



EUROPEAN COMMISSION

*Brussels, 21.1.2019  
C(2019) 114 final*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinion on the 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 {COM(2018) 241 final}.*

*The proposal forms part of a broader package of ambitious measures designed to facilitate the freedom of establishment within the internal market while putting in place the necessary safeguards against fraud and abuse. Businesses should be able to benefit from the freedom of establishment, based on new rules for clear and harmonised procedures for cross-border conversions and divisions and streamlined rules for cross-border mergers. At the same time, the Commission carefully sought the right balance between the freedom of establishment and the protection of the companies' stakeholders: employees, creditors and minority shareholders. In order to mitigate risks that could be involved in cross-border operations, the proposal introduces effective safeguards against the use of artificial arrangements to circumvent tax rules, undermine workers' rights or jeopardising creditors' or minority shareholders' interests. It empowers national authorities not to authorise a cross-border conversion or division, if companies intend to use the cross-border procedures for such abusive or fraudulent purposes.*

*The Commission welcomes the Bundesrat's broad support for the aims of the proposal. The Commission also notes its doubts relating notably to the coherence between the proposed rules on the different operations, the implementation costs, and the impact of the proposal on the existing system of preventive administration of justice ("vorsorgende Rechtspflege") in Germany, in particular the involvement of notaries. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal and trusts that these will allay the Bundesrat's concerns.*

*Concerning the differences between the proposed rules on cross-border mergers and cross-border conversions/divisions, the Commission would like to point out that it proposed targeted modifications to the existing cross-border merger rules based on an evaluation of those rules. For cross-border conversions and divisions, however, the*

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*consultations preceding the preparation and adoption of the proposal highlighted higher risks and a need for stronger safeguards.*

*On the implementation costs, the Commission wishes to point out that the proposed rules on cross-border conversions and divisions largely follow the rules on cross-border mergers. Thus, the implementation of the new procedural rules can also largely follow the cross-border merger rules. For the newly proposed online aspects, the adjustment costs will be limited where the online exchange of information is already possible.*

*On the role of notaries, as is the case with the parallel proposal on the use of digital tools and processes in company law, the proposed rules on cross-border operations leave the possibility for the involvement of notaries by Member States in such procedures. Member States are free to maintain their relevant rules in this respect provided that the relevant procedures can be carried out online.*

*In response to the more technical comments in the Opinion, the Commission would like to refer to the attached annex.*

*The Bundesrat's Opinion has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators, the European Parliament and the Council. Discussions between the Commission and the co-legislators concerning the proposal are now underway and the Commission remains hopeful that an agreement will be reached in the near future.*

*The Commission hopes that the clarifications provided in this reply helpfully address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

*Frans Timmermans  
First Vice-President*

*Věra Jourová  
Member of the Commission*

## Annex

*The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following observations grouped by topic.*

*As regards the scope of the proposal, the Bundesrat highlighted the difference as compared to the proposal concerning the use of digital tools and processes in company law<sup>1</sup> where Member States can opt out from providing the possibility of online registration of public limited liability companies while such an opt-out is not possible for the proposed cross-border operations. The Commission appreciated that the formation and registration of such companies might be more complex further to the requirements of national law. Therefore, it aimed to provide flexibility for Member States in this respect. The Commission did not identify any reason for exempting such companies from the requirements of online filing in case of cross-border conversions or divisions.*

*As to the use of languages, the proposal does not aim to force Member States to examine documents in a foreign language. The possibility to use a language customary in the sphere of international business and finance is proposed in addition to the official languages of the Member States involved in the cross-border operation. In general, the proposal, in line with the principle of subsidiarity, aims to build on the national laws of the Member States and only regulate aspects that need common rules in the European Union.*

*As regards the proposed safeguards against abuse, the Commission wishes to underline that its proposal aims to ensure that the freedom of establishment can be exercised by companies in line with the applicable case-law of the Court of Justice of the European Union, in particular with a view to the recent judgement in the Polbud case<sup>2</sup>. At the same time, it aims to provide efficient tools for Member States to fight abuse. The proposed rules on the assessment of artificial arrangement provide the necessary framework for the authorities while ensuring sufficient flexibility to discover all abusive cases. The Commission would like to emphasise that the proposal has no impact on the national incorporation requirements; Member States are free to set their own requirements that can include a requirement of real economic connection to the Member State of registration.*

*As regards the proposed rules concerning an examination by an independent expert, the Commission takes note of the points made by the Bundesrat about the exemption of micro and small enterprises from such examination and the deadlines for the appointment of that independent expert. The proposal respects the principle of proportionality and appreciates that micro and small companies might not have sufficient resources for such examination. Also for such companies, the exercise of the freedom of establishment*

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<sup>1</sup> COM(2018) 239 final.

<sup>2</sup> Judgment of the Court (Grand Chamber) of 25 October 2017. Polbud - Wykonawstwo sp. z o.o.; Case C-106/16.; ECLI identifier: ECLI:EU:C:2017:804.

*should be a real possibility. The deadlines have been proposed to ensure that the procedure is not unduly prolonged.*

*As far as the distribution of tasks in supervising a cross-border operation amongst national authorities is concerned, the proposal leaves the organisation of this distribution to the Member States. Member States may designate courts, notaries or public authorities in line with their traditions and national administrative systems.*

*As to deadlines, rules have been proposed throughout the process in order to make it more predictable. The right balance needed to be found in order to provide enough time for the authorities to perform their tasks and the stakeholders to be able to exercise their rights while not prolonging unnecessarily the process for the company.*

*As regards the proposed rules on protection of minority shareholders and creditors, the Commission welcomes the general support of the Bundesrat and takes note of the detailed comments made. The choices made in the Commission proposal are motivated by the aim of achieving an appropriate balance between protecting the respective stakeholders' interests and allowing certainty and predictability for the company.*

*As regards the protection of employees, the Commission also welcomes the support of the Bundesrat for the proposed rules. The proposal's objective is to provide a comprehensive and effective system of protection for employees. The proposed employee participation rules are based on the solutions already existing in the acquis in the directive accompanying the Statute of the European Company and the cross-border merger rules.*

*The Commission takes note of also the other detailed comments made by the Bundesrat on the proposed rules. In particular, regarding the proposed 3-year protection of employee participation, the proposal foresees such protection of employees' rights in case subsequent domestic or cross-border operations take place. The aim is to avoid that employees' rights, that are guaranteed in case of cross-border conversions or divisions, can simply be annulled afterwards through a subsequent operation. In the absence of any such further operation, the rights of employees acquired through the original cross-border conversion or division are to be applied without any time-limit. The Commission considers that a period of 3 years – which corresponds to the existing rules on cross-border mergers – is adequate for such protection.*