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From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	ST 5380/1/19 REV 1
No. Cion doc.:	ST 8561/18 + ADD 1 + ADD 2
Subject:	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

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**I. INTRODUCTION**

1. On 25 April 2018, the Commission adopted the "Company Law package", which consists of two proposals for Directives amending Directive (EU) 2017/1132: a Directive on the use of digital tools and processes in company law and a Directive on cross-border conversions, mergers and divisions. The package aims to facilitate the use of digital technologies throughout a company's lifecycle and cross-border conversions, mergers and divisions.

2. The "mobility" proposal aims to provide specific and comprehensive procedures for cross-border conversions, mergers and divisions to foster cross-border mobility while, at the same time, offering adequate protection to company stakeholders in order to safeguard the fairness of the Single Market. At this point, only mergers are covered by EU law for cross-border operations. The jurisprudence *Polbud* from October 2017 reaffirmed the absolute nature of the freedom of establishment and confirmed the limited scope of possible derogations on the grounds of public order. The aim of this proposal is to reinstate a predictable framework, legal certainty and create common standards of procedures for assessing cross-border operations in the EU. Main elements of the proposal that required technical work are the alignment and consistency between the three types of the cross-border operations; the protection of members and employees; as well as the protection of creditors, in particular the applicable law and jurisdiction.

## II. STATE OF PLAY

3. The Working Party on Company Law examined the proposal at eleven occasions during the Bulgarian, Austrian and Romanian Presidencies.
4. The European Parliament adopted the JURI Committee report during the Plenary on 15 January 2019. The Rapporteur Ms REGNER (S&D/AT) was granted a mandate to start negotiations with the Council on this basis.
5. Although there remain a number of technical adjustments that delegations would like to see integrated in the text, there was broad support at the Working Party on Company Law (Attachés) on 24 January 2019 to move this text forward considering the tight deadlines. In view of this support and of reaching a possible rapid agreement with the European Parliament, the Presidency submits to this Committee, in the Annex to this Note, a compromise package. Changes are compared to doc. 5380/1/19 REV 1 and marked in **bold underlined** and ~~strikethrough~~. The latest elements of the compromise package are explained under Section III. The Presidency considers this text could provide the basis for finding a qualitative overall compromise package agreement with the European Parliament.
6. FR, UK entered a parliamentary scrutiny reservation.

### III. MAIN ISSUES/ LATEST ELEMENTS OF THE COMPROMISE PROPOSAL

7. Scope ( Articles 86c, 120, 160c), recital (11): a number of delegations wished a wider opt-out by addressing directly the situation of the voluntary liquidation in cross-border mergers and divisions and that of companies which are subject to crisis prevention measures dealt with by the Resolution Directive 2014/59/EU. Some other delegations preferred that the current approach in mergers be reflected while in the same time allowing greater flexibility for the Member States to accommodate other procedures in the scope of this Directive. The Presidency tried to find a balanced compromise, narrowing the exceptions from the scope to companies that are in liquidation and have begun to distribute their assets.
  
8. Protection of members (Articles 86j, 126a, 160l, recitals (20)-(25)): this issue was discussed at length in many Working Party meetings. The Presidency compromise proposal presented at the Working Party meeting on 7 January 2019 (doc. 15678/18), which was largely accepted by Member States. During that Working Party meeting, most delegations supported the option reflected in the Annex to this Note as regards the applicable law and jurisdiction in case of a challenge of the share exchange ratio in cross-border mergers and divisions. This option follows the principle deriving from the current Article 127(3) of Directive (EU) 2017/1132 taking into account that the alignment to the existing rules in cross-border mergers was frequently pointed out as being important for delegations. Further flexibility has been added to the exit right regime in respect of cash compensation .
  
9. Protection of creditors (Article 86k, recitals (26)-(29)): it has been clarified in Article 86k paragraph 4 as well as in Recitals (20) to (25) that despite the fact that the cross-border conversion has taken effect and the registered office of the company has been transferred to the Member State of destination, creditors with claims antedating the disclosure of the draft terms which have not fallen due at the time of disclosure would have a choice to file their claim in the jurisdiction in the Member State of departure (i.e. where the registered office was situated prior to the cross-border conversion) or follow rules on jurisdiction laid down in Brussels Ia Regulation.

Following the suggestion of delegations, the scope of the provisions was widened so as to provide the same regime for all creditors whose claims antedate the disclosure of the draft-terms. Following the opinion of Legal Service of the Council, a solution on an alternative jurisdiction was created, which is in accordance with Brussels Ia Regulation.

Furthermore, the question of balance between the company's interest in detaching from a Member State and protection of creditors was answered, as some delegations suggested, by providing a shorter period available to creditors for making use of their national jurisdiction.

#### IV. OTHER ISSUES

10. Employee participation (Articles 86l, 133, 160n, recital (30)): a few delegations would have preferred keeping the Commission proposal. This was however not supported by the vast majority of delegations.
  
11. Minimal standards for the Liability of independent expert (Articles 86t, 133a, 160v): these were reintroduced, taking into consideration the positions expressed at the last Working Party meeting by some delegations that the national legislation already regulating these aspects should be sufficient and remain applicable.

#### IV. CONCLUSION

**The Permanent Representatives Committee is invited to mandate the Presidency to start negotiations with the European Parliament with a view to reaching a first reading agreement on the basis of the compromise package as set out in the Annex.**

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