EUROCHAMBRES

Position Paper

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EUROCHAMBRES position on the proposal for a Directive amending Directive (EU) 2017/1132 as regards Cross-Border Conversions, Mergers and Divisions [2018/0114 (COD)][1]

EUROCHAMBRES welcomes the intention of the European legislator to create a codified legal framework for cross-border conversions, mergers and divisions. We are convinced that this will help increasing the number of multinational European companies that can then compete better globally. This proposal could improve the predictability and legal certainty of company transformations considerably, which could lead to significant cost reductions, especially for SMEs.

However, we feel that the proposal tends to **exaggerate requirements** and **adds red tape**. We regret that the general trend of EU company law legislation towards more flexibility and less "red tape", as it was well put into practice by Directive 2009/109/EC on Reporting Requirements for Mergers, is now apparently being reversed.

While the methodology of the proposal to create parallel provisions for all transformations concerned - conversions, mergers and divisions – might seem to be a holistic approach at first sight, this has obviously led to the creation of the highest requirement possible for all kinds of transformations, no matter if appropriate or necessary. This is a form of "gold-plating" from the very beginning and will lead to considerably more administrative burden.

As an example, to a large extent the proposed directive takes the same approach to cross-border conversions as to mergers and divisions. However this is not adequate, as these transformations are very different: in case of a merger or acquisition the assets of a company are transferred to another legal entity, while this is not the case in case of a conversion where the legal entity remains the same.

One major shortcoming of the proposition is article 86c lit 3 and analogue article 160d lit 3 which make a planned cross-border transformation subject to examination by competent authorities to determine whether the transformation constitutes **an artificial arrangement** aimed at obtaining undue tax advantages or unlawfully prejudicing the legal or contractual rights of employees, creditors or members. Besides being redundant, these provisions are formulated in a very vague and ambiguous manner, so that they create sufficient legal uncertainty for all companies to utterly undermine the main target of the proposal which was to create legal safety for conversions and divisions.

The proportionality of the proposed examination is questionable particularly from the tax perspective. Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices includes rules on exit taxation as well as the general anti-abuse rule, which are applicable to cross-border conversions and divisions. Besides this, Council Directive 2009/133/EC on the common system of taxation applicable inter

alia to cross-border divisions includes a specific anti-abuse rule which allows EU Member States to withdraw tax benefits from a cross-border division where it appears that the transformation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

We consider these two directives as sufficient to prevent artificial arrangements aimed at obtaining undue tax advantages. Consequently, the proposed examination is not appropriate. Competent authorities have all necessary instruments at hand to prevent tax evasion or tax avoidance and it is their task to apply them properly. This is why the proposed examination is not appropriate, creates legal uncertainty, puts the aim of the proposal at risk and should thus be deleted.

While most rules are mandatory, it is exactly the rules on the **protection of creditors** in articles 86k, 126b and 160m that are at a large extend voluntary. In the interest of the creditors, who, especially if they are SMEs, rely on a similar protection of their interest in all Member States, these should be harmonised and mandatory, especially the declaration of the financial status of the company.

The provisions on **employee participation** in article 86l and 160n are exuberant and contradict the principle of subsidiarity. A high degree of employee participation in all Member States is ensured, as national laws usually take the actual production sites as reference for the application of rules on employee participation. Besides that, the threshold of 4/5 in lit 2 is not reasoned and appears random.

While the proposal aims at regulating the different kinds of transformations in depth, it is not clear how the proposed directive can be applied if a company undergoes transformation and this opportunity shall be used to **change its legal form**, for instance, from private limited company in one Member State to public limited company in another.

[1]) DIHK does not share the views expressed in this position paper.

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