

Ms. Věra Jourová  
Commissioner for Justice, Consumers and  
Gender Equality  
European Commission  
Belgium

Submitted via website

Brussels, 10 July 2018

**Subject: Proposal on cross-border conversions, mergers and divisions**

Dear Commissioner Jourová,

Accountancy Europe is pleased to provide you with our comments on the European Commission's proposal for amending the Directive on cross-border conversions, mergers and divisions.

We welcome the proposal on **the companies' cross-border** mobility, especially modernisation of cross-border procedures through digitalisation. It is important to establish a proper and consistent company law framework across Europe to enhance the internal market and provide more certainty to companies when operating cross-border. However, doing so in practice is the real challenge. Such a framework needs to be robust and also attractive to business. It needs to represent efficiency, gain and a clear cost saving over existing procedures for business to be willing to use it. Otherwise, the effort and expense of developing the proposal for the Directive and then implementing it will be doubtful. **Investors' and consumers'** protection is one of the essential elements to be duly considered in this regulatory framework.

## Ensure level playing field and consistency across the EU

Currently legislation varies across Member States which contributes to legal uncertainty and discourages businesses from engaging in cross-border operations. To tackle this, it is important to bring a level of consistency in legislation across Member States as an end result of the implementation of the current proposal for the Directive, especially when dealing with cross-border mergers.

Equally, there is the need for clear and binding rules across EU when a company can move to another EU Member State and how. We therefore welcome the ambition of this proposal to provide a framework for cross-border conversions and divisions.

Nonetheless, we would like to note that the proposal leaves Member States with a lot of flexibility to define the related procedures. This could lead to inconsistencies and divergences increasing legal uncertainty for companies. For example, the Member States govern the procedures and formalities to obtain a pre-conversion certificate and ensuring the legality of the conversion. Given the current diversity of procedures between Member State administrations, it is essential that the Directive clearly sets out the minimum common features necessary if businesses are to derive any benefit from applying the new rules.

The proposal allows Member State to decide who the competent authority dealing with cross-border procedures is. The competent authority needs to be able to assess a wide variety of matters such as employment rights, tax law, company law and wider commercial considerations. It will require significant expertise across a number of fields in any complex case. It could be useful if the European Commission provided guidance on what institution can be appointed as the competent authority and what powers it has in order to prevent unhelpful differences across jurisdictions.

Additionally, the proposal only indicates a timeframe for the competent authority to make a decision on legality of the cross-border procedure. But it does not indicate what happens if the competent authority for any reason fails to do so after the indicated period. This may be a source of serious delays and potentially damageable uncertainties.

## Ensure consistent protection of employee rights

The protection of employee rights is another essential element of the proposal. It would be easier that this aspect is covered at EU level to ensure proper safeguards as some Member States do not have any or strong legislation on e.g. employee involvement. Also, legitimate mobility should be facilitated and cannot be limited to Member States having similar regimes.

The independent expert needs to assess whether the conditions for a cross-border conversion, division or merger are met. There will be cases where the expert needs to determine if there is no artificial arrangement. Given the room left for interpretation by Member States, this may create difficulties for the expert to confirm whether or not this particular conversion, division or merger may be, for example, **circumventing employees' rights**. In the absence of guidance, such decisions will have to be made based on the assessment and value judgement by the expert putting high pressure on the expert.

It is important to set a level playing field at the EU level. If businesses find legislation too restrictive in certain Member States, they may decide against undergoing a particular cross-border procedure or to transfer the operations through some other mechanism which falls entirely outside the proposed framework. Both events would mean the Directive would miss the objective to create “optimal conditions in terms of a clear, predictable and suitable legal framework which could lead to enhanced economic activity”.

## role of the independent expert

There should be clear procedures and structures defining the involvement of professionals in the cross-border procedures. It should be ensured that the expert is of course independent and follows appropriate and accepted high level standards in this respect but is also knowledgeable and competent.

The demands on the independent expert laid down in the proposal could be quite high. This is an important matter as it will impact the reliability of the report itself. The proposal allows Member States to govern at least the civil liability of the independent experts involved in the cross-border procedures. As indicated above, such flexibility leaves space for different interpretation across Member States. This will potentially result in divergent approaches **to the expert's liability** and may lead to regulatory arbitrage. The choice of the independent expert should be based on objective grounds to ensure that the selected expert adheres to high level quality and independence standards.

The independent expert needs sufficient time to provide the report, otherwise it may have a negative impact on the quality of the report. This is particularly pertinent in the case of conversions and divisions, where the independent expert's role is far wider than for independent experts in mergers. However, it seems that the expert can end up with less than one month to provide the report given the different timelines indicated in the proposal. For example, a departure Member State has to make the independent expert report publicly available at least *one month* before the general meeting. Medium and large companies need to apply *at least two months* before the general meeting to the competent authority to have an independent expert appointed. The competent authority shall appoint the expert within five working days after the application. This can potentially create a capacity issue, especially for smaller Member States' administrations where the pool of experts can be smaller.

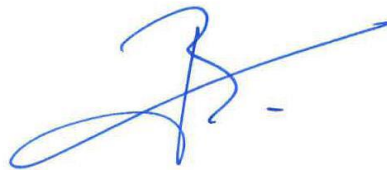
The accountancy profession is committed to continue enhancing the Internal Market and to contribute in making this proposal work in practice.

For any further information, please contact Vita Ramanauskaite, Policy Advisor at Accountancy Europe ([vita@accountancyeurope.eu](mailto:vita@accountancyeurope.eu)).

Sincerely,



Edelfried Schneider  
President



Olivier Boutellis-Taft  
Chief Executive

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