Public consultation on "EU Company law upgraded"

Package on making the best use of digital solutions, providing efficient rules for cross-border operations in EU Company Law and on efficient Conflict-of-Law rules for cross-border operations of companies.

Fields marked with * are mandatory.

Introduction

The Commission work programme for 2017[1] announced a new initiative on company law to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions.

Previous consultations[2] have shown strong support among stakeholders for promoting the use of digital tools in company law and for addressing the issue of cross-border operations of companies[3]. The 2015 Conference on Company Law in the Digital Age[4] confirmed this. All the main groups of stakeholders have, in particular, made strong calls for EU action on cross-border conversions, including in the 2009 and 2012 European Parliament resolutions. With regard to the issue of conflictof-laws, while such rules in civil and commercial law already exist in the areas of contract, tort and delict, and insolvency, an important gap remains on the law applicable to the companies. This gap has been identified also by the European Council which already in the Stockholm Programme of 2009 pointed out company law as an area where the process of harmonising conflict-of-law rules at Union level should continue.

The aim of this public consultation is to collect input from stakeholders on problems in company law, the evidence of such problems and possible solutions on how to address the problems at EU level. The consultation is divided into three parts:

- Part 1: The reasons to act
- Part 2: The use of online tools throughout the companies' lifecycle
- Part 3: The cross-border mobility of companies (mergers, divisions, conversions)
- Part 4: The conflict-of-law rules for companies

More detailed explanations about each part precede the questions. In addition, the Inception impact assessment explaining more in detail the context, problems and objectives could be found on http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm. You should fill in the section 'Information about the respondent'. For the other sections, in addition to the multiple choice questions, we encourage you to explain your views or provide additional information or explanations in the free text boxes. You may also provide additional information or views by uploading a separate document at the end of the questionnaire in Section 5. The responses will be taken into account when preparing the 2017 initiative on company law.

If you have any specific questions or feedback on this questionnaire, please write to just-companylaw@ec.europa.eu.

Target Groups:

- industry and business, including all types of companies from all sectors;
- representative associations at EU and national level (for example, representing the interests of the business community, consumers, trade unions and the legal profession);
- investors and their associations;public authorities, including national business registers and judiciary;
- individuals (EU entrepreneurs, consumers); and
- research and academia.

Specific Privacy Statement:

Received contributions will be published on the Internet. It is important to read the Specific privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

Disclaimer:

This document is a Commission services working document for consultation and does not in any way prejudge the Commission's decisions on the content of the future initiative.

Information about the respondent

* Please provide your contact information:

- Full name (authority, association, organisation, company, private name as applicable)
- E-mail address (if you are replying on behalf of an organisation, please provide your professional e-mail address).

*Please indicate your role for the purpose of this consultation:

- business register other
- public authority
- university/research institute/think tank or similar
- lawyer/lawyers' federation
- notary/notaries' federation
- judiciary/courts
- business federation/business organisation/chamber of commerce
- consumer or consumer association
- investor or investor association
- trade union/employee body or similar
- other federation, organisation or association
- company
- private person
- other

* Please specify:

- international organisation
- national public authority
- regional public authority
- local public authority
- other

* Please specify:

* Please specify:

* Please indicate the size of your company:

- micro (0-9 employees)
- small (10-49 employees)
- medium (50-249 employees)
- large (250 or more employees)

* Please indicate if you are a listed company:

- Yes
- No

* Please specify:

* Is your organisation registered in the EU transparency register? (If not, you are encouraged to register here, although you do not have to be registered to reply to this consultation.)

- Yes
- No

Please indicate your ID number:

*Please indicate the country where you are located:

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovakia
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Island
- ☐ Norway
- ☐ Liechtenstein
- ☐ Other

Please specify:

* Please indicate whether you consent to publication of your contribution:

- Yes, under the name indicated — I consent to the publication of all information in my contribution, and I declare that none of it is under copyright restrictions that prevent publication. See also the privacy statement above.
- No, I do not consent to the publication of my contribution. I understand that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation.

Please note that regardless of the option chosen, your contribution may be subject to a request for access to documents under Regulation 1049/2001 on public access to European Parliament, Council and Commission documents. In this case, the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.

Reasons to Act

1. Reasons to Act

The new company law initiative would aim to make the best use of digital solutions and provide efficient rules for cross-border mobility of companies (mergers, divisions, conversions) and uniform conflict-of-law rules for companies. The questions below seek your views as to the problems, their importance and the need for EU action. A number of problems faced by companies and stakeholders have already been identified in previous public consultations and studies related to company law. You are now invited to bring to our attention any recent developments with regard to already identified problems as well as other problematic areas. Please also provide evidence of the existence and the size of the problem. More detailed explanations on what is meant by digitalisation and crossborder mobility rules are provided in sections 2 and 3.

A recent Study on the Law Applicable to Companies found that there is considerable legal uncertainty regarding the law applicable to companies in many Member States. The main finding is that differences between Member States' conflict-of-law rules lead to significant practical obstacles to corporate mobility in Europe, limiting the possibility of companies to make effective use of the freedom of establishment. Uniform conflict-of-law rules could provide more legal certainty to companies and Member States' authorities, promote cross-border mobility in the EU and remove obstacles for them stemming from the potential for conflicts of laws in a context where the substantive laws of the Member States have not been fully harmonized. Any such uniform rules could build on the existing case law of the European Court of Justice in the area of freedom of establishment promoting choice of law. More detailed explanations are provided in section 4.

1.1 To what extent do the differences between Member States' laws or the overall lack of legal framework, in the areas mentioned below, constitute obstacles for the proper functioning of the single market?

	to a very large extent	to a large extent	to some extent	not at all	no opinion
a. Digital tools for companies to interact with Member States (registration, filing, publication)	☐	☐	☐	☐	☐
b. Digital tools for companies to interact with shareholders	☐	☐	☐	☐	☐
c. Cross-border conversions	☐	☐	☐	☐	☐
d. Cross-border divisions	☐	☐	☐	☐	☐
e. Cross-border mergers	☐	☐	☐	☐	☐
f. Conflict-of-laws for companies	☐	☐	☐	☐	☐
g. Other areas (please explain)	☐	☐	☐	☐	☐

Please explain:

1.1.1. What evidence, including practical examples, could you provide to demonstrate the existence of the problem and its size?

1.2 Which of the issues mentioned below should be addressed as a priority by the EU?

	top priority	priority	low priority	this issue should not been addressed at all	no opinion
a. Rules for the use of digital tools by companies to interact with Member States (registration, filing, publication)	○	○	○	○	○
b. Rules for the use of digital tools by companies to interact with shareholders	○	○	○	○	○
c. Rules for cross-border conversions	○	○	○	○	○
d. Rules for cross-border divisions	○	○	○	○	○
e. Rules for cross-border mergers	○	○	○	○	○
f. Rules on conflict of laws applicable to companies	○	○	○	○	○
g. Other rules related to companies	○	○	○	○	○

Please explain:

2. The use of online tools throughout the companies' lifecycle

Use of digital tools for interaction between companies and Member States

EU company law addresses the use of digital technologies only in some instances. The EU company law includes certain provisions on disclosure (publication) of company information online but no obligation as such on the online registration of companies. At national level, several Member States already allow for full online registration of companies[5]. This means that founders/representatives can register a new legal entity fully online, without having to be physically present before an authority for the act of registration or beforehand. In a number of other Member States fully online registration is still not available and is, in any event, often difficult in cross-border situations. Moreover, not all information or documents from business registers provided electronically is considered authentic, having the same value as paper documents. Therefore they are often not recognised and accepted in the same way as paper copies of documents. In addition, the information is often not easily accessible or only available in the national language(s). The situation is very similar for the registration of a branch in another Member State and for filing or publishing of information.

We seek your views as to whether current company law rules need to be modernised to ensure that everyone involved in a lifecycle of a company could fully benefit from digital technologies. We would also like to know which safeguards would be needed to ensure that digital procedures are secure and do not lead to fraud.

2.1. What are the main issues that need to be addressed regarding the use of digital tools by companies in their interaction with Member States?

- ☐ a. Making it possible to register, file and publish information on companies and branches fully on-line in a short time
- ☐ b. Providing for appropriate safeguards to make the online registration, filing and publication trustworthy
- ☐ c. Providing for online templates and forms, in particular as regards the registration of companies and their instruments of constitution
- ☐ d. Ensuring the recognition of documents/information issued by business registers, including the acceptability of electronic copies as 'true copies'
- ☐ e. Other issues
- ☐ f. No need for EU measures in this area
- ☐ g. No opinion

Please explain:

2.1.1. What kind of safeguards would be needed?

- ☐ harmonised safeguards for verification of identity (including recognition of electronic IDs, application of the eIDAS Regulation[6] and possible video-conferences)
- ☐ possibility of exceptional face-to-face verification of identity in the event of genuine suspicion of fraud
- ☐ harmonised safeguards for the electronic verification of the legality of information or documents (for example, templates)
- ☐ other safeguards
- ☐ no opinion

Please explain:

Use of online tools for interaction between companies and shareholders

Digital tools (such as e-mail, messaging applications, audio and video conferencing software, digital information exchange platforms, electronic signature, blockchain) could significantly facilitate the interaction between companies (listed and non-listed) and their shareholders. They could reduce costs and improve the efficiency of voting and the exercise of other shareholder rights, in particular in a cross-border context. However, it appears that the use of digital tools is not always allowed. Limitations may exist in some Member States for certain situations and different types of companies. In addition, Member States' different rules as well as lack of standardisation of digital tools may also create barriers to the effective use of digital tools in company law.

2.2 In which areas (listed and non-listed) companies should be encouraged to use digital tools in the interaction with their shareholders?

- ☐ a. Communication between companies and shareholders concerning general meetings
- ☐ b. Participation and voting in general meetings
- ☐ c. Communication outside the general meetings (for example, relating to payments of dividends, issuance of new shares or takeover bids)
- ☐ d. Adoption of shareholder resolutions without a physical meeting
- ☐ e. Other areas
- ☐ f. No need for EU measures in this area
- ☐ e. No opinion

Please comment:

Cross-border mobility of companies (mergers, divisions, conversions)

The EU company law already contains provisions providing a framework for cross-border mergers of limited liability companies (Directive 2005/56/EC), but there are currently no harmonised EU rules for cross-border conversions and divisions.

Cross-border mergers

The introduction of harmonised rules on cross-border mergers (Directive 2005/56/EC) made it possible to carry out cross-border mergers and resulted in a substantial increase in cross-border merger activity. At the same time, according to a recent study on the application of this Directive[7], there are still some problems related to its implementation and functioning in practice.

For example, the current rules specify that creditors should be protected according to national rules. However, research shows that the diversity of national safeguards leads to practical difficulties. In the 2014 consultation, 80% of respondents were in favour of harmonising the rules on creditors' rights. This included a preference for granting guarantees/securities to creditors[8] and for having the creditor protection period start before the cross-border merger becomes effective ('ex-ante')[9].

Minority shareholders can also be affected by a cross-border merger. The current EU framework lays down minimum rules and provides Member States with a possibility of laying down additional protection to minority shareholders under national rules. However, Member States' rules on minority protection vary across the EU. The 2014 consultation showed that 65% of respondents supported harmonisation of minority shareholders' rights. This included a preference for allowing minority shareholders to request compensation and for harmonising the starting date of the protection period [10].

3.1. What are the main issues that need to be addressed with respect to cross-border mergers?

- ☐ a. Providing for cross-border safeguards for creditors
- ☐ b. Providing for specific cross-border safeguards for public authorities (other than for creditors)
- ☐ c. Providing for cross-border safeguards for minority shareholders
- ☐ d. Further facilitating a cross-border merger procedure (e.g. a possibility to waive the management report)
- ☐ e. e. Other measures
- ☐ f. No need for further EU measures in this area
- ☐ g. No opinion

Please comment:

3.1.1. What kind of safeguards should be provided?

- ☐ i. Safeguards related to the procedural aspects of protection (deadlines) ii.
- ☐ Safeguards related to material aspects of protection (creditors' rights)
- ☐ iii. Safeguards related to the definition of creditors that would require protection (for example safeguards only covering creditors who could demonstrate that their claims would be endangered according to an independent expert report or following a court proceeding)
- ☐ iv. Other solutions
- ☐ v. No opinion

Please comment:

3.1.2. What kind of safeguards should be provided?

3.1.3. What kind of safeguards should provided?

- ☐ i. Safeguards related to opposing a merger (for example, an exit right) ii. Safeguards related to opposing a share exchange (for example, a possibility of extra compensation)
- ☐ iii. Other solutions
- ☐ iv.No opinion

Please comment:

Cross-border divisions

The current EU company law sets out a procedure for public limited liability companies to divide at national level (domestic divisions). There is currently no EU procedure to directly divide a company on a cross-border basis, and only some Member States provide for such rules at national level. Therefore, companies wishing to divide cross-border have to perform several operations (for instance, a national division and a cross-border merger), which involve costly additional procedures.

As in the case of cross-border conversions, due to the absence of the rules on cross-border divisions, the position of stakeholders (in particular employees, creditors or minority shareholders) is unclear. Also it is not always clear for public authorities, including business registers, tax authorities or social security institutions, how to treat such operations.

3.2. What are the main issues that need to be addressed with respect to cross-border divisions?

- ☐ a. Setting out a cross-border division procedure (leaving the question of safeguards for stakeholders to Member States)
- ☐ b. Setting out a cross-border division procedure and providing for uniform safeguards for stakeholders across all Member States
- ☐ c. Setting out a procedure with minimum safeguards for stakeholders (Member States could enact or maintain more protective rules)
- ☐ d. No need for EU measures in this area
- ☐ e. Other measures
- ☐ f. No opinion

Please explain:

3.2.1. For which stakeholders the safeguards should be provided?

- ☐ i.Creditors
- ☐ ii. Employees, including employee participation in the boards of companies
- ☐ iii.Minority shareholders
- ☐ iv. Public authorities (special rules other than for other creditors)
- ☐ v.Other stakeholders
- ☐ vi. No opinion

Cross-border conversions

There is currently no EU procedure for the direct cross-border conversion of a company, i.e. for companies to move at least their registered office[11] to another Member State. Only some Member States provide for such rules at national level. Also, where such rules exist, the conditions under which such a cross-border conversion can be carried out (e.g. whether the companies need to transfer only their registered offices or also their "real seat") differ[12]. In practice, in most cases, companies need to wind up in one Member State and dissolve all their contracts, and a new company has to be set up in another Member State. Alternatively, companies can convert and transfer their registered office indirectly — by becoming a European Company (SE)[13] or by creating a subsidiary abroad and merging with it via EU cross-border merger rules. Both cases involve additional procedures. Due to the lack of EU rules, the position of stakeholders (in particular employees, creditors or minority shareholders) is unclear in case of a cross-border conversion. Also it is not always clear for public authorities, including business registers, tax authorities or social security institutions, how to treat such operations.

3.3. What should be the main issues that need to be addressed with respect to cross-border conversions?

- ☐ a. Setting out only a cross-border conversion procedure (leaving the question of safeguards for different stakeholders and the question of seat of companies to Member States)
- ☐ b. Setting out a cross-border conversion procedure and providing for uniform safeguards for different stakeholders across all Member States
- ☐ c. Setting out a cross-border conversion procedure with minimum safeguards for different stakeholders (Member States could enact or maintain more protective rules)
- ☐ d. Providing for protection through conflict-of-law rules in cases of cross-border conversions [14
- ☐ e. Setting out a cross-border conversion procedure which lays down specific rules to deal with the question of seat of companies
- ☐ f. No need for EU measures in this area
- ☐ g. Other measures
- ☐ h. No opinion

3.3.1 For which stakeholders or interest groups should safeguards be provided and which kind of safeguards?

	Safeguards allowing to block the conversion	Safeguards relating to information and consultation before the conversion	Safeguards relating to the protection of existing rights (e.g. financial guarantee for outstanding claims, exit rights for minority shareholders, negotiations about employee participation rights)	Safeguards provided by conflict-of-law rules (i.e. application of the overriding mandatory provisions of the forum or of another Member State with which the company is closely connected)	Other safeguards	No opinion
i. Creditors	○	○	○	○	○	○

ii. Employees, including employee participation in the boards of companies						
iii. Minority shareholders						
iv. Public authorities (special rules other than for other creditors)						
v. Other stakeholders						
vi. No opinion						

Please comment:

3.3.2. Which specific rules should be laid down to deal with the question of seat?

- ☐ i. Cross-border conversion should only be allowed when a real seat of a company is transferred from one Member State to another
- ☐ ii. Cross-border conversion should be allowed even if only a registered office is transferred from one Member State to another
- ☐ iii. Cross-border conversion should be allowed if a company is capable to show that it has/will have a genuine economic link with the Member State to which it transfers its registered office
- ☐ iv. Other solutions
- ☐ v. No opinion

Please explain:

Conflict-of-law rules for companies

Many companies have operations in several Member States. Sometimes they are incorporated in one Member States but set up main operations in other Member States. This is an expression of the freedom of establishment guaranteed in the Treaty on the Functioning of the EU. With an ever more integrated single market, this trend is likely to continue. Despite this cross-border phenomenon, at present, conflict-of-law rules in the area of company law are regulated exclusively by Member States. Thus the content of these rules may differ substantially.

For instance, the conflict-of-laws rules of some Member States do not unambiguously refer to the state of incorporation as the connecting factor; some also provide in addition secondary connecting factors that deviate from the principle of incorporation. There have been various practical obstacles reported from the countries that have retained an element of the real seat theory, for instance problems in identifying the place of the real seat. Some countries seek to extend the international reach of their laws by providing for exceptional connecting factors or qualifying certain rules as overriding mandatory provisions. Also, the delimitation of the international scope of company law from other areas of law, notably insolvency, contract and tort law, has been found to be problematic in several respects. This means that the case law of the European Court of Justice has not yet led to a convergence of national conflict-of-law rules applicable to companies. Companies may encounter also other problems and difficulties linked to a lack of clarity of national law, or even be faced with conditions that make cross-border conversions virtually impossible.

4.1. What problems does the divergence of national conflict-of-law rules regarding companies cause?

- ☐ Problems related to the connecting factor (for instance the "real seat" or place of incorporation)
- ☐ Problems related to the divergent or conflicting provisions in different national company laws
- ☐ Cross-border conversions are made virtually impossible
- ☐ Problems related to the boundary between the applicable company law and other fields of law (for instance insolvency, tort, contract law)
- ☐ Problems related to the scope of overriding rules of domestic law that may interfere with foreign company law
- ☐ Other

Please comment:

Connecting Factor

The connecting factor determines which national substantive company law applies. For the connecting factor, traditionally, some Member States follow the real seat theory, i.e. the law governing a company is determined by the place where the central administration of that company is located. Other Member States follow the incorporation theory, i.e. the law governing a company is determined by the place of its incorporation.

The case law of the European Court of Justice has considered certain practices in Member States imposing their company law rules on companies incorporated in other Member States on the basis of the real seat approach an unjustified restriction to the freedom of establishment. Against that background, today in all Member States, the place of incorporation is used de facto as the sole or the main connecting factor to determine the applicable law (lex societatis) in intra-EU cases. A significant number of companies have made use of the resulting corporate mobility and choice of law.

The law of the place of incorporation is not applied without exceptions. The laws of all Member States provide that certain provisions of their substantive company law apply to companies that are incorporated under the law of another jurisdiction (so-called "overriding mandatory provisions", i.e. provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation). This indicates a strong policy desire of a country to retain an appropriate degree of control over foreign companies operating within its territory when public interests are at stake. For instance, national rules concerning the use of corporate names to avoid the creation of a misleading impression and rules on the eligibility and disqualification of directors reflect wider policy goals, because such rules seek to balance the interests of different social actors within the society where a company operates. Whilst this broad consensus should be taken into account in the context of a possible future harmonisation, the jurisprudence of the European Court of Justice, which sets limits to the application of overriding mandatory provisions in order to give effect to the principle of freedom of establishment, must be respected at the same time.

4.2. By which law should a company be governed?

- ☐ a. By the law of the country where the company was incorporated or has its registered office, subject to overriding mandatory provisions and public policy exceptions
- ☐ b. By the law of the country where the company has its real seat, subject to overriding mandatory provisions and public policy exceptions. Please specify which elements for the determination of the 'real seat' you have in mind, e.g. central administration, main operations)
- ☐ c. Other
- ☐ d. I don't know

Please explain further:

Matters governed by the lex societatis

Most existing conflict-of-law rules for companies provide for a non-exhaustive enumeration of matters, which are governed by the lex societatis. Also a possible EU instrument could contain such a non-exhaustive enumeration of matters governed by the lex societatis. These matters could include both the internal aspects of the company (in particular the rights and obligations among the members of the company, its functioning and organisation, or the liability of directors vis à vis the members of the company and the company itself), as well as the external aspects of the company (i.e. the existence of the company as a legal entity, its general capacity and the separation between the members´ and the company´s property). The governance of all these matters by the same law could ensure consistency and predictability.

Certain matters do not only address the internal affairs of the company, but reflect wider policy goals and choices as these rules seek to balance the interests of different social actors within the society where a company operates. This concerns for instance rules on employee participation.

Therefore two options could be considered: The first option would be to exclude such rules from the scope of an EU instrument and leave such matters to the national conflict-of-law rules. The second option would be to include such rules in the scope of the instrument, based on the consideration that Member States can protect such social policy goals also in relation to companies governed by a foreign lex societatis, by relying on overriding mandatory provisions.

Matters which are not of a company law nature will be in any case excluded from the scope of an EU instrument on conflict-of-law rules on company law. These matters include revenue, customs and administrative matters; insolvency; contractual and non-contractual obligations, rights in rem, trusts and labour law.

4.3. What matters should the lex societatis cover?

- ☐ a. Internal matters
- ☐ b. External matters
- ☐ c. I don't know

4.3.1. Please specify which internal matters:

- ☐ The rights and obligations among the members of the company
- ☐ The functioning and organisation of the company
- ☐ The liability of directors vis à vis the members of the company and the company itself Other
- ☐ internal matters

Please comment:

4.3.2. Please specify which external matters

- ☐ The existence of the company as a legal entity
- ☐ The general capacity of the company
- ☐ The separation between the members´ and the company´s property Other
- ☐ external matters

Please comment:

Please explain/comment further:

4.4. Should certain matters be excluded from the scope of a uniform conflict-of-law instrument reflecting wider policy goals and choices?

- a. Yes
- b. No
- c. I don't know

Please specify which areas should be excluded (e.g. employee participation rights):

Please comment further:

Universal or intra-EU application

Conflict-of-law rules usually have universal application. For instance, when determining the law applicable to contracts or torts, it is irrelevant whether the law of a Member State or a non-Member State is designated as applicable. Therefore, one option is to provide for universal application also of a future instrument on company law. There are, however, also EU conflict-of-law rules without universal application, for example in insolvency proceedings.

Including companies established under the law of a non-EU country in the scope of a future instrument on the law applicable to companies could have far-reaching implications, for instance with regard to the protection of shareholders, other stakeholders and society at large. Therefore, taking into account such specificities of company law, it could also be considered to exclude companies incorporated in third countries from the scope of a future EU instrument. Such a more limited scope of application would correspond to the scope and impact of the current case-law of the Court of Justice which, in the absence of EU conflict-of-law rules, is based on the freedom of establishment and therefore addresses only intra-EU cases.

4.5. Should harmonised conflict-of-law rules in the area of company law have universal application, i.e. should they also apply to companies incorporated in third countries and having operations in the EU?

- ☐ a. Yes
- ☐ b. No
- ☐ c. I don't know

Please comment further:

Change of applicable law

In accordance with the case-law of the European Court of Justice, the possibility for a company established in one Member State to convert to a company governed by the national law of another Member State, i.e. to change the applicable law while keeping its legal personality, without prior winding-up or liquidation, is guaranteed by the freedom of establishment in certain circumstances. Specifically, a Member State which enables companies established under its national law to convert, cannot exclude or unduly inhibit, in a general manner, companies initially governed by the law of another Member State to convert to companies governed by its own national law and thus exercise mobility. However, the company that wishes to change its applicable law must satisfy the requirements applicable to national companies for incorporation in the new host Member State (e.g. registration, effective residence requirements, minimum capital, disclosure, internal structure or number of members). The Court has clarified that in this regard the principles of equivalence and effectiveness apply.

The old home Member State's law could continue to govern the rules on the protection of minority shareholders and creditors of the company.

However, not all Member States' laws explicitly allow the cross-border relocation of the statutory seat of companies or have rules on its effects on the applicable law.

4.6 Should a future instrument on conflict-of-laws in cross-border operations of companies specifically address the possibility of a change of the applicable law through a cross-border conversion to another Member State without loss of legal personality and specify which matters should be covered by the 'old law' and which by the 'new law'?

- ☐ a. Yes
- ☐ b. No
- ☐ c. I don't know

Please explain further:

Other comments

Are there any other relevant issues about the subject matter of this consultation that should be taken into consideration?

- [ ] Yes
- [ ] No
- [ ] No opinion

Please comment further:

Please upload your file

Thank you very much for your contribution!

Footnotes

[1] COM(2016) 710 final, 25.10.2016.

[2] For instance, the 2014 public consultation on cross-border mergers and divisions; the 2013 public consultation on cross-border transfers of registered offices; the 2012 consultation on the future of EU company law.

[3] For the purposes of this consultation, cross-border operations of companies include crossborder divisions, cross-border mergers and cross-border conversions (i.e. transfers of companies' registered offices to another Member State).

[4] http://ec.europa.eu/justice/events/company-law-2015/index_en.htm

[5] i.e. registration of a legal entity in a business register.

[6] Regulation (EU) No 910/2014, OJ L 257, 28.8.2014, p. 73

[7] http://ec.europa.eu/justice/civil/files/131007_study-cross-border-merger-directive_en.pdf

[8] 83% of respondents who were in favour of harmonisation supported providing creditors with a right to request a company to provide a guarantee or security; 54% were in favour of asking the court to require the company to provide such a guarantee or security.

[9] 86% of respondents were in favour of harmonising the date determining the beginning of the protection period and 75% of those supported an “ex ante” starting date.

[10] 70% of respondents in favour of harmonisation supported providing minority shareholders with a right to request compensation. 75% of respondents were in favour of harmonising the date of the beginning of the protection period.

[11] The registered office refers to the address of a company as registered in the business register. It establishes an important link between a company and the legal order of the country in which it was formed and registered.

[12] Member States apply their own laws with regard to the establishment of companies on their territory. Many Member States only require a registered office. Other Member States require more, for instance a "real seat" – i.e. central administration, headquarters or principal place of business – in their territory as a condition for establishment.

[13] A specific European legal form of Societas Europea, SE, for which transfers are allowed in EU law

[14] E.g. by excluding certain matters from the scope of a conflict-of-law instrument (see question 4.5) or by specific rules on which law applies in the event of a cross-border conversion protecting minority shareholders