptions** (Art. 86a para 2 and 3).
- **MS options** (Art. 86a para 4).

Art. 86c and 86d

Art. 86c: Procedures and Formalities

- **Law of the departure Member State** shall govern *those parts* of the procedures and formalities to be complied with in connection with the cross-border conversion in order *to obtain the pre-conversion certificate*, and the **law of the destination Member State** shall govern those parts of the procedures and formalities to be complied with *following receipt of the pre-conversion certificate*.

Art. 86d: Draft terms of cross-border conversions

- E.g. Legal form and name of the company, location of its registered office in the departure and destination MS, details of the offer of cash compensation, likely repercussions of the cross-border conversion on employment, safeguards offered to creditors.

Art. 86e: REPORT OF THE ADMINISTRATIVE OR MANAGEMENT BODY FOR MEMBERS AND EMPLOYEES

- *Explains and justifies* the **legal and economic aspects of the cross-border conversions** and the **implications** of the cross-border conversion **for employees**.
- Report includes a **section for members** (para 3) and a **section for employees** (para 5).
- Report or reports must be available together with the draft terms of the cross-border conversion not less than **six weeks before the date of the general meeting**.

Art. 86f: INDEPENDENT EXPERT REPORT

- Report for members of the company on the examination of the draft terms.
 - Includes an opinion on the **adequacy of the cash compensation**.
 - Indicates the **method or methods** used to **determine the cash compensation**.
 - Describes any **special valuation difficulties** which have arisen.
- MS **may exclude** single-member companies from this obligation.

Art. 86g: DISCLOSURE

- **One month before** the meeting the company must make **publicly available in the register** (MS option: website of the company):
 - **Draft terms of the cross-border conversion**
 - Notice informing the members, creditors and representatives of the employees, that they may **submits comments** on the draft terms at the latest 5 days before the date of the general meeting.
- MS option to disclose the expert report in the same way.
- MS shall ensure that the documentation required is accessible to the public free of charge through the system of interconnection of registers.

Art. 86h: APPROVAL BY THE GENERAL MEETING

- **General meeting decides** by means of a resolution:
 - Whether to approve the terms of the cross-border conversion, and
 - Whether to adapt the instrument of constitution and the statutes if they are contained in a separate instrument.
- MS shall ensure that the approval of the draft terms and any amendments to those draft terms require a **majority of not less than two thirds but not more than 90 % of the votes.**
- MS shall ensure that the approval by the general meeting **cannot be challenged solely on the following grounds:**
 - That the cash compensation has been inadequately set, or
 - That the information given on the cash compensation did not comply with the legal requirements.

Art. 86i: PROTECTION OF MEMBERS

- Exit right for members who have voted against the cross-border division.
- They are entitled to receive an **adequate cash compensation for their shares**. They have to declare this within **one month after the general meeting**.
- The compensation has to be paid two months after the validity of the conversion at the latest.
- MS may stipulate that an increased cash compensation must be offered to all exiting members (even if they have not taken part in the procedure „erga omnes-effect“).

Art. 86j: PROTECTION OF CREDITORS

- MS shall provide for an **adequate system of protection of the interests of creditors** whose claims antedate the disclosure of the draft terms of the cross-border conversion and are not due at the time of disclosure.
- MS shall insure that creditors who are dissatisfied with the safeguards offered in the draft terms **may apply for adequate safeguards** (the satisfaction of their claims is at stake and they have not obtained adequate safeguards).
- MS may require that the administrative or management body of the company provide a **declaration** (disclosed together with the draft terms) that accurately reflects its **current financial status at a date no earlier than one month** before the disclosure of that declaration.
- MS shall ensure that creditors whose claims antedate the disclosure of the draft terms are able to institute **proceedings against the company** also in the departure Member State **within two years of the date the conversion has taken effect**.

Art. 86k and Art. 86l

Art. 86k: Employee information and consultation

- Information that must be given to employees according to already existing provisions of EU-law.

Art. 86l: Employee participation

- Politically difficult topic in various directives.
- Goal is to prevent companies from „fleeing from employee participation“ just before the relevant national threshold in a company is reached (for example 500 employees in Germany and 300 in Austria) by a provision that requires workers participation to be „exported“ to the destination MS if 4/5 of the national threshold have been reached. (see also Art. 160l para 2 for divisions).

Art. 86m: Pre-conversion certificate

- MS must designate a „competent authority“ (court, notary or other authority) to scrutinise the **legality of cross-border conversions** as regards those parts of the procedure which are governed by the law of the departure Member State and to issue a **pre-conversion certificate**.
- The company has to apply for this certificate and the competent authorities may request information, if not provided by the company, also from other relevant authorities. That scrutiny shall be finished **within 3 months**.
- If the decision of the competent authority is negative, the company shall be informed of the reasons. The company should have the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.
- MS shall ensure that the competent authority **does not issue** the pre-conversion certificate where it is determined in compliance with national law that a cross-border conversion is **set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law**, or for **criminal purposes**.
- MS shall ensure that the competent authority may consult other relevant authorities with competence in the different fields concerned by the cross-border conversion, e.g. those of the destination MS.

Art. 86n and Art. 86o

Art. 86n: Transmission of the pre-conversion certificate

- MS shall ensure that the pre-conversion certificate is shared (and available, see Art. 22) with the authorities of the destination MS through the system of interconnection of registers.

Art. 86o: Scrutiny of the legality of the cross-border conversion by the destination MS

- The competent authority of the destination MS has to **scrutinise** if the **conversion** and the **converted company** comply with its national law. So it depends on that law if a splitting of the seat (into a registered and real seat in another MS) is allowed.
- **Any application by the company**, including the submission of any information and documents, may be completed **fully online** without the necessity for the applicants to appear in person before the authority, in accordance with the relevant provisions of Chapter III of Title I (as amended by the Digitalisation Directive, Art. 13i).

Art. 86p, 86q und 86r

Art. 86p: Registration

- The laws of the departure MS and of the destination MS shall determine, with regard to their respective territories, the arrangements, in accordance with Article 16, for **disclosing the completion of the cross-border conversion in their registers**. The registers shall make that information publicly available and accessible through the system of interconnection of registers (para 1).
- The register in the destination MS must notify the register in the departure MS through the system of interconnection of registers, that the cross-border conversion has taken effect.

Art. 86q und 86r: Date on which the cross-border conversion takes effect and consequences of a cross-border conversion

- The **law of the destination MS** shall determine the **date** on which the cross-border conversion **takes effect**. All the assets and liabilities of the company, including all contracts, credits, rights and obligations, shall be those of the converted company (legal identity).

Art. 86s and 86t

Art. 86s: Independent experts

- MS must establish rules on the **civil liability of the independent expert** who made the report according to Art. 86f and on his independence from the company planning the cross-border conversion.

Art. 86t: Validity

- Once a cross-border conversion has taken effect it **cannot be declared null and void**. This does not affect MS' powers, inter alia, in relation to criminal law, the prevention and combating of terrorist financing, social law, taxation and law enforcement, to impose measures and penalties, under national law, after the date on which the cross-border conversion took effect.



Thank you very much for your attention!

