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Delegations will find attached document SWD(2018) 141 final.

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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law**

**and**

**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) 239 final} - {COM(2018) 241 final} - {SWD(2018) 142 final}

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## GLOSSARY

<b>Acquiring company</b>	The company that receives the assets and liabilities from the acquired company in a merger or division by acquisition.
<b>Business register</b>	The database maintained by each Member State to keep record of registration of companies in the given Member State and subsequent changes in the information on companies.
<b>Conflict of law</b>	In situations with cross-border elements, conflict of laws rules determine which of possibly two or more national laws apply to the internal functioning of a company.
<b>Connecting factor</b>	The relevant link between a subject (in this context a company) and a legal order which determines the applicable law in a conflict of law situation.
<b>Cross-border conversion</b>	An operation whereby a company formed and registered in accordance with the law of a Member State converts into another company formed and registered in accordance with the law of the another Member State retaining its legal personality and without being wound up or going into liquidation.
<b>Cross-border division</b>	An operation whereby a company splits and transfers all or some of its assets and liabilities to existing or new company/companies in another Member State.
<b>Cross-border merger</b>	An operation whereby two or more companies from two or more Member States transfer their assets and liabilities to an existing (acquiring) or a new company.
<b>Cross-Border Merger Directive (CBMD)</b>	Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. Now it is part of the Codification Directive (see below).
<b>Codification Directive</b>	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification). This Directive codified in 2017 several Directives covering different aspects of company law.
<b>Dividing company</b>	The company that is being split up in the framework of a company division.

<b>Freedom of establishment of companies</b>	The freedom of establishment applicable to legal entities pursuant to Articles 49 and 54 TFEU.
<b>Group reorganisation</b>	The restructuring of legal and/or operation structure within a corporate group.
<b>Inbound conversion</b>	The process of conversion from the perspective of the country of destination, i.e. whereto the company will be registered as the result of the process.
<b>Limited liability company</b>	A company with share capital and with legal personality possessing separate assets which alone serve to cover its debts. It is defined in Annex II of Directive (EU) 2017/1132 relating to certain aspects of company law (codification).
<b>Member State(s) (MS)</b>	In the context of this Impact assessment, this covers Member States of the EU and of the EEA (i.e. Iceland, Liechtenstein and Norway in addition to the EU).
<b>National Gazette</b>	A periodical publication authorised to publish public or legal notices. In the context of this Impact Assessment it refers to the national gazettes in the MS that publish company information.
<b>Outbound conversion</b>	The process of conversion from the perspective of the country of departure, i.e. where the company originally was registered.
<b>Recipient company</b>	The company that receives certain assets and liabilities from the dividing company in the framework of company division.
<b>Registered office</b>	The office and the address under which the company is registered in the business register.
<b>Registration of companies</b>	The process through which the competent authorities or organisations create and keep records of the creation of companies, changes in companies' registered information (filing) and the linked documentation. The business register is the database where these data are recorder.
<b>SE</b>	Societas Europea (European Company), a limited liability company formed according to the Regulation (EC) No 2157/2001 on the Statute for a European company (SE).

## INTRODUCTION

### 1.1 Context

Companies play a crucial role in promoting economic growth, creating jobs and attracting investment in the European Union. They help deliver greater economic as well as social value for society at large. To achieve this, companies need to operate in an environment which is conducive to growth and adapted to face the new economic and social challenges of an increasingly globalised and digital world.

There are around 24 million companies in the EU<sup>1</sup>, out of which approximately 80% are limited liability companies. Around 98-99% of limited liability companies are SMEs<sup>2</sup>. Every year around 2,5 million new companies are created and a slightly smaller number of companies cease to exist<sup>3</sup>. High growth enterprises<sup>4</sup> play an important role in contributing to the economic growth and the creation of jobs. In 2014, around 145 000 companies, or almost a tenth (9.2 %) of all enterprises with at least ten employees in the EU-28's business economy were recognized as high-growth enterprises, providing work for over 12 million employees<sup>5</sup>.

The possibility to operate beyond national borders is a part of the natural life-cycle of the company. This includes the option to carry out a cross-border merger, division or conversion, offers them an important chance to survive and grow e.g. by having new business opportunities in other EU countries, by reorganizing, cutting organisational cost or adapting to changing market conditions. For example, a survey carried out in 2016<sup>6</sup> found out that 22% of the business executives had immediate plans for expansion in the internal market.

However, cross-border company operations can have significant impacts for relevant stakeholders as well as society at large. Therefore, it is essential that the protection of those involved in and affected by the company affairs, namely employees, creditors and minority shareholders, keep pace with the growing trans-nationalization of companies and that Member State authorities are able to act against abuse.

The current situation concerning cross-border corporate mobility provides a very fragmented picture across the EU. The existing EU legal framework provides rules only for cross-border mergers of companies, while cross-border divisions and conversions are subject to national rules, if such rules exist at all. In addition, it is not always certain

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<sup>1</sup> The study 'Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies' EY 2017 (hereinafter referred to as EY study on cross-border operations of companies) refers to 24,4 million in 2016. It makes an estimation based on Eurostat data of 2014.

<sup>2</sup> EY study on cross-border operations of companies

<sup>3</sup> According to Eurostat data, there were 2,586,418 new companies in EU28 in 2014, while 2,307,036 companies ceased to exist. In 2013, the number of new companies in EU28 was 2,487,921, with 2,329,272 companies ceasing to exist.

<sup>4</sup> This refers to an enterprise with average annualised growth in number of employees greater than 10 % per year over a three-year period and having at least 10 employees in the beginning of the growth.

<sup>5</sup> Source: Eurostat.

<sup>6</sup> EY Attractiveness Survey, 2016, 1,469 executives participated in the survey. MS covered by the study were Germany, France, the Netherlands, the UK, Belgium or Portugal.

which law applies to the internal functioning of companies with operations in more than one MS. Since there are no harmonised rules at EU level, the case law of the Court of Justice has developed the principles, based on freedom of establishment, especially related to cross-border conversions<sup>7</sup>, but also to the recognition of companies incorporated in another MS<sup>8</sup>. In its judgements, the court has always stated that it is for the legislator to establish a detailed procedure/rules.

Furthermore, in today's world, the use of digital tools and processes, in particular in order to initiate economic activity by setting up a company or continuing it in another MS easily, rapidly and cost-effectively is one of the prerequisites for a competitive market and for competitive companies. However the current EU law provides only for very limited use of such tools and in particular there are no provisions on the online registration of companies. While the Commission proposal on the establishment of a Single Digital Gateway<sup>9</sup> covers the general registration of business activity via online means, the constitution of limited liability companies is carved out from the proposal because it necessitates a comprehensive approach to be addressed in the company law *acquis*. The Commission committed to propose specific rules for this area without delay.

Overall, today's Single Market does not offer companies and their stakeholders optimal conditions in terms of clear, predictable and balanced legal framework. This is especially important for SMEs which are the backbone of EU economy. For them any improvement in the possible use of digital tools and any possibility of performing cross-border operations less costly and burdensome is very important.

While the role of companies is to create wealth, it should not only concern the well-being of the company itself, but also of the stakeholders associated with it. In case of cross-border mobility of companies, in particular the interests of employees<sup>10</sup>, creditors and minority shareholders play an important role. However, today the legal uncertainty and lack or complexity of rules for cross-border mobility of companies also means that there is no clear framework to ensure effective protection of these stakeholders. This may even lead to a situation whereby the freedom of establishment could be abused by some companies. In the situation of a lack of legal certainty the protection offered to stakeholders is therefore often ineffective.

Therefore, it is important to unleash the potential of the Single Market by breaking down barriers to cross-border trade, facilitating access to markets, increasing confidence and stimulating competition while offering effective protection to stakeholders.

## **1.2 Calls for an initiative**

The Investment Plan for Europe<sup>11</sup> stressed that determined efforts are needed to make the most of the Single Market and make it an effective launch pad for companies. The 2015

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<sup>7</sup> ECJ cases VALE, Cartesio, currently Polbud

<sup>8</sup> ECJ cases Centros, Überseering, Inspire Art

<sup>9</sup> Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 - COM(2017)256

<sup>10</sup> In line with the European Pillar of Social Rights.

<sup>11</sup> COM(2014) 903 final.



Single Market Strategy<sup>12</sup> mentioned uncertainties over company law as one of the obstacles that SMEs complain about in the Single Market and announced that the Commission would consider *"further ways of achieving simpler and less burdensome rules for companies — while continuing to act against letterbox companies — including making digital solutions available throughout a company's lifecycle, in particular in relation to their registration and to the filing of company documents and information"* and would also *"examine the need to update the existing rules on cross-border mergers and the possibility to complement them with rules as regards cross-border divisions"*. The 2016 Communication on the Start-up and Scale-up Initiative<sup>13</sup> stressed the need to remove barriers for start-ups to develop in the Single Market and reiterated the call for measures in the area of company law. Furthermore, both the 2015 Digital Single Market Strategy<sup>14</sup> and the 2016 e-Government Action Plan<sup>15</sup> stressed the role of public administrations in helping businesses to easily start business, operate online and expand across borders. The e-Government Action Plan specifically recognised the importance of improving the use of digital tools when complying with company law related requirements. In addition, the Single Digital Gateway included a political commitment to come forward with online registration of limited liability companies in the context of the digitalisation of company law.

In addition, the Stockholm programme of 2009 called for an initiative on uniform conflict of laws rules in the area of company law<sup>16</sup>.

Against this background, the Commission 2017 Work Programme<sup>17</sup> included a company law initiative to facilitate the use of digital technologies throughout a company's lifecycle (equally confirmed in the Digital Single Market Mid-term Review<sup>18</sup>) and cross-border mergers and divisions.

The need to complement and improve the legal framework as regards the use of digital tools and on cross-border company mobility was also recognised by the European Parliament. In its 2017 resolution on the e-Government Action Plan, it called on the Commission to consider further ways to promote digital solutions for formalities throughout a company's lifecycle and underlined the importance of work on the interconnection of business registers<sup>19</sup>. Furthermore, in its recent resolution of 13 June 2017<sup>20</sup>, the European Parliament called for a comprehensive EU framework in order to simplify the procedures and requirements applicable to transfers, divisions and mergers, and to remove obstacles arising from conflicts of laws, with a view to facilitating companies' mobility in line with their business needs, while preventing abuses and fictitious transfers for the purposes of social or fiscal dumping and duly respecting

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<sup>12</sup> COM(2015) 550 final.

<sup>13</sup> COM(2016) 733 final.

<sup>14</sup> COM(2015) 192 final.

<sup>15</sup> COM(2016) 179 final.

<sup>16</sup> Official Journal C 115 of 4.5.2010.

<sup>17</sup> COM(2016) 710 final; Annex 1.

<sup>18</sup> COM (2017) 228.

<sup>19</sup> European Parliament resolution of 16 May 2017 on the EU eGovernment Action Plan 2016-2020; (2016/2273(INI)).

<sup>20</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)).

employees' representation rights. In its 2009<sup>21</sup> and 2012<sup>22</sup> resolutions the European Parliament also specifically asked the Commission to come forward with a proposal on cross-border conversions.

The Council also encouraged the Commission in its 2015 Conclusions on the Single Market Policy<sup>23</sup> to address the online registration of companies through the use of the Digital Single Market Package. Furthermore, most recently in the Tallinn declaration on eGovernment the Member States make a strong call to step up efforts for provision of efficient, user-centric electronic procedures in the EU<sup>24</sup>.

The Commission has actively engaged with stakeholders and conducted comprehensive consultations throughout the impact assessment process, in view of collecting the evidence needed to come to a political decision on the scope of this company law package. Stakeholder views are indicated throughout the impact assessment where relevant and summarised in Annex 2.

### **1.3 Scope of the impact assessment**

The purpose of this impact assessment is to assess whether and to what extent the existing company law legal framework both at EU and national level a) hampers the exercise of the freedom of establishment by companies and the possibility to use digital tools throughout companies' lifecycle as well as b) provides the effective protection for stakeholders, such as creditors, minority shareholders, employees but also other third parties which are affected by companies' activities. In addition, the impact of the existing national conflict of laws rules is assessed in this respect. The areas covered are:

- Use of digital tools and processes throughout a company's lifecycle: Companies use a number of digital tools and processes in order to comply with requirements stemming from company law, such as registering a company as legal entity, filing documents to the business register or applying for publication in the national gazette. This also encompasses digital access to company related information by third parties. The use of digital tools in interactions between companies and their shareholders is not part of this impact assessment.

- Cross-border mergers: A cross-border merger takes place when two or more companies from different MS join into one surviving entity by transferring to it all their assets and liabilities.

- Cross-border divisions: A division involves a transfer of all or some assets and liabilities from a dividing company to existing or new company/companies in another MS.<sup>25</sup>

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<sup>21</sup> European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

<sup>22</sup> European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)).

<sup>23</sup> Council Conclusions on Single Market Policy, 6197/15, 2-3 March 2015.

<sup>24</sup> The [Tallinn Declaration on eGovernment](#) was signed at the ministerial meeting during Estonian Presidency of the Council of the EU on 6 October 2017.

<sup>25</sup> Divisions can be carried out in different ways, e.g. a dividing company can be wound up and transfer its assets and liabilities to more than one existing or newly formed company whose shares are allocated to the

- Cross-border conversions: A conversion means an operation whereby a company formed and registered in accordance with the law of a Member State converts into a company formed and registered in accordance with the law of another Member State while retaining its legal personality and without being wound up or going into liquidation. Unlike cross-border mergers and divisions, which involve more entities across MS, a cross-border conversion concerns just one company.

- Conflict of laws rules: In situations with cross-border elements, conflict of laws rules determine which of possibly two or more national laws apply to the internal functioning of a company.

This impact assessment addresses those five areas which are interrelated and contribute directly to a company's ability to expand their business and reap the full benefits offered by the Single Market. Digitalisation serves as the starting point as the pragmatic use of the opportunities offered by digital tools would help entrepreneurs to create their business and communicate to the relevant competent authorities with greater ease and less cost. Moreover, the effective use of digital safeguards would ensure the integrity of the information that is provided to business registers in a cross-border setting and provide greater transparency and security to society at large. Should entrepreneurs then wish to expand their business cross-border, the enhancement of the Cross-border Merger rules and the introduction of procedural rules for cross-border divisions and cross-border conversions would not only offer them greater ability to grow their business and explore new markets but would also offer robust protection to employees, minority shareholders and creditors. Digitalisation strongly interacts with these procedures as effective digital communication between the business registers through the EU system (called BRIS<sup>26</sup>) would enable them to establish a clear point in time to which a company merges, divides and converts cross-border and changes its legal form. This would in turn provide greater legal certainty for business registers, entrepreneurs and stakeholders. Finally, certainty on the applicable law is relevant if a company finds itself in a situation with cross-border elements.

The present impact assessment addresses all the above-mentioned areas as the impact assessment aims at informing the political decision whether action needs to be taken in all of these areas or only in selected ones. Where possible, the interactions between different areas and between any preferred options are spelled out. In addition, the assessment refers to the relevant stakeholder feedback which has been obtained in various consultations confirming the assessment of relevance (see for details on stakeholder consultation Annex 2).

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shareholders of the dividing company (so-called 'split up'). Alternatively, the dividing company can continue to exist and it can transfer some of its assets to other (new or existing) companies (so-called 'spin-off') or companies to which assets are transferred can become its subsidiaries (so-called 'hive-down'). The shares can be allocated to shareholders of the dividing company in proportion or disproportionately to their existing shareholdings, J. Schmidt, cross-border mergers and divisions, transfers of seat: Is there a need to legislate? Study for the EP JURI Committee, 2016 (hereinafter referred to as [J. Schmidt, EP Study](#)), p. 27.

<sup>26</sup> The system of interconnection of business registers was created with Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p. 1–9. This directive is now part of the codified Directive (EU) 2017/1132 relating to certain aspects of company law.

Decisions to set up a company, expand, restructure or move the company cross-border depend on many factors such as business opportunities, productivity gains and business environment as well as the legal, tax and regulatory regime of a given MS.<sup>27</sup> However, companies cannot even envisage exercising the freedom of establishment in practice, if the underlying legal framework does not allow them to carry out such operations or make them very costly or complicated. Against this background, this impact assessment will only analyse the prerequisite condition for mobility, namely the enabling rules and procedures in the area of company law. It will not address the EU and national legal frameworks in other related policy areas such as labour law, insolvency, taxation or other aspects of digitalisation not associated with company law such as cloud computing or e-residency.

The proposed policy options will not touch the existing acquis in these other areas which will remain fully applicable. In many cases, the proposed policy options would build on or complement the existing acquis such as use of BRIS, the e-card, once-only principle or make them applicable for companies (e.g. eIDAS). Moreover, the proposed policy options will have due regard for the European Pillar of Social Rights, in particular the 8<sup>th</sup> principle that seeks to safeguard the social dialogue and involvement of workers.<sup>28</sup> As such, employee participation in cross-border operations should be seen as part of the wider social acquis aimed to protect employees in case of cross-border operations.

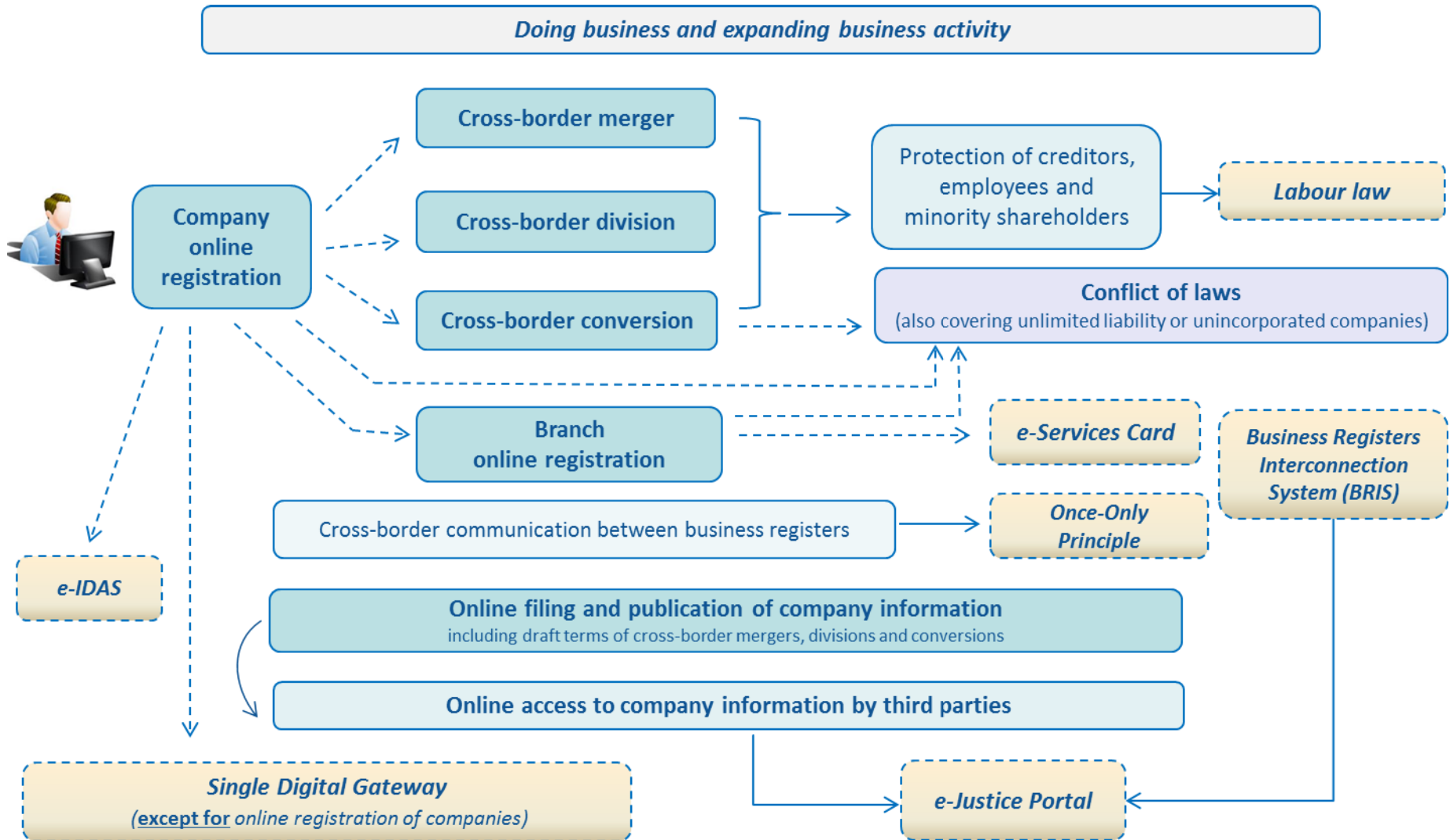
The diagram below presents the different areas subject to this impact assessment as well as their interrelations. In addition, the graph shows links with other EU policies or initiatives.

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<sup>27</sup> EY Attractiveness Survey – Europe 2017

<sup>28</sup> The European Pillar of Social Rights, Chapter II: Fairer working conditions. For further information see [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en)

**Relationship between the issues covered by this impact assessment and links with other EU initiatives**



## THE PROBLEM DEFINITION

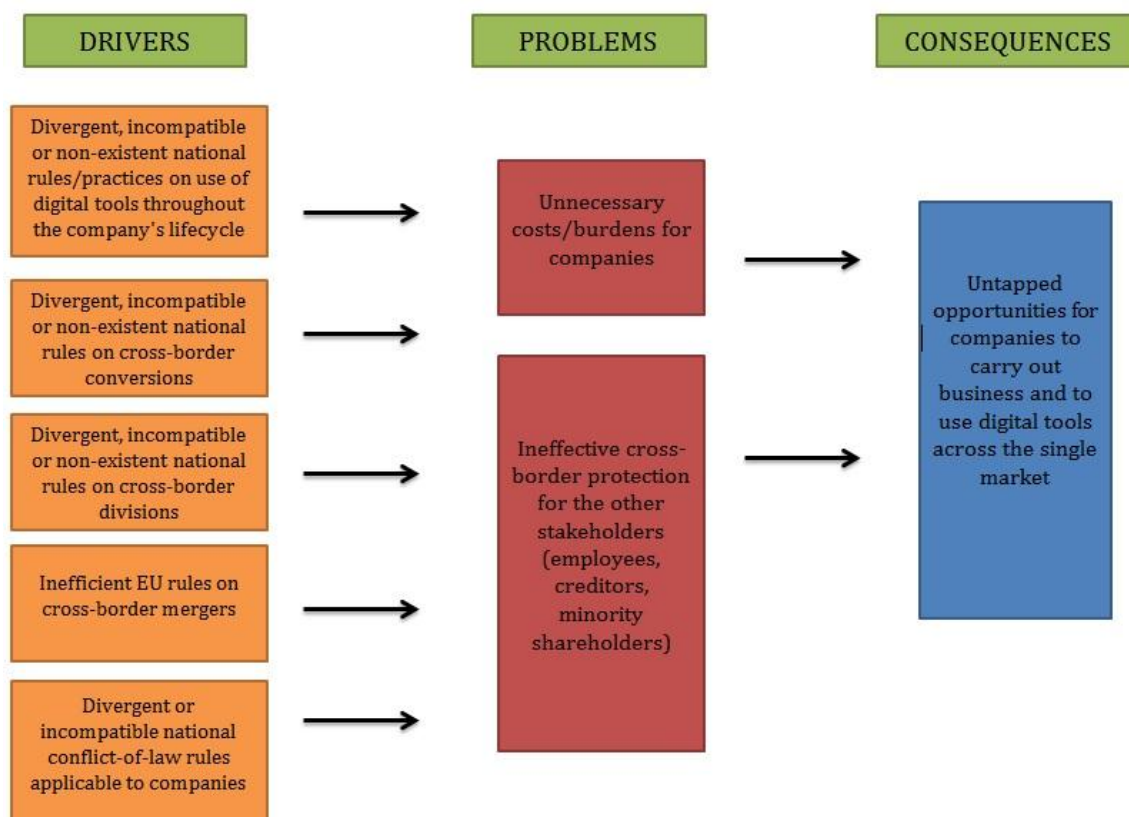
The well-functioning Single Market is important for increasing EU's competitiveness and its functioning is key to the European Union remaining an attractive location for businesses, both domestic and foreign<sup>29</sup>. Together with the free movement of capital and the freedom of establishment, company law directives and regulations provide a legal framework which has an impact on investments. The more uncertainty there is in company law the less attractive the EU is for investors. This results in untapped potential.

The problem is that in the absence of a reliable legal framework for cross-border divisions and conversions, and inefficiencies in the current EU rules for cross-border mergers, companies have difficulties to access markets in other MS and often need to find costly alternatives to direct procedures which can deter them, in particular SMEs, from doing cross-border business. In addition, the lack of possibility to use relevant digital tools is also a barrier to the exercise of the freedom of establishment by companies. These lead to unnecessary costs for companies and hinder or prevent them from using the opportunities offered by the Single Market. This also means that relevant stakeholders (employees, creditors, minority shareholders and other third parties) are faced with uncertainty as to their rights and protection in cross-border situations.

The problem tree below illustrates the main drivers, problems and consequences relevant for this initiative. The following sub-chapters describe the drivers and problems in more detail for each subject area. Concrete examples of difficulties faced by companies and stakeholders can be found in Annex 4.

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<sup>29</sup> Restoring EU Competitiveness 2016 updated version, European Investment Bank.



The number of companies currently engaged in cross-border activity can best illustrate the overall scale of the problem. According to data from a 2011 study on the Opportunities for the Internationalisation of European SMEs there are only 2% of SMEs that have investment abroad (500,000 companies).<sup>30</sup> Furthermore, according to Eurostat data from 2014 only 0.7% of companies are intra-EU foreign affiliated (i.e. they are controlled or owned by multinational enterprises that are resident in another EU MS).<sup>31</sup> All of these companies are likely to benefit from the package. However, due to the outdated modalities for which companies have to use when communicating with business registers (particularly in a cross-border setting) and the inefficient procedures companies have to use when operating cross-border, a significant population of EU companies are never even given the opportunity to make effective use of their freedom of establishment. Therefore, the number of companies concerned with the package is likely to be significantly higher.

## 1.4 Use of digital tools and processes throughout a company's lifecycle

### 1.4.1 Driver: What causes the problem?

In a world where technology is part of everyone's daily life, companies increasingly use digital tools in their business. Companies also need to interact with public authorities, but this is not always possible through electronic means. The EU offers a very inconsistent landscape when it comes to the availability of online tools for companies in their contact with public authorities in the area of company law. MS provide e-government services at

<sup>30</sup> Final Report on the Opportunities for the Internationalisation of European SMEs (2011), p. 21.

<sup>31</sup> 2014 Eurostat data on "foreign affiliates"



variable degrees: some are very advanced and provide easy-to-use, fully online solutions<sup>32</sup>, while others are more timid in their efforts and do not offer at all online solutions for critical steps in a company's lifecycle such as the registration of the company as a legal entity.

Currently the EU company law includes certain elements of digitalisation such as the obligation for MS to make available online information about limited liability companies registered in central, commercial or companies registers (herein business registers). However these requirements are limited and lack precision, leading to a very diverse implementation at national level.

In addition, certain digital processes are not covered at all by EU law and only a number of MS address them at national level. For example, today only 17 MS<sup>33</sup> provide a procedure for the *fully online registration of companies*; in the other MS the only way to register a company<sup>34</sup> is by going in person to the registration authority or another body which then submits the application for registration. This creates inefficiencies and an uneven playing field for companies as some MS<sup>35</sup> only allow for face-to-face procedure for company registration while others<sup>36</sup> allow both face-to-face and online procedure – or only online (as is the case in Estonia and Denmark). More detailed information about the situation in different MS can be found in Annex 4.

The situation is similar for the *online registration of branches*. While data on all branches of EU companies is not yet available today, according to available BRIS statistics, there are 6,000 branches alone in 10 MS. Although branches do not have a legal personality, they still need to be registered in the business register. The registration of a branch largely follows the same requirements as company registration.

Although the recent Commission proposal for a Single Digital Gateway sets out the requirement for MS to digitalise the registration of business activity in general, limited liability companies are not in the scope of this proposal as it was deemed more appropriate to address this in the context of company law. The lack of an EU legal framework for limited liability companies and their branches would only perpetuate a situation where unequal opportunities are offered to companies across the single market.

Once they have been registered, companies and branches have an obligation to *file* certain information with the business registers during their life time (for example, amendments to their articles of constitution, changes in the names of company legal representatives or their annual accounts). Although the current EU law stipulates that companies should be able to submit the documents and particulars that are part of the mandatory disclosure requirements "by electronic means"<sup>37</sup>, the current definition of

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<sup>32</sup> A number of business registers already have in place advanced online tools and solutions, for example Denmark, Estonia, Latvia.

<sup>33</sup> Bulgaria, Denmark, Estonia, Finland, France, Italy, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the UK.

<sup>34</sup> Company registration refers to the creation of the company as a legal entity. This is often seen as a series of sub-steps, generally comprising the verification of the identity of the company founder, checking the availability and/or appropriateness of the company name, the drawing up, signing and certifying of the documents for constitution of the company, followed by the actual registration with the register.

<sup>35</sup> For example Belgium, Germany, and Spain.

<sup>36</sup> For example Cyprus, Finland and UK.

<sup>37</sup> Article 16(2) of Directive (EU) 2017/1132.

"electronic means" is not specific enough and leads to a diverse implementation in the MS (see also overview in Annex 4). Most significantly, in several MS (e.g. Belgium, Germany, Hungary, and Spain) company representatives cannot file documents fully online; instead they need to go in person in front of a notary or legal professional who certifies the documents and then submits them online to the business registers<sup>38</sup>, while some MS (e.g. Estonia, Poland) require only facultative involvement of notaries.

Once companies and branches have filed the necessary information with the business registers, current EU rules provide for the *publication* of all or part of that information in the national gazette. It is only by publication in the national gazette (or equally effective means) that the disclosed information becomes legally effective. Such requirement dates back to the early days of EU company law<sup>39</sup> when the publication in the official gazette was the only way of ensuring certainty and transparency of business information. A revision of the EU rules in 2003<sup>40</sup> introduced the option for MS to keep the national gazette in electronic form<sup>41</sup>, without specifying how the information should be submitted by the company and in particular it did not do away with possible multiple submission requirements in MS (i.e. both to the business register and the national gazette). Today at least 14 MS make their national gazettes available in electronic form<sup>42</sup>; in one of those (France) an additional publication in print remains mandatory.

Overall, the situation remains divergent in different MS. Whether online or on paper, companies continue to submit the same information to two different places (business register and national gazette). This is not the only example of *multiple submissions by companies of the same information*. For example, companies that have a branch in another EU country need to file their annual accounts both to the business register where the company is registered and to the business register in the MS where the branch is registered.

Concerning access by third parties to company information in business registers, the directive<sup>43</sup> on the interconnection of business registers (BRIS) sets a minimum set of data which must always be provided for free<sup>44</sup>. However for the other company information available in the business registers most MS charge fees for all or some of that information<sup>45</sup>. Although this is in line with the existing EU rules which state that MS can

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<sup>38</sup> Study on digitalisation of company law, Everis, 2017 (hereinafter referred to as Everis study, 2017)

<sup>39</sup> The first company law directive was adopted in 1968 and some of the requirements, such as the publication in the national gazette, were introduced then.

<sup>40</sup> Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 04/09/2003 P. 13-16. It was the same directive that also introduced the possibility for companies to file documents online.

<sup>41</sup> MS also have the choice to replace the publication in the national gazette with equally effective means of publication through a central electronic platform.

<sup>42</sup> The following MS publish company information online: BE, CZ, CY, DK, EE, FI, FR, DE, GR, HU, PL, PT, ES, UK. Source: Everis study 2017.

<sup>43</sup> Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers Text with EEA relevance, OJ L 156, 16.6.2012, p. 1–9

<sup>44</sup> This includes the company name, registered office, legal form, company registration number and the Member State in which the company is registered.

<sup>45</sup> Only six MS provide all information free of charge: Belgium, Bulgaria, Czech Republic, Luxembourg, Slovenia and the UK.

charge *fees* which cannot exceed the administrative cost of storing and maintaining that data, this means that access to information varies across the EU, with more information being available free of charge in some MS than in others.

#### 1.4.2 What is the problem for companies?

The lack of rules for *online registration, filing and publication* or the divergence of such rules in the MS create unnecessary costs and burdens to entrepreneurs who wish to set up a new business or to expand their business by registering subsidiaries or branches or fulfil specific requirements online. This in turn may lead to missed business opportunities due to delay in registering the business or in a worst case to the decision not to set up a business at all. The replies to the 2017 public consultation on company law confirmed the fact that the differences between MS laws or the overall lack of a legal framework as regards interactions with business registers via digital tools is seen by most stakeholders, in particular business organisations and public authorities, as an obstacle to the functioning of the single market. This problem needs to be addressed urgently as businesses are increasingly going digital and more public services are available online. They consider that the registration of companies should be also available online.

Concerning the online registration, evidence from those MS that have put in place solutions for online registration shows that electronic applications for company registration are generally cheaper and quicker to process than applications made in person and on paper. This means that companies that do not have the option to register online incur higher costs than those that can complete the procedure fully online. The time needed to complete the procedure also adds up to the costs incurred by companies and when procedures require the physical presence in front of a competent authority the time for completing the registration is longer than when procedures are done fully online. In addition to the direct costs for registration or filing, company founders also incur indirect costs such as travel costs (in particular when travelling abroad).

MS	Application for company registration		Time to process the application	
	Paper-based	Online	Paper-based	Online
Ireland <sup>46</sup>	EUR 100	EUR 50	10 to 15 days	Within 5 days
Finland <sup>47</sup>	EUR 380	EUR 350	Up to 17 working days	Within 5 working days
UK <sup>48</sup>	£40	£12	8 to 10 days <sup>49</sup>	Within 24 hours

For the *filing of documents*, the submission of documents on paper is also generally more costly than the submission of documents online. For example, in Belgium to file on paper an abbreviated model of annual accounts costs EUR 226,34, as opposed to EUR 155,67

<sup>46</sup> <https://www.cro.ie/Publications/Fees/Company>

<sup>47</sup> <https://www.prh.fi/en/kaupparekisteri/hinnasto/kasittelymaksut.html>

<sup>48</sup> <https://www.gov.uk/limited-company-formation/register-your-company>

<sup>49</sup> When the company founder uses postal registration but wishes to have their application processed within 24 hours, then the registration fee is £100, compared to the cost of £12 for the online application which would be processed within the same time period.

for online filing; in the UK, the submission of annual accounts by post costs £40, while the electronic submission of the same documents costs £13.

Costs for registration and filing are even higher in those MS (e.g. Belgium, Germany, Hungary, Poland, and Spain) where company founders or representatives need to come in person in front of a notary or legal professional. For instance, the fees for notarial services are EUR 145 in Belgium or EUR 220 in Cyprus and can vary from EUR 150 to EUR 4,000 in Spain<sup>50</sup>. These fees are typically added to the registration or filing fees.

Concerning the issue of limited access to free of charge information available in the business registers, companies themselves can be affected in cases where they are looking up information on potential business partners. This can be particularly relevant for SMEs for which the costly access to information on businesses from other MS can hamper their business opportunities and cross-border trade in the Single Market.

#### *1.4.3 What is the problem for other stakeholders?*

Other stakeholders, such as creditors, investors, employees or their representatives or consumers who rely on company information from the business registers can also be affected by the above-mentioned drivers. For them the problem is twofold: reliability of data and the access to it. These stakeholders mainly face problem of limited access to free of charge information filed by companies in the business register as most registers charge fees for that information. Prices per document may not be considered high (average range from 2 to 15 Euros per document), but if more documents about the same company or about many companies are needed, then the costs add up and can become prohibitive for certain stakeholders. The issue of the limited access to free of charge information has become even more prominent with the launch of the business registers interconnection system (BRIS). BRIS facilitates access to company data from the EU business registers via a single European access point, but the easiness to search for this information only highlights how little information is in fact available for free in the registers.

In addition, the fact that the information needs to be filed in two places (e.g. business register and national gazette) may still create uncertainty as to how stakeholders can rely on that information. For example, third parties may rely on information from the business registers not knowing that this information is only legally effective after publication in the national gazette. In turn, this creates mistrust in the EU business environment and affects the transparency and proper enforcement of rules.

The relevant competent authorities in the MS – namely the business registers – are also affected by their own slow take-up of digital solutions. This is mainly proven by counter-examples from those that have already made progress in digitalising their processes over the past few years. For example, after the introduction of online filing and registration in 2008, the Slovenian business register noted a significant reduction in the time needed to process an application (in the first year the average time for registration was reduced from 60 days in 2007 to 4.3 days in 2008). Similarly, the Danish business register reported that, following the introduction of the online registration and filing system, in just four years the average time for case handling decreased by 69% and the average

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<sup>50</sup> Everis study, 2017.

ramp-up time for a new employee decreased by 90%<sup>51</sup>. This means that registers that are not yet offering streamlined online procedures for companies are missing out on the efficiencies that these solutions could bring to their own organisations.

Notaries have signalled that for them a problem is legal certainty and the trustworthiness of registers. As they are part of the registration processes in a number of MS they are afraid that the digitalisation would question the need of their services, as in many MS in which fully online registration is functioning well, the involvement of a notary is not necessary. Notaries, therefore, as having a direct stake in the registration processes in many countries, have in reality different concerns than other stakeholders which are not part of the process.

## 1.5 Cross-border mergers

### 1.5.1 Driver: What causes the problem?

Mergers are used by companies for different purposes such as group reorganisations<sup>52</sup>, cutting organisational costs as well as business-oriented considerations in order to enjoy greater returns to scale, consolidated branding, or other synergies between different business activities.

The introduction of the Cross-Border Merger Directive<sup>53</sup> (CBMD) led to a substantial increase in cross-border merger activity in the EU and EEA. The number of cross-border mergers rose by 173% between 2008 and 2012 as a total of 1,227 cross-border mergers were carried out during this period, which indicates that the procedure set up by the Directive substantially enhanced cross-border activity. Indeed, recent further research demonstrates the striking impact that the introduction of the CBMD on cross-border merger activity as between 2013 and 2017 there were 1,163 cross-border mergers that took place in 9 EU Member States alone, almost the same as the EU-wide figure for the preceding 4 years.<sup>54</sup> Stakeholders (such as law firms, business registers and trade unions) interviewed for the 2013 study on the application of the Directive welcomed the new procedures, the procedural simplification and reported lower costs and shorter timeframes due to the harmonised framework<sup>55</sup>.

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<sup>51</sup> European Commerce Registers' Forum report, 2017, p. 45 and 56.

<sup>52</sup> The EU cross-border merger rules (see below) are seen as an effective tool for internal reorganisation of groups of companies and over a third of cross-border mergers appear to have been carried out within groups, Bech-Bruun and Lexidale, Study on the Application of the Cross-border Mergers Directive, September 2013, (hereinafter referred to as Bech-Bruun/Lexidale, 2013) [http://ec.europa.eu/internal\\_market/company/docs/mergers/131007\\_study-cross-border-merger-directive\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf), p. 973.

<sup>53</sup> Directive 2005/56/EU of the European Parliament and of the Council of 26 October 2005 (OJ L 310, 25.11.2005, p. 1); replaced and repealed on 19 July 2017 by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

<sup>54</sup> Biermeyer, Thomas and Meyer, Marcus, Cross-border Corporate Mobility in the EU: Empirical Findings 2017, p. 5.

<sup>55</sup> Bech-Bruun/Lexidale 2013, p. 5-8, 49.

Despite these positive developments, the evaluation of the functioning of the CBMD (Annex 5) which draws from the research<sup>56</sup> and consultations<sup>57</sup> demonstrates persisting issues that are frustrating the full effectiveness and efficiency of the Directive.

Concerning protection of creditors and minority shareholders, the Directive lays down minimum, mainly procedural rules and leaves the substantive rules subject to national laws. Therefore, the differences between MS laws persist. For example, the Directive only says that creditors shall be protected subject to national rules, without further specifications. Similarly, the Directive lays down some rules concerning shareholders in general (e.g. information via the draft merger terms, merger and expert reports, voting during the general meetings) but leaves it to MS to decide whether to introduce further protection for minority shareholders.

In the 2015 public consultation, the under-harmonisation of such rules was noted as a key point of concern for stakeholders. Approximately 80% of respondents were in favour of harmonisation of creditor rights and 65% in favour of harmonisation of minority shareholder protection. This view was further reflected in the 2017 public consultation where 80% of the MS that responded called for the substantive and procedural aspects of creditor protection to be harmonised. Similar views were echoed in a recent European Parliament Resolution.<sup>58</sup>

As to employee participation on board level, the Directive sets out a comprehensive framework. It provides that the rules on employee participation shall follow the laws of the MS where the registered office of the successor company is situated. Since this could invite for forum shopping, the Directive includes three exceptions to this general rule in order to guarantee the status quo in terms of employee participation. If any of these exceptions apply (basically there must be some form of employee participation before the merger), the management can either negotiate with employees a bespoke solution on the participation or apply standard rules (on the composition of the body representative to employees, its competence and powers, and the functioning of employee participation) provided by SE Directive 2001/86/EC<sup>59</sup>. The percentage of employees required to have been previously covered by an employee participation system is one third (compared to one quarter in the SE directive rules). The current employee participation rules have been criticised both by companies and trade unions<sup>60</sup>

In addition, the Directive offers limited possibilities to simplify the merger procedure. For example, it allows waiving an independent expert report if all shareholders agree and does not require an expert report or the approval by the general meeting in case of a

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<sup>56</sup> For instance, the report on the future of EU company law by the expert Reflection Group in 2011, [http://ec.europa.eu/internal\\_market/company/docs/modern/reflectiongroup\\_report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf); J. Schmidt, EP Study, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL\\_STU\(2016\)556960\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556960/IPOL_STU(2016)556960_EN.pdf) ; Bech-Bruun/Lexidale 2013.

<sup>57</sup> 2015 consultation on cross border mergers and divisions, [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf); the 2012 consultation on the future of EU company law, [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm) .

<sup>58</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)). P. 10

<sup>59</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ L 294, 10.11.2001, p. 22).

<sup>60</sup> See point 2.2.3.

merger between a parent company and its wholly-owned subsidiary. Research and stakeholder consultation<sup>61</sup> have underlined the need for further simplifications in case of costly procedures which do not confer benefits on the stakeholders concerned. In addition, it has been argued that the procedure does not sufficiently integrate digital tools in the procedure itself (e.g. as regards submitting the documents to public authorities or sharing those between the authorities)<sup>62</sup>.

### *1.5.2 What is the problem for companies?*

Companies often face costly legal advice and a very long delay to complete a merger due to the divergent national rules<sup>63</sup>. For instance, while a simple cross-border merger takes between 2 and 4 months, some mergers can take up to 7 months depending on the MS involved<sup>64</sup>. This can be due to different delays for authorities to issue a pre-merger certificate<sup>65</sup> or due to different protection periods for stakeholders in different MS.

The divergence between national rules can also make it difficult or impossible to meet certain steps of the procedure<sup>66</sup>. It might be impossible for the merging companies to meet the 6-month deadline for submission of pre-merger certificates if due to different creditor protection periods such a certificate has not been yet issued in one of the MS concerned<sup>67</sup>.

The more complex the procedure and less possibilities for a simplified procedure, the higher will be the costs for the merging companies<sup>68</sup>. For instance, stakeholders have taken the view that drawing up a management report on the impacts of the merger involves substantial time and costs and is an unnecessary burden in cases where the merging companies have no employees or the shareholders agree not to require such a report<sup>69</sup>. It is estimated that drawing up such a report can amount to up to between €5,000 and 8,000 in Italy and that that legal advice for drawing up the necessary reports for a cross-border operation can sum up to € 8.000-12.000 in Belgium.<sup>70</sup> Between 2008 and 2013, most merging companies and most companies resulting from a cross-border merger were private limited liability companies<sup>71</sup>. Given that such private companies are mainly small or medium-size companies and they, in general, have to carry out the whole merger procedure which is primarily foreseen for big public limited liability companies, the costs arising for small and medium sized companies can be bigger than benefits, having a negative impact on economic growth.

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<sup>61</sup> Bech-Bruun/Lexidale 2013 and the stakeholders in their replies to the 2015 consultation

<sup>62</sup> This view was expressed by experts of ICLEG.

<sup>63</sup> See also subsection 2.3.2. of the evaluation in Annex 5 for deficiencies as regards efficiency of the current cross-border merger rules.

<sup>64</sup> Bech-Bruun/Lexidale, 2013, p. 133.

<sup>65</sup> A certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

<sup>66</sup> See also subsection 2.3.1. of the evaluation in Annex 5 for deficiencies as regards effectiveness of the current cross-border rules.

<sup>67</sup> *Ibid*, 2013, p. 54.

<sup>68</sup> See also subsection 2.3.2. of the evaluation in Annex 5 for deficiencies as regards efficiency of the current cross-border merger rules.

<sup>69</sup> *Ibid*, p. 85-86.

<sup>70</sup> EY study on cross-border operations of companies.

<sup>71</sup> Among the merging companies there were 70 percent of private limited liability companies versus 28 percent of public limited liability companies; 66 percent of the acquiring companies were of Llc type (of private nature), versus 32 percent of Plc type of companies, Bech Bruun/Lexidale, 2013, p. 978.

Companies also consider the employee participation procedure too complex and leading to unnecessary costs and delays within the merger.<sup>72</sup>

The evaluation of the functioning of the existing rules on cross-border mergers (Annex 5) found that the provisions of the CBMD have been less effective and efficient as regards creditors and minority shareholder protection; it further found deficiencies as regards the efficiency of the rules concerning the possibilities for a simplified procedure. It could not be conclusive on the efficiency of the employee participation procedure.

### *1.5.3 What is the problem for other stakeholders?*

A cross-border merger may impact the rights of creditors who may, for example, need to sue the company in a different MS or may be in a worse financial situation if the liabilities of the acquiring company exceed its assets.<sup>73</sup> Shareholders, in particular minority shareholders, may become shareholders of a company they do not wish to be part of or be affected by an inadequate exchange ratio.

The current minimum standards and reference to national rules on protection of creditors and minority shareholders in the Directive create complexity and legal uncertainty<sup>74</sup>. This triggers the need of stakeholders to ask for legal advice. In case they cannot afford it, their rights might become unenforceable. Due to the lack of specific safeguards and harmonised rules, creditors and minority shareholders benefit from more rights in some MS than in the others or they suffer from the lack of protection in some MS.

The CBMD does not provide substantive protection rights for minority shareholders, but it allows MS to adopt provisions designed to ensure appropriate protection for minority shareholders. The duration of the period when minority shareholders can request protection varies between MS (from 10 days to 3 months). The content of the protection rights provided by national law also differ. In most MS minority shareholders have a right to sell their shares against adequate cash compensation (so-called "exit rights"), while some MS offer also a right to additional cash compensation if the share exchange ratio is not adequate or a right of investigation, and/or additional procedural safeguards such as majority of 75% is required in the general meeting to approve a cross-border merger). Some MS have not introduced specific minority shareholders' protection in national law. These divergences in MS laws lead to unequal treatment of stakeholders within the same cross-border merger operation and to legal uncertainty. They create costs for shareholders, as they do not know their rights and remedies in all MS. There is not even a minimum standard to which they could refer to.

Concerning the protection of creditors, the general rule of the CBMD provides that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. In accordance with the Directive on domestic mergers national laws have to provide "adequate protection" for the interests of creditors. MS' rules diverge on the time limit for the protection of creditors' claims and

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<sup>72</sup> E.g. Romanian and Lithuanian companies and legal advisors considered the rules on employee participation as being very cumbersome or complex, Polish and Italian ones saw the employee participation procedure as major obstacle for the completion of a cross-border merger, Bech-Bruun/Lexidale, 2013, p. 207, 213, 221, 226.

<sup>73</sup> Reynolds/Scherrer, 2016, p. 37.

<sup>74</sup> See also subsection 2.3.1. and 2.3.2. of the evaluation in Annex 5 for deficiencies as regards effectiveness and efficiency of the current cross-border merger rules.



on the period of time during which creditors can exercise their rights. The rules also vary on the nature of protection, e.g. in all MS with rules creditors can demand a guarantee/security to guarantee that the company resulting from a merger will meet their claims but in many MS creditors even have a veto right over the merger<sup>75</sup>. Similarly as for shareholders, these divergences lead to additional costs for creditors as they do not know their rights and remedies in all MS. There is not even a minimum standard to which they could refer to.

Cross-border mergers may impact the position of employees in two ways. Firstly, generally, employees require comprehensive information about a cross-border merger. Currently, the situation of employees is only considered generally in the management report addressed predominantly to shareholders. It has been criticised that employees are not sufficiently informed about the details and implications of a cross-border merger<sup>76</sup>. Secondly, there is an impact on employees' rights in those cases where there are representatives of employees in boards of the merging companies (or at least in one of them). The CBMD provides for rules dealing with the question of the transfer of acquired rights, focusing on the employee participation in the company resulting from the merger (as described in detail in section 2.2.1). These rules are considered problematic by trade unions as not giving enough protection for employees<sup>77</sup>.

## 1.6 Cross-border divisions

### 1.6.1 Driver: What causes the problem?

In a similar way as in mergers, divisions offer a way for companies to change or simplify their organisational structure, adapt to changing market conditions and realise new business opportunities in another MS, as confirmed by respondents to the 2015 consultation on cross-border mergers and divisions<sup>78</sup>. For instance, divisions may be used to sell part of the business, to transfer it to other companies belonging to the same group or to distribute different parts of a company between different heirs or shareholders in conflict<sup>79</sup>. Companies might be interested in separating their business to concentrate on part of it, to better allow specific parts – which operate in different business sectors – to meet their long-term objectives or due to different regulatory requirements. It appears that divisions are more often used by bigger companies than by SMEs, which rather search for cross-border partnerships than divide<sup>80</sup>.

Despite relatively numerous divisions at national level – thousands or hundreds in Denmark, France, Italy, Sweden, Romania, Estonia, Croatia, Poland or Finland<sup>81</sup>, cross-

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<sup>75</sup> See also Annex 4 for more details on the problems caused by the lack of specific rules.

<sup>76</sup> See for instance T. Biermeyer/M. Meyer, Identification of Cross-Border Mergers where the Issue of Employee Participation has arisen (2008-2012), European Trade Union Institute, 2015.

<sup>77</sup> See also Annex 5 for deficiencies as regards efficiency of the current cross-border merger rules.

<sup>78</sup> [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm).

<sup>79</sup> Schmidt, EP Study, p. 26

<sup>80</sup> EY study on cross-border operations of companies

<sup>81</sup> According to results of the 2015 public consultation and additional information from national authorities, there were about 700 national divisions per year in Denmark during the 5 preceding years; over a thousand national divisions in France, around 500 in Poland and Estonia, around 200 in Finland, Latvia and Sweden, and around 150 in Belgium.

border divisions are rarely carried out.<sup>82</sup> Recent studies estimate that the range of cross-border division activity in the EU was between 50 – 200 operations in 2016.<sup>83</sup>

The high number of national divisions confirms that such operations are very useful as corporate restructuring tools. The main reason behind a small number of cross-border divisions is the divergence or non-existence of national rules and the absence of EU rules. The existing EU company law, Directive 82/891/EEC, sets out rules for national divisions of public limited liability companies only.<sup>84</sup>

As regards national rules, only less than half of the MS (e.g. Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Spain, Finland, France, Italy, Lithuania, Luxembourg, Romania, the Netherlands, Portugal, Sweden, Spain and the UK) provide for specific rules on cross-border divisions or allow them by relying on other legislation or case law. For instance, Czech Republic, Denmark and Finland have specific rules based on the national rules transposing the EU provisions on cross-border mergers. In France, Romania, Italy, Luxembourg, Spain and the UK cross-border divisions are allowed without specific rules, often following the case law of the Court of Justice (e.g. SEVIC case C-411/03) or by applying national provisions on cross-border mergers or domestic divisions<sup>85</sup> by analogy<sup>86</sup>. For example, in France a national court has confirmed that corporate restructuring between French and Dutch companies is possible if the Dutch law recognizes the validity of the operation and if the restructuring complies with the relevant national legislation in the MS concerned<sup>87</sup>. In Italy, in the absence of legal rules, academics take the view that cross-border divisions, being similar to cross-border mergers, can be carried out<sup>88</sup>.

Even when MS allow companies to divide cross-border, the relevant national provisions are often divergent or even incompatible. In a number of MS carrying out a direct cross-border division is not possible<sup>89</sup>. Therefore, there have been a number of calls for the Commission to propose a new procedure for cross-border divisions to sit alongside the CBMD. This was the case in the 2017 public consultation<sup>90</sup> and recent European Parliament Resolution that called on the Commission to propose a procedure and noted that "introducing harmonised standards at EU level in the field of cross-border divisions

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<sup>82</sup> Data on cross-border divisions is also generally difficult to obtain. According to research and calculations, 55 cross-border divisions took place in Sweden, one in Denmark, and 3 in France in 2016, and it is assumed that overall around 100 cross-border divisions could take place each year in the EU. The estimate of the EY study on cross-border operations of companies is based on numbers of cross-border divisions in 2016, which in turn, were obtained either from business registers where available or were calculated on the basis of numbers of domestic divisions and attractiveness of the countries.

<sup>83</sup> EY study on cross-border operations of companies, p. 25.

<sup>84</sup> OJ L 378, 31.12.82, p. 47; MS have to permit divisions only in cases where they do so at national level.

<sup>85</sup> For instance, Spain and Luxembourg permit cross-border divisions on the basis of rules for domestic divisions; EY study on cross-border operations of companies.

<sup>86</sup> On the basis of the EY study on cross-border operations of companies, Bech Bruun/Lexidale 2016, J. Schmidt, EP Study, and additional research.

<sup>87</sup> See Bech Bruun/Lexidale 2016, p. 103.

<sup>88</sup> *Ibid*, p. 561 on transposition into Italian law.

<sup>89</sup> E.g. Cyprus, Germany, Hungary, Latvia, Malta, Poland, Slovak Republic and Slovenia, EY study on cross-border operations of companies.

<sup>90</sup> Annex 4 – p. 84

would lead to a simplification of operations and a reduction of costs and duration of the procedures".<sup>91</sup>

### 1.6.2 What is the problem for companies?

The current legal situation means that carrying out a direct cross-border division is usually very difficult, costly or sometimes even impossible. With diverging national rules and in particular in the absence of specific national procedures, companies often face legal uncertainty and need to seek legal advice. 68% of the respondents to the 2015 consultation mentioned the legal uncertainty due to the lack of EU rules as the main obstacle to completing a cross-border division and 51% of the respondents the duration and complexity of the current procedures<sup>92</sup>.

For instance, if the dividing company and the recipient company are situated in different MS, the companies may need to meet different requirements (e.g. type and content of documents they need to draw up, involvement of independent experts or deadlines). Such different requirements make it difficult to structure the cross-border operation and render it more complex and costly. In some cases, costs involved or incompatibility of national rules could lead companies to decide not to divide at all and therefore result in missed business opportunities.

This means that companies face unnecessary costs when they want to sell a part of business or transfer it to other companies belonging the same group, but cross-border. On average the costs of a cross-border division at EU level are estimated to be between €55,000 and €70,000.<sup>93</sup> The same costs are faced when, for instance, the two main shareholders, or their heirs situated in two different MS, do not agree any longer about the strategy of a company, and the easiest solution to save business would be then to divide a company cross-border.

Impact on companies can be seen by comparing the costs between cross-border and domestic divisions. The costs of a national division are estimated to be overall low. However, with regard to cross-border divisions, the costs can vary depending on whether a MS has specific procedure in place or whether the division is carried out indirectly. For instance, in Finland, where there is a set procedure for a direct division, the costs are estimated to be below €30,000. This differs significantly from the UK, where there are no procedural rules and the company has to effect a cross-border division through a merger, where the costs of a cross-border division can rise over €100,000.<sup>94</sup>

Member State <sup>95</sup>	Cost of domestic division	Cost of cross-border division
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<sup>91</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions, P15\_TA-PROV(2017)0248.

<sup>92</sup> See summary of replies, p. 20-22. [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm)

<sup>93</sup> EY study on cross-border operations of companies, p. 28.

<sup>94</sup> Cost estimations are divided into three categories: legal and tax advisory costs (60%); registration costs (5%) and: time to operate the division costs (35%). For instance in Austria the legal fees are estimated to be approx. €30,000, other advisory fees to be approx. €20,000 and notary and registration fee to be approx. €10,000. For further analysis see EY study on cross-border operations of companies, p. 89.

<sup>95</sup> Denmark and Finland have national rules for cross-border divisions and the other MS in the table allow direct cross-border divisions by relying on other national provisions by analogy.

<b>Member State<sup>95</sup></b>	<b>Cost of domestic division</b>	<b>Cost of cross-border division</b>
Austria	€ 10,000 - 60,000	€ 30,000 - 60,000
Belgium	€10,000 – 30,000	€ 30,000 – 60,000
United Kingdom	€30,000 - 60,000	€60,000 – 100,000+
Bulgaria	Below €10,000	Below €10,000 – 30,000
Denmark	Below €10,000	€10,000 – 30,000
Finland	Below €10,000	€10,000 – 30,000
Italy	€ 10,000 - 60,000	€ 30,000 – 100,000
Lithuania	€10,000 – 30,000	€ 30,000 – 60,000
Sweden	Below €10,000 – 30,000	€10,000 – 60,000
Spain	€10,000 – 30,000	€10,000 – 30,000

*Source: EY study on cross-border operations of companies*

When companies cannot carry out a direct cross-border division or this would be too complicated or expensive, they tend to use alternative indirect procedures. For instance, they might divide at national level and merge cross-border with another company or create a new company abroad and transfer part of their assets and liabilities to it. As indicated by stakeholders, such indirect ways involve additional procedures, legal uncertainty and need of legal advice which lead to even higher costs. For instance, when carrying out a national division and a cross-border merger, a company would in most cases need to prepare all the documents twice (i.e. draft terms of each operation, management reports, independent expert reports), organise two general meetings of shareholders and receive all the necessary certificates from the public authorities separately for each operation, leading to unnecessary costs.<sup>96</sup> For around half of the respondents to the 2015 consultation, the costs of such an indirect procedure were the main obstacle to carrying out a cross-border operation as compared to a domestic one.

### *1.6.3 What is the problem for other stakeholders?*

As in case of cross-border mergers, the rights of stakeholders such as employees, creditors or minority shareholders are likely to be impacted by a cross-border division, as they would be subject to divergent national rules. While there is no clarity whether national rules apply to the stakeholders concerned in all cases and in all MS, the following descriptions explain the complexity of the current situation.

The national rules on creditors' protection differ significantly. In case of domestic divisions, in the Czech Republic creditors have a right to petition the court for protection, while in Denmark, an independent expert evaluates if creditors' claims would be endangered. In Italy, this can be assessed either in an expert report or by a court. For cross-border divisions, in the Czech Republic creditors are entitled to seek a guarantee

<sup>96</sup> E.g. drawing up of a management report can amount to up between €5,000 and 8,000 in Italy and legal advice for drawing up the necessary reports for a cross-border operation can add up to €8,000 and 12,000 in Belgium; and organisation of a shareholder meeting can cost between €2,000 and 5,000 in Ireland and lead to legal advice costs of between €3,000 and 5,000 in Italy (with €2,500 and 4,500 for notarial fees as required in Italy for cross-border operations, Data from the EY study on cross-border operations of companies.

provided that it will be more difficult to recover their claims after division while in Denmark creditors can claim protection if the valuation expert concludes that the creditors would not be sufficiently protected after the division. The timing to provide creditor protection also varies: e.g. creditors can claim protection for example 1) up to four weeks after the general meeting, 2) within three months from the issuance of the public notice by the registration authority or 3) within six months after the cross-border divisions becomes effective. In Italy and Sweden, cross-border merger rules are usually applied by analogy, while in Belgium and France domestic division ones are used.

The national rules also differ on minority shareholder protection. Through the cross-border division, shareholders may become shareholders of a company in a jurisdiction (another MS) where they did not wish to. Some MS (e.g. Denmark, Ireland, Italy, Poland) allow shareholders to sell their shares for adequate compensation, some require high majorities when voting in the shareholders' meeting (e.g. 90% in Austria as compared to 75% in case of proportionate divisions, 75% in Denmark as compared to 66% for the proportionate ones), some others provide for an ex-ante court scrutiny of the fairness of the terms of division (UK) or the possibility to set aside a resolution tainted by abuse of majority power (France).

Such divergence can result in varying treatment of stakeholders of a dividing company across MS. In some cases, stakeholders might not receive any protection at all. For instance, in real life cases involving Italian and UK companies, creditors had the right to oppose the division according to Italian law but not according to the UK rules. In a hypothetical case of a division involving Danish and French companies, minority shareholders in a Danish dividing company would have a possibility to sell their shares for adequate compensation if they voted against the division at the general meeting whereas the shareholders of a French company would not have such a right<sup>97</sup>.

In case of domestic divisions, some MS provide for protection, e.g. in Belgium, where in principle, the employment contracts of the employees are transferred automatically to the receiving company while maintaining acquired rights, or Denmark (considerable protection where a business changes ownership) or the Netherlands (a works council – if at least 50 employees – has the right to provide formal advice on all reorganisations of a company and could bring a dispute before a court if the company board goes against their advice), whereas in a number of others (e.g. in France, Ireland, Italy, Lithuania, Spain or the United Kingdom) there are no specific provisions in place. But these domestic protections are not easily transferrable to the cross-border context.

As regards employees' rights in case of cross-border divisions, the provisions differ between protection based on information and procedure in Denmark and based on information rights in Czech Republic and no specific rights in Finland; in MS where other national rules are applied by analogy, those rules also differ, e.g. in Belgium safeguards from domestic divisions would apply whereas in Sweden – the ones from cross-border merger rules.

Moreover, more generally, there is no specific requirement to inform companies about the cross-border division and its implications – which appears particularly problematic given that divisions are considered as risky in terms of safeguarding employment rights.

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<sup>97</sup> On the basis of the Danish rules for cross-border divisions and French rules for domestic ones.

Due to the lack of rules, in case of a cross-border division, the employees' rights can diminish since the division can lead to lower number of employees. In case of a lower number of employees, the national law might not require the same level of employee's rights as before the division. Companies might use cross-border divisions and the legal uncertainty around it to avoid the need to apply potential domestic rules for employees' participation. The problem of "avoiding" national participation rules, by performing a cross-border division below the threshold, may be much more significant for cross-border divisions than for cross-border mergers (where the overall number of employees grows) In cases where companies carry out cross-border divisions indirectly, (e.g. through a division at national level and then through a cross-border merger), the situation is even more complicated for stakeholders. They would need to understand how they would be protected (if at all) under each separate procedure and under diverging national rules on creditors and minority shareholders in domestic divisions and cross-border mergers. This would result in legal uncertainty and need of legal advice<sup>98</sup>.

## 1.7 Cross-border conversions

### 1.7.1 *Driver: What causes the problem?*

Cross-border conversions are important for those companies that would like to continue operating in another MS without losing their business contracts. Conversion is a direct process whereby the company's legal personality is preserved as it converts its legal form to a legal form in the new MS (without needing to wind up or to liquidate its assets and liabilities in the initial MS). A conversion is particularly attractive for a small company that does not have enough financial resources to search for expensive legal advice and conduct a cross-border merger.<sup>99</sup> A move by a small company to another MS is often done for the same reasons which are behind free movement of persons, i.e. personal or language reasons, search for better business opportunities and better financing, closeness to the clients or finding a more business friendly legal environment. For bigger companies, or groups of companies, the tax consideration is important, but often companies move to adjust their corporate governance or capital structure, or financial disclosure requirements.

In its jurisprudence, the Court of Justice has firmly established the right of legal entities, within the meaning of Article 54 TFEU, to carry out a cross-border conversion. This right is protected as an inherent aspect of the freedom of establishment pursuant to Articles 49 and 54 TFEU. The case-law (see Annex 6) can be summarised as follows: MS should allow cross-border conversions if national conversions are allowed. However, the more detailed conditions for conversions are left to national laws, but they should not, in principle, impede the freedom of establishment. Such conditions may be justified as overriding reasons of general interest, in a non-discriminatory and proportionate manner (assessed on a case-by-case basis by European and national courts).

The recent *Polbud* judgment<sup>100</sup> made it clear that a general requirement of winding-up of companies before carrying out a cross-border conversion is an unjustified restriction to

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<sup>98</sup> See also Annex 4 for more details on the problems caused by the lack of specific rules.

<sup>99</sup> See also the European Added Value Assessment - Directive on the cross-border transfer of a company's registered office 14th Company Law Directive (European Parliament).

<sup>100</sup> C-106/16

the freedom of establishment. In this case, the Court also held that companies may rely directly on Article 49 TFEU to transfer their registered office to another Member State, even where they do not transfer their real head office. The Court recalled its earlier jurisprudence that the fact that either the registered office or real head office of a company was established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute abuse.

However, despite being judicially recognised, the right to exercise a cross-border conversion remains largely unrealised for a number of companies. Recent studies have estimated that the range of volume of cross-border transfers of a registered office for 2016 to be between 350 – 900 operations.<sup>101</sup> Therefore, they constitute less than 1% of domestic transfers. This is largely due to the lack of common procedures in EU law and the divergent approaches at national level.

There are a number of MS that allow cross-border conversions according to their national legislation (i.e. Belgium, Cyprus, Czech Republic, Denmark, France, Greece, Italy, Luxembourg, Malta, Portugal, Slovakia, and Spain). A certain number of these MS enable and regulate conversions through law and procedure (e.g. Cyprus, Czech Republic, Denmark, Malta and Spain); in some others, discussion about a national law is currently ongoing (e.g. the Netherlands) and the others provide more limited rules, e.g. France where a cross-border conversion requires a unanimous agreement of shareholders.

As the cross-border conversion means that the company leaves one MS and incorporates in another MS, the divergences of the national rules on cross-border conversions, if they exist, make cross-border conversions very difficult. In practise, a cross-border conversion can only happen in cases where both MS have compatible rules – the MS which a company leaves and the MS to which a company moves to.

Even between those MS which have enacted legislation on conversions, the procedures put in place are inconsistent. For instance, MS have adopted divergent approaches to: information and disclosure requirements prior to a cross-border conversion; dates and deadlines to be met; publication requirements; steps required for the execution of a conversion; safeguards afforded to stakeholders (employees, creditors and minority shareholders). Furthermore, these rules may differ depending on whether it is an outbound or inbound conversion, which adds to the complexity. For instance, Hungary does not allow Hungarian companies to convert into companies in another MS (outbound), whereas conversions of foreign companies into Hungary are allowed subject to specific conditions set by the Hungarian Supreme Court following the Court of Justice judgment in the *VALE* case (C-378/10) (inbound).

In addition, more than half of the MS do not provide any specific rules allowing for cross-border conversions (Austria, Bulgaria, Croatia, Estonia, Finland, Germany, Hungary, Ireland, Lithuania, Latvia, Poland, Romania, Slovenia, Sweden and the UK). It is to be noted that the Commission has pointed out this problem in the framework of country reports under the European Semester. In some of those MS, it might be still possible to convert on a cross-border basis of analogous interpretation of CJEU case-law

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<sup>101</sup> EY study on cross-border operations of companies, p. 19.

e.g. Germany<sup>102</sup>. Some other MS might permit *inbound* transfers on the basis of CJEU jurisprudence but have incorporated rules into their national law which require that a company winds up and therefore make *outbound* transfers of registered office impossible (Croatia, Hungary, Ireland, Lithuania, Poland, Romania and the UK)<sup>103</sup>.

In 2008, the CJEU stressed that it is the EU legislator who is solely competent to resolve the issue regarding the coupling of the head office with the registered office.<sup>104</sup> However, this has yet to happen and as such there are cases on conversions currently pending before the CJEU.<sup>105</sup> In 2017, the Commission received a letter from 6 MS specifically calling for an EU instrument on conversions. This view was further reflected in the 2017 public consultation which showed broad support from MS/stakeholders alike as approximately 85% of all respondents were of the opinion that there should be an EU instrument on this matter.

### 1.7.2 *What is the problem for companies?*

In the absence of clear rules at EU level, companies that wish to undergo a cross-border conversion can try to carry out direct conversions by relying on the national rules for cross-border conversions (in case those are in place) and CJEU jurisprudence or carry out indirect conversions through other existing EU procedures (e.g. on cross-border mergers or SEs<sup>106</sup>). They can also wind-up a company and create a new one in another MS transferring them all assets and liabilities. This creates unnecessary costs and burdens for companies. In a number of cases conversions, or operations leading to an equivalent result, are simply impossible for smaller companies.

First, relying on a case-law often means long "legal battles" with registration authorities who do not have the habit to apply directly the case-law, but rather base their decisions on national procedures.<sup>107</sup> This is too costly for small companies. It is not expected that the situation will fundamentally change in this regard after the Polbud judgment as the CJEU recognised that companies can rely on the freedom of establishment to convert across borders. However, absent EU harmonisation, the situation remains that it is highly

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<sup>102</sup> See recent judgment by the German High Court of Frankfurt (Oberlandesgericht Frankfurt) in a case of a cross-border conversion of a German private limited liability company (GmbH) to Italy (OLG Frankfurt/M., judgement of 3 January 2017 – 20 W 88/15, ZIP 2017, 611).

<sup>103</sup> See Polbud judgement where the Court considered that the general requirement of winding-up is an unjustified restriction to the freedom of establishment.

<sup>104</sup> CJEU case Cartesio (Case C-210/06, 16 December 2008), para. 108 – "*The question whether – and, if so, how – the registered office (siège statutaire) or real seat (siège réel) of a company incorporated under national law may be transferred from one Member State to another, are problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions.*"

<sup>105</sup> Polbud C-106/16 – delivery of judgement is scheduled on 25 Oct 2017

<sup>106</sup> Statute for a European Company (Regulation 2157/2001) includes a very special procedure for the transfer of seat which applies only to European Companies (SEs). It is not a cross-border conversion, *sensu stricto*, since a SE is not converting into another company law form. The conversion/transformation of a public limited liability company into SE is a pre-condition for applying the rules of the Regulation on transferring the registered office.

<sup>107</sup> The difficulties with the legality of a cross-border conversion and the interaction between registers have recently been exemplified in a recent judgment by the German High Court of Frankfurt in a case of a cross-border conversion of a German private limited liability company (GmbH) to Italy. OLG Frankfurt/M. v. 03.01.2017 – 20 W 88/15, ZIP 2017, 611.



possible that each case would be treated differently by the individual Member States' authorities without EU harmonised procedure.

Secondly, if two national procedures which relate to cross-border conversions, do not match, a cross-border conversion is simply impossible or too costly (judicial path). Even if the procedures match, a cross-border conversion itself is estimated to cost, on average, at the present state of law, between €20,000 to €40,000 depending on the MS involved and the size of a company.<sup>108</sup> This is prohibitive for small companies.

Costs and administrative burdens result from the potentially different requirements in the departure and destination MS as regards the type and content of documents to be prepared (e.g. draft terms of conversions, pre-conversion certificate<sup>109</sup>), different procedures and the related deadlines or other additional requirements. For instance, in the Czech Republic's conversion procedure the seat transfer proposal contains much more information than its Italian counterpart<sup>110</sup>. In respect of publication, in Spain the transfer is to be published in the Official Gazette (accompanied by a call for a general meeting) and in the main newspapers in the province where the company is domiciled, whereas in Cyprus it must only be published in two daily newspapers.

Thirdly, due to difficulties or impossibility to carry-out a direct conversion procedure, a company may choose to do this in indirect way by first creating a subsidiary abroad and then merging with it. So there is at least one step (the creation of a new company) that is not necessary in comparison with the direct conversion. Moreover, in cross-border mergers, there are at least two companies at stake, therefore there is a need for having for example expert reports for each company, whereas in a cross-border conversion there is one company and therefore one report. The cost of at least one extra report is unnecessary for the conversion. Due to this and other complexities of dealing with at least two companies, instead of one, the costs of carrying out a conversion on foot of a cross-border mergers are estimated to be between €80,000 to €100,000 depending on the MS and types of companies involved.<sup>111</sup> This can often be prohibitive for SMEs.

Another "alternative path", i.e. converting/transforming a company into an SE is also complex and normally only accessible for bigger companies. In such a case, there need to be either two companies or one public limited liability company with a subsidiary in another MS for at least 2 years. These requirements could be much easier met by groups of companies or bigger companies. Most small companies would not be public limited liability companies and would not be able to have a subscribed capital of not less than €120,000 which is required by SE Regulation. Also, the purpose of cross-border conversions is different from the aim behind creating SEs. In case of conversions the aim

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<sup>108</sup> It is important to note that these costs only account for Member States where there is a set procedure or they permit conversions by analogous interpretation of CJEU case law. These costs can increase significantly when there is a court procedure involved (as is the case in the UK). Similar to cross-border divisions 60% of the costs can be attributed to advisory fees, 5% to registration and 35% to operational costs. For further analyses see EY study on cross-border operations of companies, p. 24.

<sup>109</sup> A certificate conclusively attesting to the proper completion of the pre-conversion acts and formalities

<sup>110</sup> In the Czech Republic, aside from data such as the company name, seat registration number, it also needs to include the articles of association, an assessment of the consequences of the conversion for employees and a schedule of the transfer. Furthermore, information rights of shareholders, creditors and other entitled persons and information on the law governing the internal affairs after the transfer have to be provided.

<sup>111</sup> EY study on cross-border operations of companies, p. 56.

is to move from one MS to another, whereas the purpose of SE is to have a company that operates in the whole EU without having to move anywhere, since precisely the Statute allows it to operate easily in all MS (with common rules). The sole procedure of transfer, without counting the creation of SE, is estimated to cost around €30,000.<sup>112</sup>

Finally, if a company chooses to wind-up a company and transfer assets and liabilities to a newly created one in another MS, it may cost around €24,000 for SMEs and more than €100,000 for a bigger company.<sup>113</sup>

Similar to cross-border divisions, the impact which the lack of procedural rules has for companies can be best demonstrated by comparing the costs of a cross-border conversion to the costs of a national conversion. A study found a significant divergence between the costs of a national conversion, that require costs inferior to €10,000 in all the MS for which data was collected and the estimated costs for cross-border conversion which require higher costs than undertaking a domestic transfer in the majority of the MS. For instance, for Cyprus, where there is a set procedure in place, the cost difference is not significant, with costs estimated to be below €10,000 for both procedures. Conversely, for Austria, where cross-border conversions are authorised by applying the SE Regulation by analogy, the costs differ between less than €10,000 for a national transfer and €30,000-60,000 for a cross-border transfer. The most distinguishable difference in costs can be identified in the United Kingdom where cross-border conversions are not authorised and an indirect procedure has to be used. Here the costs are estimated to be €10,000 for a national conversion but can rise to over €100,000 for an indirect procedure to achieve the same result as a cross-border transfer.<sup>114</sup>

All of this shows that there are real difficulties faced by companies, especially by SMEs. As E&Y study provides that:

*Through interviews with legal practitioners in the MS and the Expert Panel with experience advising companies on (cross-border conversions), it was indicated that the tendency to abandon the transfer of a registered office will mainly apply to smaller companies such as SMEs who do not have the means nor the time to either (1) appeal the refusal to transfer the registered office through the use of the CJEU jurisprudence or (2) use finances for alternative solutions to undertake the transfer.*

At the same time, it has been found<sup>115</sup> that a very large percentage of domestic transfers concerns SMEs (99,3% in Italy, 99,9% in Estonia). It is likely that the same would be true for cross border conversions. Therefore, given that 99% of all limited liability companies in the EU are SMEs<sup>116</sup> and that a cross-border conversion procedure might be of particular interest for them, the above-mentioned problems can lead to considerable lost opportunities for the internal market.

### 1.7.3 What is the problem for other stakeholders?

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<sup>112</sup> EY study on cross-border operations of companies, p. p. 66.

<sup>113</sup> EY study on cross-border operations of companies, p. 54.

<sup>114</sup> EY study on cross-border operations of companies, p. 64.

<sup>115</sup> Study on the Law Applicable to Companies, LSE, 2017, available at: <https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/>.

<sup>116</sup> Eurostat

Similar to other cross-border operations, the rights of stakeholders such as employees, creditors or minority shareholders might be affected: when a company converts from one MS to another, in principle, the rights of such stakeholders may also change because they become stakeholders of the transferred company in the receiving MS.

The protection of stakeholders would very much depend on the approach used by a company in the absence of EU rules. If companies choose to carry out direct conversions by relying on the national rules for cross-border conversions (in case those are in place) and CJEU jurisprudence, this means application of divergent and often incompatible rules and procedures. In addition, the protection offered by case-law is insufficient, since the case-law so far has dealt only with limited aspects of protection and its guidance is by its nature offered on case by case basis.

As regards employee protection, some MS have specific rules on it; some do not have rules at all. For example, in the Czech Republic employees involved in the outbound conversion have the right to be acquainted with the transfer report and to express their opinion on the transfer, while in Cyprus and in Malta there is no such protection. The problem for employees might be the same as under cross-border divisions: there is a risk that companies use cross-border conversion and the lack of relevant rules to avoid the provision of employees' rights by moving to another MS with more favourable rules for companies in this respect. The problem of "avoiding" national participation rules, by performing a cross-border conversion below the national threshold, may be much more significant for cross-border conversions than for cross-border mergers (where the overall number of employees grows). Moreover, more generally, employees are not sufficiently informed about a cross-border conversion – this appears particularly problematic as the cross-border conversion is considered risky for employment rights.

Furthermore, a possibility offered by a combination of MS laws which would allow the creation of letter-box companies in the destination MS is not welcome by many stakeholders, including employees. Concerns are raised that companies having a registered office, but not a head office in the destination MS after conversion may be used to avoid many obligations of the MS where they have a real head office. This problem has become more prominent following the Polbud judgement which stipulates that the freedom of establishment is applicable when only the registered office is transferred.

As far as creditor protection is concerned, some MS (usually those with specific rules on cross-border conversions) provide the creditors with a right to request a security or to object the reincorporation (e.g. Cyprus, Czech Republic, Denmark, Malta, Spain and draft bill under discussion in the Netherlands). In Spain creditors are allowed to object the reincorporation, in Cyprus a creditor may object to the reincorporation but the court may intervene; while in the Czech Republic a creditor may demand security for unpaid debts. Some other MS (e.g. France, Greece, Luxembourg and Portugal) do not regulate this issue at all.

As far as minority shareholders protection is concerned, the existing rules in MS range from no special rules (e.g. the UK) to rather elaborate protection regimes (e.g. in Germany where minority shareholder have an exit right against cash compensation and a right to additional cash compensation if the share exchange ratio is not adequate). There are also in some cases different majorities required to approve a conversion by shareholders; often supermajority is required (e.g. Belgium, Czech Republic, Malta,

Spain, Portugal) but in some cases even unanimity (e.g. in Luxembourg, France, Greece for some companies), which is more protective of minority shareholders but might make such conversions close to impossible in practice.<sup>117</sup>

In the absence of a direct conversion procedure, as explained above, companies may choose to carry out indirect conversions through other existing EU procedures. In respect of indirect conversions, the SE Regulation and cross-border merger rules (see point 2.2) contain specific provisions on protection of stakeholders. As to the SE Regulation, it provides for a number of safeguards, but the SE does not offer a real conversion procedure and for the reasons explained in point 2.4.2 it contains complex rules which are not suited for smaller companies. As to the cross-border merges, the weaknesses of protection offered by cross-border merger directive are described in point 2.2. Naturally, when a company winds-up and reincorporates the acquired rights are extinguished and the new rights depend entirely on the national regime of the new MS.

This plethora of unsatisfactory options and lack of efficient solutions leads to legal uncertainty or clearly incompatible rules. The protection of stakeholders in such cross-border transactions, in contrast to national conversions, is therefore often ineffective.

## **1.8 Conflict of laws rules**

### *1.8.1 Driver: what causes the problem?*

Legislation regulating companies has only been partially harmonised at the EU level and the national company rules vary. Therefore, companies operating across borders or considering such cross-border activities face the risk of being governed by different or contradictory laws depending on where they are formed or active. They are also confronted with a lack of legal certainty as to which law applies, including in situations where the applicable law changes as in a cross-border conversion but also in static situations where a company engages in significant cross-border operations. As a consequence, the effect of the freedom of establishment on the mobility of companies across MS is still rather limited and foreign incorporations take place in other MS only to a small extent<sup>118</sup>. In the UK there are between 227,000 and 270,000 foreign incorporated companies, in Estonia, Romania, France, Germany and Slovakia around 30,000, and in all other MS even less than that. An empirical survey of lawyers from all MS found that the divergence of national private international law regarding companies causes legal uncertainty for economic actors and their owners (shareholders), directors and managers operating within the internal market and for MS as to the question which rules of national law applies to foreign companies operating on their territory. Such legal uncertainty has an adverse effect on the cross-border mobility of companies, on foreign incorporations as well as on cross-border conversions.<sup>119</sup>

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<sup>117</sup> Information on the basis of the EY study on cross-border operations of companies and the Study on the Law Applicable to Companies, LSE, 2017, available at: <https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/>.

<sup>118</sup> Study on the Law Applicable to Companies, LSE, 2017, available at: <https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/>

<sup>119</sup> Study on the Law Applicable to Companies, p. 16.

It is argued<sup>120</sup> that this is also due to the absence of uniform conflict-of-law rules. At present, conflict of laws rules in the area of company law are regulated by MS and the content of these rules differs substantially. In particular, the connecting factor determining the applicable law, i.e. the criterion that is decisive on which law applies to companies with cross-border activities, varies among MS. Traditionally, some MS 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 MS follow the incorporation theory, i.e. the law governing a company is determined by the place of its incorporation (the place of its registered seat). It is important to distinguish the connecting factor determining the applicable law from effective residence requirements under substantive company law which exist in several MS and which make the incorporation of a company subject to such requirements, with the consequence that companies are only registered if they have effective residence in the MS concerned. Connecting factors for conflict of law rules based on the incorporation theory are independent from and have no link to effective residence requirements under substantive company law. In other words, where a MS follows the incorporation theory for the determination of the applicable law, it applies the substantive law of the MS where a company is incorporated but that law may require a real seat on its territory for the incorporation of a company. Under this point, the terms 'incorporation theory' and 'real seat theory' as well as the term 'connecting factor' are used exclusively in the context of determining the law applicable to a company.

The difference between the two theories concerning conflict of laws rules could lead to situations where a company incorporated in MS A, but with its central administration in MS B, would be recognised as a company of MS A by MS that followed the incorporation theory, but in MS that followed the real seat theory that same company would be governed by the law of MS B. Potentially, a company could therefore be subject to different and possibly contradictory laws at the same time.

The Court of Justice of the EU has addressed some, but not all, of these uncertainties faced by companies in the internal market<sup>121</sup> in the context of the relationship between national company laws and the freedom of establishment. The case-law of the Court of Justice has considered that certain practices in MS imposing their company law rules on companies incorporated in other MS (hereinafter also 'foreign companies') on the basis of the real seat approach are unjustified restrictions of the freedom of establishment where they lead to the non-recognition of foreign companies not having their real seat in the MS of incorporation. In its present state, EU law guarantees that a company incorporated in a MS must be recognised throughout the EU provided that it has any of its registered office, central administration or principal place of business in a MS.<sup>122</sup> Besides formal recognition of companies as legal persons, MS cannot impose additional obligations unless such obligations are justified by overriding mandatory requirements.<sup>123</sup> The same principles apply in that MS may not prevent a seat transfer accompanied by a change of a

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<sup>120</sup> Study on the Law Applicable to Companies, *idem*.

<sup>121</sup> See Annex 6: Overview: ECJ case-law on the mobility of companies.

<sup>122</sup> Case C-212/97, *Centros*, Case C-208/00 *Überseering*.

<sup>123</sup> Case C-167/01, *Inspire Art*, para. 101 et seq.

company's governing law, provided that this is possible under the law of the MS which the company wishes to adopt.<sup>124</sup>

The above-mentioned case-law of the Court has, however, addressed existing obstacles only partially and only on a case-by-case basis. As a consequence, there is significant variation in how the relevant connecting factor determining the applicable law is formulated and whether the conflict rules contain exceptions to this connecting factor where the foreign company has substantial links to the new state. In several MS, conflict of laws rules applicable to companies are unclear, uncertain, underdeveloped or even non-existing or do not fully comply with the case law of the Court of Justice on freedom of establishment. Some MS still formally adhere to the real seat doctrine, but effectively disapply it in practice because of the use of presumptions. Some apply their domestic law to foreign companies at the choice of third parties if the company's real seat is located within the new state. Other MS apply specific provisions of their domestic company law to foreign companies if idiosyncratic links of differing intensity with the new state are present, for example the location of assets in the new state or the carrying out of business activity. MS seem therefore to be split into four categories: those which apply a pure incorporation theory (BG, CY, CZ, FI, HU, IE, LT, MT, NL, SK, SE, UK); those where the incorporation theory is applied but this is unclear to non-experts or those where the incorporation is subject to exceptions but there is clarity in the legal framework (AT, BE, HR, EE, FR, DE, IT, RO, SI, ES); those where the incorporation is subject to exceptions and there is no clarity in the legal framework for non-experts (DK, EL, LV, LU) and those where even legal experts cannot identify whether the country follows a connecting factor based upon the incorporation theory or not (PL, PT)<sup>125</sup>.

This situation, combined with insufficient awareness of the case-law in MS authorities and even lower courts, results in an enhanced risk of having to go through protracted litigation to benefit from the freedom of establishment.<sup>126</sup> The recent Polbud judgment does not help to resolve the existing legal uncertainty in this respect, since the Court does not address the issue. It is important to distinguish between the connecting factor determining the applicable law from effective residence requirements under substantive company law.

Finally, the boundaries between the law applicable to the internal functioning of companies (not yet regulated at EU level) and other areas of conflict of laws (already regulated at EU level, such as contract, tort and insolvency law) can raise legal uncertainties. For instance, there is significant variation in how the MS define the liability of directors in insolvency towards shareholders, creditors, or other third parties.

The laws and practices of MS with regard to the law applicable to companies reveal therefore lack of uniformity and legal certainty as to several important aspects. All these elements may constitute obstacles to cross-border activities and corporate mobility in the EU and limit the possibility of companies to make effective use of the freedom of establishment.

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<sup>124</sup> Case C-210/06, *Cartesio*. See also the Study on the Law Applicable to Companies which contains a thorough description and analysis of the case law, pp. 28-31.

<sup>125</sup> See Annex 7, which is based on the information gathered by the Study on the Law Applicable to Companies, pp. 100-127.

<sup>126</sup> Case C-378/10, *VALE*, para. 41.

A number of the national public authorities and business organisations that replied to the 2017 public consultation considered that the differences between the MS laws or the overall lack of legal framework in respect to conflict-of law rules for companies to a certain extent constitute obstacles to the proper functioning of the internal market - with 28% considering it as an obstacle to a large or very large extent. The picture is different among trade unions (which predominantly see it only as a problem to some extent), and notaries (who predominantly do not see it as a problem at all).

### 1.8.2 What is the problem for companies?

As a result of the lack of uniform conflict of laws rules, companies present or aiming to be present in more than one MS may incur additional costs and even refrain from exercising their freedom of establishment: The lost opportunities resulting from this latter aspect cannot be quantified but there is evidence that the extent to which private international laws differ between a given country pair is significantly and negatively related to the foreign incorporations<sup>127</sup>. Countries that have a clear-cut version of the incorporation theory seem to benefit in the market for incorporations, as compared to countries that have retained elements of the 'real seat' theory<sup>128</sup>: high numbers of foreign incorporations can be found in the UK (with ca 60% of all foreign incorporated companies in the EU), SK and FR<sup>129</sup>.

Differences between the national conflict of laws rules create additional costs in both so-called 'static' situations (where there is no change of applicable law) and in dynamic situations (where a company wishes to change the law applicable to its internal functioning, and therefore to convert into a company subject to a different national law).

#### **Illustrations of a static situation which may lead to a conflict of laws**

A Finnish businesswoman wants to set up a business which has a registered office in Finland but with all its economic operations in Estonia. She is uncertain whether she can safely rely on the applicability of Finnish law to that business.

#### **Illustration of dynamic situations which may lead to a conflict of laws**

A company registered in Slovakia with operations in Germany wishes to change its applicable law, without affecting its operations.

Legal uncertainty as to the applicable law has been most often quoted as a practical problem (together with costs of translations)<sup>130</sup>.

In static situations, legal costs may be incurred *ex ante*, when a company establishes itself in more than one MS. The need to determine which rules it will be subject to may

<sup>127</sup> Study on the Law Applicable to Companies, p. 14.

<sup>128</sup> Study on the Law Applicable to Companies, p. 63.

<sup>129</sup> Study on the Law Applicable to Companies, p. 43. However, it is also clear that other elements contribute as well, since jurisdictions which retained some elements of 'real seat' are also scoring high (EE, RO). About 15% of foreign incorporations are due to foreign EU citizens in the country in question. Across the EU, an estimated 500,000 companies are foreign incorporated companies.

<sup>130</sup> Study on the Law Applicable to Companies, p. 91.

require specialised legal advice. Even where companies are not taking such advice *ex ante*, costs may need to be incurred *ex post*, for example when the company needs to determine the shareholders' rights or the duties of directors to or when it needs to defend itself against potential lawsuits.

The legal uncertainty regarding which rules apply and the risk that more than one law may be applicable to a company or that a company may be found to fall foul of company law obligations (e.g. minimum capital requirements) in a given country are an obstacle to the exercise of the freedom of establishment and therefore an element which undermines growth, innovation and job creation<sup>131</sup>.

In dynamic situations, when a company wishes to perform a cross-border conversion, the lack of uniform conflict of laws rules will lead to additional legal costs which come on top of those incurred as a result of differences in the substantive laws of the MS<sup>132</sup>. These may also be incurred *ex ante* or *ex post* (as in static situations) and a company may need to employ legal experts from at least two jurisdictions (more if the company is comparing the legal regimes in several potential new states).

In addition, in both static and dynamic situations, there are different costs associated with the two main approaches to determining the law applicable to companies. All limited liability companies (representing some 80% of all companies in the EU) have currently a place of registration/incorporation<sup>133</sup>.

However, several MS retain elements of the 'real seat' as additional connecting factors. Companies with establishments in these countries may experience additional costs and obstacles to corporate mobility when compared with those established exclusively in countries applying the incorporation theory. For example, companies established in 'real seat' MS will have to ascertain the fact-based links which are relevant for the purposes of determining the applicable law and which differ considerably between MS: place of central administration, head office, main operations, economic link or a combination of these as factors determining the applicable law. Such remnants of the real seat theory are consistently statistically significant for companies' decision to perform a cross-border conversion<sup>134</sup>. Lawyers and practitioners from 'real seat' jurisdictions also indicated practical problems such as objections by the commercial register to register a company whose headquarters were situated in another MS, legal uncertainty and lack of support from local lawyers and notaries<sup>135</sup>.

Where the place of incorporation cannot be determined, e.g. for unincorporated entities, another connecting factor would have to apply, which could point to the law of the 'real seat' or another law with which a company is more closely connected. However, such

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<sup>131</sup> The conflict of laws rules applicable in a MS are obviously not the only factor which companies take into account when establishing themselves in a Member State: many companies take also geographic and linguistic proximity into account (e.g. Cyprus and Greece, the Czech Republic and Slovakia, Finland and Estonia), see Study on the law applicable to companies, p. 46. Furthermore, the high number of foreign incorporation in Central and Eastern European MS may also be explained by more business-friendly tax and labour law conditions designed to attract foreign investors.

<sup>132</sup> See the analysis above in section 2.3.

<sup>133</sup> Directive (EU) 2017/1132, Article 16.

<sup>134</sup> Study, p. 60.

<sup>135</sup> Study, p. 75.



cases are likely to represent a small proportion in practice and will therefore not lead to substantial costs.

### 1.8.3 What is the problem for other stakeholders?

The lack of harmonised conflict of laws rules may also mean uncertainty as to the protection afforded to stakeholders, in both static and dynamic situations.

In static situations, stakeholders (creditors, shareholders, employees) may not be clear about which rules apply to their protection and may as a consequence incur additional costs to ensure against such risks or refrain from acting in the most economically beneficial way. As long as the law applicable to a company is not easily ascertainable, stakeholders will need to incur additional legal costs, either *ex ante* (before entering a legal relationship with the company) or *ex post* (after entering such a legal relationship, e.g. when there is a breach of a duty on the part of a director), as well as opportunity costs (when refraining from entering a legal relationship with a company whose legal status is unclear because the law applicable to it is unclear). For example, creditors in particular need to be able to determine which law applies to the capacity of a company to enter legal relations, and what the consequences are when directors act *ultra vires*. Employees may need to know what their rights to participate in decision making are.

In dynamic situations, minority creditors and shareholders as well as employees may find themselves in a situation where they need to incur additional costs to be able to determine which law protects their rights in the event of a cross-border conversion. National conflict of laws rules may differ in respect of (1) determining the law applicable to the protection of pre-existing stakeholders, and (2) determining the law applicable to the condition for re-incorporation of the company in the new MS. The new law will affect the protection of stakeholders entering a legal relationship with the company after the conversion took place, so clarity about which law applies after the change is of importance to stakeholders.

#### **The situation of employees**

Employees are a special category of stakeholders: for them, legal certainty about the applicable law may not be sufficient protection and they would require in fact protection under the law of the country where they are performing their activity in performance of an employment contract<sup>136</sup>.

### 1.9 How would the problem evolve – what is the baseline scenario?

As regards the use of digital tools and process during the company's lifecycle, with no initiative at the EU level, national company law procedures would continue to integrate digital solutions at different pace, further increasing inconsistencies between the levels of digitalisation in the MS. In addition, the Commission proposal for a European services e-

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<sup>136</sup> This is recognised in other EU instruments where workers are protected by the mandatory rules of the country where they habitually carry on their work (Regulation 593/2008 on the law applicable to contractual obligations) or where they are temporarily posted (ref. Directive on posted workers).

card<sup>137</sup> does not cover procedures and requirements under company law. The Commission proposal for a Single Digital Gateway<sup>138</sup> covers the general registration of business activity and excludes the constitution of limited liability companies as this necessitates a comprehensive approach which would be more appropriately included in the company law acquis.

Concerning cross-border mobility of companies, with no initiative at EU level, companies and stakeholders would continue to rely on the existing rules for Cross-Border Mergers enshrined in the Codified Directive<sup>139</sup>, on the national legislation if in place for cross-border divisions and conversions, on the Court's case law and on indirect ways of carrying out cross-border divisions and conversions.

For cross-border mergers, no substantial changes could be expected without a proposal at EU level. Some MS could change their national rules which are not harmonised in the Directive, e.g. on protection of creditors or minority shareholders. However, such changes are likely to be limited and importantly unlikely to be compatible with changes introduced by other MS.

For cross-border divisions and conversions, some MS who do not have specific national rules yet, may unilaterally introduce such provisions following the case-law of the Court. For instance, rules on cross-border conversions were introduced in Denmark soon after the Court's decision in the VALE case. In the Netherlands, the discussions on a national draft law on cross-border conversions are currently ongoing. The examples of recent cases, such as the judgement by the German High Court of Frankfurt (see section on problems in cross-border conversions), and the currently ongoing case (C-106/16) in front of the Court, legal practitioners in an increasing number of MS might acknowledge that cross-border conversions should be permitted, which could in turn lead to more MS considering rules. This might be less likely in the case of cross-border divisions where there are less ongoing cases and less discussion in the legal literature.

At the same time, any such developments towards more recognition and legislation at national level might be slow and incomplete. For instance, the Romanian Brasov Court of Appeal rejected a request of a Romanian company to convert to the UK in 2014, arguing, among others, that the Court's judgment in the Cartesio case does not clarify the reincorporation proceeding and no specific rules have been implemented in Romania<sup>140</sup>. In Hungary, the developments following the VALE case opened up a possibility of carrying out cross-border conversions into Hungary, without, however, changing the situation as regards converting out of the country.

Although the Court of Justice may further clarify some principles, in particular as regards cross-border conversions (including in the currently ongoing case C-106/16), it would likely provide only partial answers, on a case by case basis, and would not set out a uniform procedure.

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<sup>137</sup> COM (2016) 823 and 824.

<sup>138</sup> Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 - COM(2017)256

<sup>139</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), OJ L 169, 30.6.2017, p. 46.

<sup>140</sup> See the study on the law applicable to companies, p. 232.

As regards conflict of laws, continued reliance on the jurisprudence of the Court of Justice of the EU in the area of freedom of establishment will not by itself remove legal differences between MS' conflict of laws rules<sup>141</sup>, nor will it eliminate the associated legal uncertainty and costs for market actors. The Court has considered that certain practices in MS imposing their company law rules on companies incorporated in other MS are unjustified restrictions of the freedom of establishment where they lead to the non-recognition of companies established in another MS. There are, however, problems stemming from the potential for conflicts of laws which would remain. Companies would continue to run the risk to be governed by several laws at the same time. Legal uncertainty would persist as to which rules of national law may be applied to companies established in another MS.

## **NEED FOR ACTION AT EU LEVEL**

### **1.10 Legal basis for the EU to act**

Depending on the policy option, the Union could take a legislative action in accordance with Article 4(2) (a) TFEU in order to ensure the functioning of the internal market and further develop and implement the general principles of right of establishment enshrined in Article 49 of the TFEU. The EU action could consist of several measures. Directives based on Article 50 TFEU, in particular Article 50(2) (f) (progressive abolition of restrictions on freedom of establishment) and 50(2) (g) (coordination measures concerning the protection of interests of companies' members and other stakeholders) could be envisaged. Article 114 TFEU could also apply. As regards the conflict of laws, the EU action could be based on Article 81(2) (c) TFEU empowering the EU to adopt measures aimed at ensuring the compatibility of the rules applicable in MS concerning conflict of laws.

### **1.11 Added value of EU action**

There is clear added value to address the problems at EU level rather than through individual action by MS. As the problems described earlier show, the current situation is mainly caused by divergent national rules, lack of appropriate rules or the need to modernise EU rules. Therefore, MS acting individually could not satisfactorily remove the barriers to the freedom of establishment because rules and procedures would need to be compatible in order to work in a cross-border situation. Concerning the online registration, as limited liability companies are not covered by the Commission proposal for a Single Digital Gateway, MS would continue to apply their own rules in this respect with little prospect that such rules would address the cross-border situations in a comparable manner. The problems related to the requirements of a systematic physical presence before the competent authorities of certain MS would remain.

For example, it is highly unlikely that MS could introduce sufficiently similar rules and procedures to enable fully online cross-border registration, divisions or conversions of companies, to ensure smooth carrying out of such acts across the EU or to remove legal uncertainty created by divergent national conflict of laws rules. Similarly, MS acting alone could not establish safeguards for stakeholders in cross-border situations.

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<sup>141</sup> See the study on the law applicable to companies, p. 63.

The Court of Justice has also repeatedly recognised that all differences of national rules could not be solved by the jurisprudence concerning the freedom of establishment, but had to be dealt with by future legislation or conventions<sup>142</sup>.

Many stakeholders, especially MS and businesses, share the view of added value of the EU action with regard to the use of digital tools and the necessity of laying down the rules for cross-border operations such as conversions and divisions.

## **OBJECTIVES: WHAT IS TO BE ACHIEVED?**

### **1.12 Policy objectives**

The **general objective** of the initiative is to develop the Single Market, to deepen it and make it fairer and more predictable, by enhancing the responsible use by companies of the opportunities offered by the Single Market. It should stimulate jobs, growth and investments, with a positive impact on SMEs in particular. It would also contribute to the creation of a digital single market by enhancing the use of digital technologies throughout a company's life-cycle.

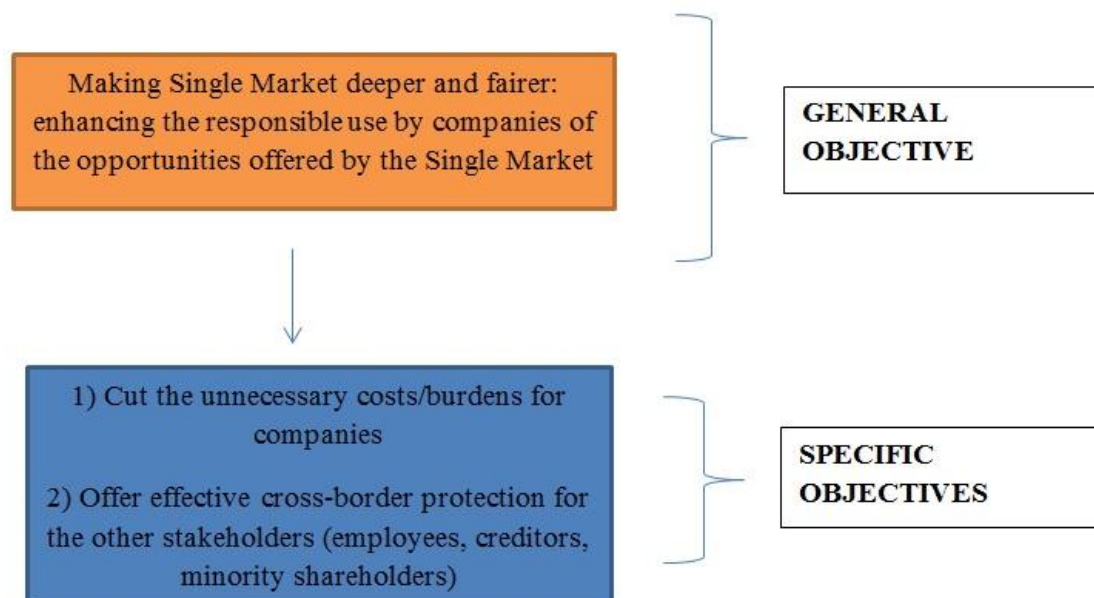
More precisely, to deal with the identified problems and drivers presented in section 2, the initiative has the following **specific objectives**:

- **Cut unnecessary costs and burdens for companies** with regard to procedures throughout their lifecycle as well as by providing clear and predictable rules, and
- **Offer effective protection for the other stakeholders** (employees, creditors, minority shareholders and third parties)

This would mean that companies, including SMEs, can effectively exercise the freedom of establishment enshrined in the TFEU, and at the same time stakeholders, in particular creditors, minority shareholders and employees would be effectively protected. The initiative aims to offer more choice for companies in relation to how they operate, restructure and move within the Single Market and facilitate the use of digital tools and procedures, in particular in the cross border context. At the same time, the initiative also aims to provide more trust and protection by making digitally performed actions trusted, by increasing legal certainty both for companies and stakeholders on the rights and obligations of the actors involved and by offering more transparency.

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<sup>142</sup> C-81/87 para. 21 to 23, C-208/00 para. 69, C-210/06 para. 108



Consistency with other EU policies and the Charter of Fundamental Rights

This initiative will contribute to the success of many Commission initiatives which aim to improve the functioning of the Single Market and make it fairer and to build a digital Europe.

The digital strand of this initiative will build on existing digital elements of EU company law in particular the Business Registers Interconnection System (BRIS). It will enhance the interaction between administrations and citizens/businesses and promote the use of the once-only principle which is now largely supported in Commission initiatives such as the e-Government Action Plan. It will also complement the use of the future European services e-card<sup>143</sup> in case of cross-border service provision through the setting-up of a branch and contribute, through the interconnection of data, to applications for e-cards by companies in all other situations of cross-border establishment. This initiative will also provide the necessary legal foundations for the use of digital tools and processes in order to enable companies to benefit from the use of eID and e-signature through the eIDAS Regulation<sup>144</sup>. It will also directly complement the recent Commission proposal for a Single Digital Gateway which requires that certain key procedures for companies, such as business registration, will be fully digitalised and linked to the gateway. Finally, the online registration of companies will also benefit from the recent Public Document Regulation<sup>145</sup> which will require MS to accept a series of documents from citizens without further verification and translation by the end of 2018.

This initiative will also contribute to the Investment Plan for Europe and to the Capital Markets Union<sup>146</sup> by making the legal framework for companies clearer, more predictable and stable in order to incentivise investment in Europe. At the same time, this initiative

<sup>143</sup> Proposal for a regulation of the European Parliament and of Council introducing a European services e-card and related administrative facilities Brussels, 10.1.2017 COM(2016) 824 final.

<sup>144</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

<sup>145</sup> Public Document Regulation (EU) 2016/1191.

<sup>146</sup> COM(2015) 468 final.

will also be coherent with the objective of creating a deeper and fairer economic union and its European Pillar of Social Rights<sup>147</sup> which sets out a number of key principles and rights to support fair and well-functioning labour markets and welfare systems. In particular, by enhancing the protection and transparency for relevant stakeholders including employees, the initiative will directly contribute to the principle stipulating that employees or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.

Although this initiative will not deal with taxation, it will be in line with the objective of creating a fair and efficient corporate tax system in the European Union<sup>148</sup>. In particular, increased cross-border accessibility to company related information and the aim of avoiding the use of letter box companies will contribute to increased transparency and to ensuring fair taxation where profits are generated.

The proposal on harmonising the conflict of law rules will further the EU policy of making private international law rules more legally certain across the EU and will fill in an important gap which has been identified in the Stockholm programme, as there are currently uniform EU rules on conflict of law rules only in contractual relations (Rome I Regulation), non-contractual relations (Rome II Regulation) and - even more significantly - insolvency proceedings. But while there are uniform conflict of law rules addressing the end of a company's life cycle, there are no uniform conflict of law rules addressing its formation and internal operation.

The proposed rules of this initiative ensure the full respect of the rights and principles set out in the e Charter of Fundamental Rights of the European Union and contribute to implementation of several of those rights. In particular, the main objective of this initiative is to facilitate the rights of establishment in any MS, as prescribed by Article 15(2) of the Charter and ensuring the principle of non-discrimination on grounds of nationality (Article 21(2)). The initiative aims to reinforce the freedom to conduct a business in accordance with Union law and national laws and practices (Article 16). The right to property set out in Article 17 of the Charter is also strengthened by the initiative through the safeguards provided for shareholders. Although the initiative will provide rules for companies in the framework of company law, it will also contribute to the workers' right to information and consultation within the undertaking (Article 27 of the Charter) by providing more transparency for employees in case of cross-border operations of companies. The protection of personal data shall be ensured in line with Article 8 of the Charter. Prohibition of abuse of rights, namely of the freedom of establishment, shall be duly considered, as prescribed by Article 54 of the Charter. The basic rights and freedoms protected by the Treaties, in particular the freedom of establishment, are also relevant for this measure.

## **POLICY OPTIONS AND ANALYSIS OF THEIR IMPACTS**

The policy objectives set out in the previous section can be addressed through a selection and combination of different policy options. Given the nature of this initiative consisting

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<sup>147</sup> COM(2017) 2600 final.

<sup>148</sup> A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action COM (2015) 312 final.

of a package of several complementary measures as explained in section 1.3., this impact assessment focuses on those options for each topic where consultative and other preparatory work has identified the most pressing need. The respective stakeholder input is fleshed out when describing the relevant options.

This section provides a description and analysis of the policy options which are:

- specific for the use of digital tools,
- common for cross-border mergers, divisions and conversions, one specific option on conversions, and
- conflict of law rules

In each case, a preferred option is presented. Following the identification of the preferred options, they are presented and assessed as an overall package in sections 6.1 and 6.3.

In line with the scope of this impact assessment, all the described policy options are limited to measures in the area of company law. The proposed options do not include introduction of international solutions at EU level, because no relevant initiatives have been identified.

Concerning the substantive requirements<sup>149</sup> for the incorporation of limited liability companies in the EU, the approaches vary across MS. There are three groups of MS: those requiring for incorporation only the registered office (BG, HR, CY, CZ, DK, FI, HU, IE, MT, NL, PT, RO, SI, SE and UK), those requiring both the registered office and the real seat in their territory (AT, BE, SI and ES), and those with mixed systems with differing features (EE, F, DE, EL, IT, LV, LT, LUX, PL)<sup>150</sup>. Although this diversity of incorporation requirements plays a role in relation to company mobility in the EU, the following policy options do not include a harmonisation of the substantive incorporation requirements for all limited liability companies. The proposed options are limited to digitalisation of procedures as well as specific cross-border operations (i.e. company mobility). This is because the objective of this initiative is to harmonise procedures and safeguards which are considered necessary to facilitate cross-border operations while preventing their use for abusive purposes.

The harmonisation of substantive incorporation requirements would be beyond the scope of this Impact Assessment. An overall harmonisation of the incorporation requirements for all limited liability companies, including for companies that do not carry out any cross-border activities could also raise issues of proportionality and subsidiarity. Currently, at the EU level, the incorporation requirements are only harmonised for the European Company, which represents a special European company law form and which has as a legal basis Article 352 TFEU.

### **1.13 Use of digital tools and processes throughout a company's lifecycle**

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<sup>149</sup> As explained in section 2.5.1, such requirements under substantive company law which exist in several MS have to be distinguished from the connecting factor determining the applicable law.

<sup>150</sup> For details on MS laws on this issue, see Annex 7.

The results of the 2017 public consultation on company law showed that most groups of stakeholders, in particular the business organisations (87%) consider the action in this field as a priority. A majority of the trade unions expressed only moderate support for new rules concerning the use of digital tools in company law, while notaries<sup>151</sup> strongly opposed the need for such EU rules. The lack of support by this group of stakeholders may be due to the fact that in certain MS notaries are traditionally involved in the process of setting up a company and they have concerns about the impact of digital solutions on their role in the process. Furthermore, in the recent Tallinn declaration on eGovernment the MS make a strong call to step up efforts for provision of efficient, user-centric electronic procedures in the EU<sup>152</sup>.

The following issues have been selected as being the most relevant for this area with a view to achieving the objectives of this initiative in respect to the use of digital tools and processes: online registration and filing; multiple submission of company information; and limited access to free of charge company information. These issues have been brought up by a majority of stakeholders (business associations, trade unions, notaries or chambers of commerce) throughout different consultations. The results of the 2017 public consultation on company law also confirmed that new rules on digitalisation should give priority to these issues. New rules on these issues would be modifying and complementing the existing company law *acquis*. To recall, the current EU legal framework does not provide rules for online registration but it includes certain provisions on online filing of information by companies. Furthermore, the existing rules require companies to file the same data twice. As to the access to company information, although it is now possible to search online for information from all EU business registers via one single European access point thanks to the interconnection of business registers (BRIS), only a very limited set of company data is available free of charge.

In addition to the issues for which different policy options are presented, other accessory modifications would be introduced in order to ensure the best use of digital solutions in company law and to make the rules and procedures fully digital and operational. They will also take into account the Single Digital Gateway. For example, the new provisions on online registration of companies and branches would require MS to lay down rules concerning e.g. non-discriminatory conditions for acceptability of electronic documents or data originating from another MS or for the control of the legal capacity of the founding member/representative of the company and his/her identity. The new provisions would also require MS to make available national online templates for the constitution of a company.

### *1.13.1 Online registration (creation of a company as legal entity) and filing of documents to the business register*

#### 1.13.1.1 Description of options

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<sup>151</sup> Notaries represented 85% of the respondents who felt that the EU should not be dealing with digitalisation of company law. Also, notaries that replied to the consultation came almost entirely from two MS (47% from DE and 51% from AT).

<sup>152</sup> The [Tallinn Declaration on eGovernment](#) was signed at the ministerial meeting during Estonian Presidency of the Council of the EU on 6 October 2017.



**Option 0** – the **baseline scenario** would mean that MS continue to have diverging rules or no rules about the possibility to register a company or branch online. MS would also continue to have diverging rules about the online submission of company information to the business register.

**Option 1** would provide rules on the online registration of company and branch and online filing of company documents with the possibility for MS to decide whether the physical presence of the founder or company representative is necessary. In this scenario, no harmonised provisions on safeguards for electronic identification would be laid down at EU level, but those would be left to MS.

**Option 2** would entail that in all MS the physical presence of company founders or representatives is not required when completing these procedures online<sup>153</sup>. To ensure uniform implementation between the MS, this option would also introduce safeguards for electronic identification laid down at EU level.

**Option 3** would have all the elements of option 2 but it would differ in that it would allow MS to exceptionally require physical presence, on case-by case basis, when there is a genuine suspicion of fraud (e.g. there are strong reasons to believe that the electronic identity is fraudulent or is being used fraudulently).

It should be noted that options 2 and 3 would also address the concerns expressed by notaries in the recent public consultation on company law. Both options would include rules on the mutual recognition of secure identification means based on eIDAS standards<sup>154</sup> and preventive control of registration by MS. Moreover, those MS in which the legality of registration, including the legal capacity of the founder or representative is checked by notaries, the role of notaries would be preserved in procedures related to online registration and filing, as long as company founders or representatives can complete the procedure fully online (except for the cases of genuine suspicion of fraud mentioned in option 3).

#### 1.13.1.2 Analysis of impacts

<b>Impacts</b>	<b>Option 1</b>	<b>Option 2</b>	<b>Option 3</b>
<b>Effectiveness in cutting the unnecessary costs/burdens</b>	Compared to the baseline scenario, this option would cut costs for companies by	This option would ensure faster and cheaper way for companies to complete	This option would have the same effectiveness as option 2, except for the cases where

<sup>153</sup> In general, obtaining identification means is subject to specific rules which are not in the scope of this impact assessment. Such identification means may be used for many different purposes and are not exclusively used for the online registration of companies (for example, some MS use bank identification tokens for the company registration purposes). Although the issuance of an identification means may in some case imply physical presence, this would only happen once, at the time where the original identification takes place and the identification means is provided to the person. Once this is done, normally no further physical presence is necessary. As such, the physical presence required for issuance of identification means that can be used for multiple purposes (not only company law procedures) is not understood as a requirement for physical presence under the options herein.

<sup>154</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

<b>for companies</b>	making it possible for them to use the online procedure for company registration. However the impact would be limited in cases where MS would impose physical presence of the company founder. Concerning the online filing, this option would not modify the rules compared to the baseline scenario.	these procedures fully online, leading to potentially significant reduction of costs and burdens on companies. Online registration could take on average half of the time needed to process a paper-based registration and the cost for online registration could be up to 3 times cheaper than the paper-based registration <sup>155</sup> .	physical presence would be required. However such cases are deemed to be exceptional and to occur only when there is genuine suspicion of fraud.
<b>Effectiveness in offering cross-border protection for the other stakeholders/ third parties</b>	This option would have limited effect in providing protection of stakeholders against possible fraudulent entries in the register, creation of fictitious companies or hijacking of companies due to the lack of any harmonised EU rules on safeguards for electronic identification. The level of protection would be very different in each MS.	This option would be more effective than option 1 in providing protection of stakeholders against possible fraudulent entries in the register, creation of fictitious companies or hijacking of companies thanks to harmonised EU rules on safeguards for electronic identification.	This option would provide the most effective protection of stakeholders as it would include not only harmonised EU rules on safeguards for electronic identification, but also allow MS to deal with such cases in case of genuine suspicion of fraud.
<b>Efficiency: compliance costs for companies</b>	The compliance costs for companies would differ per MS and would be higher in those MS, where, e.g. physical presence would still be required.  For the online filing, this option would bring no changes compared to the baseline scenario.	The compliance costs for this option are expected to be lower than for option 1. Even though some administrative fees may still apply, company founders or representatives would save time and money (costs of visits, costs of travel) by completing procedures fully online <sup>156</sup> .	The compliance costs would be the same as for option 2, except for the exceptional cases where the physical presence would be required and where the procedure could take longer to complete and be overall more expensive.
<b>Impacts on MS including on national legal systems</b>	All MS would need to transpose the new EU rules into national law, but those MS which	This option would have a similar impact to option 1, but in addition it would bring changes	Impact similar to option 2, since everything still needs to be in place to allow for completion of

<sup>155</sup> Based on a [World Bank report](#). The numbers apply on average percentage of income per capita.

<sup>156</sup> See also previous footnote on the issuance of "multiple purpose" identification means for which the one-off requirement for physical presence is not covered by this IA.

<b>(including implementation)</b>	currently do not use digital solutions would most likely also incur costs for adapting their IT systems. However, while possibly high in the beginning, those setting up costs would be recovered in the medium and long term through saving time and resources in their administration (e.g. see the example of the Danish business register where, following the introduction of online registration and filing system, between 2011-2015 the average time for case handling decreased by 69% and the average ramp-up time for a new employee decreased by 90% <sup>157</sup> ).	in those MS that already use digital solutions for part of the procedure for online registration or filing, but still require the physical presence of company founders and representatives. These MS would need to update their national laws and may need to put in place further IT solutions to allow for fully online procedures. For MS in which the legality of registration is checked by notaries, the role of notaries could be preserved as long as company founders or representatives can complete the procedure fully online.	procedures fully online, while physical presence may be required only exceptionally.
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### 1.13.1.3 Comparison of options

According to the results of a public consultation in 2016<sup>158</sup>, the registration of business activity including registration of a company was seen as the most important online procedure for businesses that should be available online. In addition, the 2017 public consultation on company law showed strong support from business organisations (70%) and MS (64% of respondent MS) for the introduction of new rules on online registration and filing.

The baseline scenario (option 0) would not respond to these calls as it would not introduce any EU wide rules. Maintaining the *status quo* would also mean ignoring all the evidence that shows the benefits of e-government solutions, in particular for company registration. As an example, in its response to the public consultation the Polish government reported an increase by 47.25% in the birth-rate of Polish companies in 2015 after the introduction of online registrations in 2012.

There are 2.5 million new companies established in the EU annually. It is difficult to estimate how many of those companies would register online if this was possible across the EU. However, for purposes of illustration, calculations for a sample representing just above 70% of new companies registered in the EU clearly indicate the cost savings compared to the costs for paper-based registration, if companies chose to register online.

<sup>157</sup> European Commerce Registers' Forum report, 2017, p. 56.

<sup>158</sup> Commission staff working document - Synopsis report on the stakeholder consultation on the Single Digital Gateway, SWD(2017) 212 final, p.4.

The savings are estimated to be between 42 – 84 million Euro (see annex 9 for details on how these savings were calculated). Overall, creating online registration procedures could also incentivise MS to reassess the cost-benefit ratio of organisation of their procedures, while maintaining legal certainty and possibly differentiating, for instance, on the basis of complexity. In addition, the introduction of rules on fully on-line filing of company information would also bring additional savings for companies.

Concerning the costs for MS, it is to be noted that all MS already provide for electronic business registers since 2007 following a requirement introduced into EU law at the time<sup>159</sup>. For all options it is expected that any costs for upgrade of IT systems would outweigh the related initial costs (as illustrated by the Danish example in the box above). For MS who already have in place tools for the fully online registration of companies the setting-up costs varied from EUR 100,000 in PL (for private limited liability companies), to EUR 42,000 in IE or around EUR 120,000 in LV<sup>160</sup>. Other MS have partial solutions in place, as for example the electronic registration is available to notaries or legal advisors (but not directly to the company founder). This means however that these MS would be able to build on their existing tools without significant costs.

Concerning options 1, 2 and 3, one of the main differences between them refers to whether physical presence would be required or not. While option 1 would reduce costs for companies, some of these could be off-set by the requirement for physical presence. However options 2 and 3 would provide most cost savings for companies. A 2017 study<sup>161</sup> shows that "e-procedures could reduce costs by yearly EUR 19 million for cross-border businesses and EUR 810 million for domestic businesses. *The greatest gain would be achieved for countries and procedures where currently submission in person is required* (EUR 11 and 516 million for cross-border and domestic businesses respectively)". Even though these numbers refer to several types of e-procedures, business registration – including of registration of a company – is one of the procedures covered by the study.

The issue of physical presence is important as some stakeholders (in particular notaries and to some extent trade unions) express concerns about the use of digital solutions e.g. for the identification of the company founder or company representative. However, experience from the countries where procedures can be completed fully online shows that various solutions such as e-ID cards, digital signatures or banking authentication can be successfully used for this purpose. The digital signatures could be particularly helpful to sign the documents constituting the company. The digital signatures framework is a part eIDAS Regulation and any questions of implementation with regard to digital signatures are related to that Regulation. However, digital signatures are only one of the possibilities to perform fully on-line process. Fully on-line registration of companies could also be done via video-conference with all parties present in the digital space and the authorised person, such a notary, signing the documents on behalf of the parties.

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<sup>159</sup> Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221 , 4.9.2003, p. 13.

<sup>160</sup> Based on Commission staff working document, Impact assessment accompanying Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, SWD(2014) 123 final, p. 29.

<sup>161</sup> Ecorys Netherlands in association with Mazars: "[Study about administrative formalities of important procedures and administrative burdens for businesses](#)", p. 5 (our highlight).

In addition, recent research<sup>162</sup> has found that the use of digital solutions for online registration without any physical presence does not enhance fraud, but rather has the effect of reducing it. In any case, options 2 and 3 would both respond to such concerns and to the feedback received from the 2017 public consultation on company law, where there was support from stakeholders, in particular business organisations (70%) and MS (64%) for harmonised safeguards on electronic identification. Annex 2 gives more details on the questions related to safeguards.

At the same time, situations may arise where the competent authority responsible for the company registration or filing of documents has strong reasons to suspect a fraudulent use of the digital solutions for completion of company law online procedures. It therefore seems justified to still allow MS to exceptionally ask for the company founder or representative to be present in person – but only in rare and well justified cases. This is why option 3, which is highly cost-effective for companies while offering the highest protection for stakeholders, is considered to be the preferred option.

### *1.13.2 Multiple submission of the same information by companies*

#### 1.13.2.1 Description of options

**Option 0** – the **baseline scenario** would mean the current rules would continue to apply, asking companies to file certain information with different authorities (business register and national gazette) or different registers (register of the company and register of the branch). Concerning the filing of information, today it is only after publication in the national gazette that company information becomes legally effective.

**Option 1** would seek simplification by introducing rules requiring MS to ensure that once the company information filed with the register, it is the register that sends it electronically to the national gazette for publication (as opposed to the company representative submitting the same documents twice). In this respect, this option would not change the baseline scenario in relation to publication in national gazette as the way to ensure that company information becomes legally effective. Similarly, when the register receives certain data from the company (e.g. change of company name, change of registered office or latest annual accounts), it would then send it to the register of the branch in another MS (as opposed to the company doing that). This option would implement the once-only principle at EU level through several concrete cases.

**Option 2** would differ from option 1 in that it would make the requirement for publication of company information in the national gazette optional. This means that company information would become legally effective once it is available in the business register. MS could still have the choice to publish such information in the national gazette, but on the condition that it is the register (and not the company) that sends it electronically to the gazette. As regards filing of information on branches, option 2 would correspond to option 1, i.e. when the register receives certain data from the company, it would send it to the register of the branch in another MS.

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<sup>162</sup> Assessment of the impacts of using digital tools in the context of cross-border company operations, Optimity (hereinafter referred to as Optimity study impacts of using digital tools).

### 1.13.2.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Compared to the baseline scenario, both options would be very effective in cutting costs and burdens for companies, which would save time and money by no longer having to file the same information twice. While exact savings of these measures are difficult to estimate, the new rules would partly contribute to the overall savings that the implementation of the once-only principle at EU level can bring. It has been estimated that such overall savings could result in annual net savings of as much as €5 billion per year <sup>163</sup> .	
<b>Effectiveness in offering cross-border protection for the other stakeholders / third parties</b>	This option would be effective in that the transfer of information via digital channels from one authority to another would significantly reduce the risk of having discrepancies between the information available online e.g. in the business register vs national gazette as in the baseline scenario. In addition, it is expected that the information would be available more quickly in the national gazette or in the register of the branch. This would offer very good cross-border protection to those that rely on the information from the registers and national gazettes.	This option would be more effective than option 1 as it would ensure that the information files by companies takes legal effect faster than today (i.e. once it is available in the business register and not after publication in the national gazette). It would also eliminate any risk that third parties rely on information from the business register without knowing that the respective information is only legally effective if it has also been published in the gazette.
<b>Efficiency: compliance costs for companies</b>	Both options would be very efficient in reducing the compliance costs for companies, in particular if more "once-only" cases are introduced (such as communication of certain changes in company data between the register of the company and the register of the branch in another MS). For companies filing their annual accounts in the register of the branch in another MS, this could also cut costs for translation into the local language.	
<b>Impacts on MS including on national legal systems</b>	This option would require MS to adapt their national laws to reflect the new EU rules. It would also most likely involve costs for adapting their IT systems mainly in respect to the electronic transmission of company information from the register to the national gazette. However, those costs would typically be one-off costs and significantly reduced in the medium and long term. This option would have no impact on the national gazettes in MS as the requirement of publication in these gazettes would be kept.	As option 1, this option would require MS to adapt their national laws to reflect the new EU rules. It would also most likely involve costs for adapting their IT systems mainly in respect to the electronic transmission of company information from the register to the national gazette. These costs would be less significant than in option 1, as they would only arise in case MS decide to keep the requirement of publishing information in the national gazette. In addition, as in option 1, these costs, if any, would typically be one-off costs and significantly reduced in the medium

<sup>163</sup> Based on [Final Report: Study on eGovernment and the Reduction of Administrative Burden \(SMART 2012/0061\)](#), p. VI. More details about the calculation method for this figure are provided in annex 9.

		and long term. As MS may still continue requiring publishing information in the national gazette, it is expected that MS would make use of this option where they fear otherwise significant impact is on the national gazettes.
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### 1.13.2.3 Comparison of options

Compared to option 0 – baseline scenario, both options 1 and 2 would provide important cost savings and simplifications for companies and MS, including the business registers. Recent research<sup>164</sup> shows that EU governments that have already embraced the once-only principle have done it for one or more of the following reasons: (1) reducing the administrative burden on citizens and businesses; (2) more efficient (lower-cost, more effective) government administration; and (3) fraud prevention.

The main difference between the options 1 and 2 is whether company information should still be published in the national gazette or should be an optional choice for MS. In this respect, option 2 would better reflect today's reality where third parties would rely on information once this is available online (in this case in the business register) and would not expect to have to check whether the same information has also been published in the national gazette or in another electronic platform with equally effective means<sup>165</sup>. Having a simple rule where information is legally effective by being made available in the register increases legal certainty and provides more protection to third parties.

Making publication in the national gazette optional takes into account previous experience as an earlier attempt to eliminate the publication in the national gazette (or similar platform) failed due to strong opposition from the MS<sup>166</sup>. Option 2 now offers a more balanced solution as it still gives the choice to MS to continue to publish in the gazette if they wish so; it is only the effect of publication that is transferred to the register. Overall, option 2 is the preferred option as it consists of a modern and practical solution while providing increased protection of third parties.

## 1.13.3 Online access to company information held in business registers

### 1.13.3.1 Description of options

<sup>164</sup> Study by Jonathan Cave, Maarten Botterman (GNKS Consult BV), Simona Cavallini, and Margherita Volpe (FORMIT): [EU-wide digital Once-Only Principle for citizens and businesses - Policy options and their impacts](#), 2017, p. vii.

<sup>165</sup> A number of MS are already using the option to publish company data in a central electronic platform other than the national gazette; however it is still only publication by such equally effective means that the information becomes legally effective.

<sup>166</sup> The 2008 Commission Proposal for a Directive of the European Parliament and of the Council amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies was later withdrawn by the Commission.

**Option 0** – the **baseline scenario** would mean that only a limited set of company data (company name, address, legal form and registration number) is available for free in all business registers, while most MS continue to charge fees for most data.

**Option 1** would propose to expand this set of data to be provided free of charge by all business registers, but MS could still charge fees for other information. The "always free-of-charge" data could include e.g. information on the legal status of the company; other names of the company (former names or secondary/alternative names) if any; company website (if any); object of the company (if national law requires to have this information in the business register); and information on whether the company has any branches established in another MS. In addition, the set of free data could also include the names of the company's legal representatives which are considered important to stakeholders and the Commission has had calls for promoting easy access to it.

**Option 2** would be much more ambitious and require MS to make available all company information free of charge for everyone.

As regards practical implementation, both options would build also on the interconnection of business registers (BRIS): while users could access the information in the individual registers, the information would also be available through the European e-Justice portal which is the central access point for BRIS.

#### 1.13.3.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	This option would have limited impact on companies, except for the situation where companies themselves would be the one looking for information about other companies in the business registers. Otherwise companies would most likely continue to pay fees when filing information in the registers.	Same as option 1.
<b>Effectiveness in offering cross-border protection for the other stakeholders/third parties</b>	This option would be very effective in increasing the transparency of company information and facilitating free of charge access to more company data, thus offering better protection to third parties that rely on information from the business registers.	This option would be the most effective in providing protection to other stakeholders who would have free access to all company data in the registers.
<b>Efficiency: compliance costs for companies</b>	Companies would continue to pay fees for filing so in this respect the situation would stay the same as today (baseline) in terms of compliance costs.	This option could lead to a potentially significant increase in the fees paid by companies for filing information as business registers could consider charging companies more in order to make up for the loss of revenue from fees paid by end-users.
<b>Impacts on MS including on</b>	This option would require most MS to introduce some changes in their	This option would significantly impact the business registers and their



<b>national legal systems</b>	national laws. Extending the common free set of data may also have an impact on the revenues of some of the business registers.	current financing model. Some registers, in particular those that are self-funded, would need to seek new source of income to make up for the revenues coming from charging end-users.
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### 1.13.3.3 Comparison of impacts

Compared to option 0 – baseline scenario, both options 1 and 2 would significantly improve the access to company information and lead to increased transparency about companies and their functioning across the EU. Companies themselves would benefit from having easier and extended access to data about potential business partners in other MS, which in turn would lead to more legal certainty and increased cross-border trade.

While option 1 would increase the amount of information available for free, option 2 would have the most impact in terms of transparency by providing all company information for free and would thus be welcome by many stakeholders. However, option 2 would at the same time have a significant impact on the business registers which may need to change their financing structure. For example, one MS reported that the fees collected by their business register in one year for access to details about company directors amounted to approximately EUR 250,000. If this information were provided for free, the same amount would need to be recuperated from somewhere else – most likely from companies when they file changes to company information. As the details about company directors are only one type of information in the business registers, this example gives an idea of the potential total loss in revenue for registers if all information were to be provided for free.

Feedback from business registers shows that in some MS these organisations are self-funded and charging both companies and users is their only source of revenue. If no revenues would come from charging end-users, registers could decide instead to raise the fees for companies for filing information. Although EU governments are more and more supportive of transparency and open/free data, providing "all data free of charge" would have a significant impact on business registers and their business models and would need to be built up progressively over a reasonable long period of time. The latest annual report of a business registers' organisation also acknowledges that both in Europe and worldwide there is still a way to go until all registers will be able to be fully open and provide all information for free<sup>167</sup>. On balance, it seems premature and unrealistic to propose option 2 at this point in time.

Overall, option 1 offers increased transparency and protection to third parties compared to the baseline. It also responds to stakeholders' call for more free-of-charge information, while taking into account the revenue structures of business registers. It also strikes the best balance between the demands for free data by third parties and the need to avoid an increase in compliance costs for companies who could be charged more when filing data in the registers. Therefore, option 1 is the preferred option; it could be combined with a review clause in order to make sure that further developments are assessed.

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<sup>167</sup> ECRF report 2017, p.78-79

## 1.14 Cross-border operations (mergers, divisions and conversions)

The 2017 consultation produced divergent views on the overall need of action in the area: most stakeholders (businesses, MS, trade unions and notaries) saw the need to deal with the issue of cross-border conversions. As regards the need of amending cross-border merger rules and introducing rules on divisions, most MS and businesses were in favour, whereas trade unions were more sceptical. The notaries saw some need for introducing rules on cross-border divisions, but less for amending cross-border mergers.

However, similarly to the 2015 public consultation, most stakeholders identified the same issues as problematic: the protection of creditors, the protection of minority shareholders and the protection of employee rights. The question of scope of rules was mainly raised by the European Parliament and in many academic discussions. In the 2017 consultation, the respondents were also divided as to the needs of safeguards, especially whether their importance is the same for cross-border mergers, divisions and conversions. Particularly trade unions and notaries stressed the importance of safeguards. Based on the stakeholders' views and relevant research, a number of policy options will be assessed in relation to the most relevant issues linked to the cross-border mergers, divisions and conversions. The policy options would be part of an overall harmonised legal framework.

In case of the **cross-border mergers** such a framework consists of the existing EU rules on cross-border mergers. Some of the existing provisions would be modified or new provisions added in order to introduce the chosen policy options on employee participation as well as creditor and minority stakeholder protection. In addition, other modifications would be introduced such as further simplified formalities (i.e. possibility to waive the management report in case all members agree) clarification of the existing accounting rules, online filing of draft terms of cross-border mergers and other cross-border merger related data as well as the use of BRIS for the transmission of pre-merger certificates between national authorities. The evaluation of the existing cross-border merger rules (annex 5) analyses the need to modify the existing cross-border rules.

In case of **cross-border divisions and conversions**, the initiative would introduce new EU wide harmonised procedures and rules which would follow to a large extent the rules on cross-border mergers including the use of digital procedures and BRIS. However, they would need to be adapted to the specificities of these cross-border operations – i.e. the company being split in cross-border divisions and one company moving cross-border in cross-border conversions. The need to have such new procedural rules is assessed below.

A common issue for all the cross-border operations is the scope of application which would determine which types of companies could benefit from the harmonised rules and procedures. The current rules for cross-border mergers apply to private and public limited liability companies and leave out other legal entities within the meaning of Article 54 TFEU (e.g. partnerships, cooperatives, foundations). Some of the respondents to the 2015 and 2017 consultations, some researchers<sup>168</sup> and the European Parliament in its June 2017 resolution<sup>169</sup> asked for the scope of the CBMD to be broadened to cover

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<sup>168</sup> J. Schmidt, EP Study

<sup>169</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0248&language=EN&ring=A8-2017-0190>

partnerships and cooperatives. Same calls were made for cross-border divisions and conversions.

As also referred to in the evaluation of the functioning of the existing cross-border merger rules<sup>170</sup> existing data shows a very limited use of the cross-border merger rules by entities other than limited liability companies. 66 percent of the acquiring companies and 70 percent of the merging companies involved in cross-border mergers were private limited liability companies, whereas 32 percent of acquiring companies and 28 percent of the merging companies involved in cross-border mergers were public limited liability companies<sup>171</sup>. In addition, for all cross-border operations, extension of the scope would lead to potential practical difficulties related to EU company law and accounting rules which only apply to limited liability companies. For example, it would be unclear what rules they should follow in some parts of the procedure (e.g. as regards disclosure and publication of documents). Therefore, in line with the conclusions of the evaluation of for cross-border mergers<sup>172</sup>, it is considered that the existing scope of application of the cross-border merger rules provides the most effective solution for all cross-border operations.

#### *1.14.1 New procedural rules for cross-border divisions and cross-border conversions*

##### 1.14.1.1 Description of options

**Option 0 - baseline scenario** means that there are no harmonised rules at EU level for cross-border divisions and cross-border conversions. Therefore, for cross-border divisions, companies that wish to divide cross-border must either: (i) establish a new company in the destination MS and by way of contractual agreement transfer part of the assets to that new company in the destination MS (indirect division) or; (ii) divide nationally, establish a new company in the destination MS and merge part of the divided company with the newly formed entity or; (iii) rely on national rules that authorise cross-border divisions on foot of analogous application of national division procedures or analogous application the CBMD. Similarly, for cross-border conversions, companies that wish to transfer their registered office are in reliance on following: (i) national procedures for cross-border conversions that only exist in a limited number of MS; (ii) the application of CJEU jurisprudence in situations where the practitioners and authorities have sufficient awareness of the case-law; (iii) the use of indirect procedures on foot of the Cross-border Merger Directive and the SE Regulation or; winding-up the company in the departure MS and re-incorporating in the destination MS and then transferring all of the assets and liabilities.

**Option 1** would introduce harmonised EU procedures to enable companies to carry-out direct cross-border divisions and cross-border conversions. The rules would follow to a large extent the rules on cross-border mergers, but they would be adapted to the specificities of these cross-border operations. Main rules would comprise the following:

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<sup>170</sup> Subsection 2.3.1. of the evaluation in Annex 5 for deficiencies as regards effectiveness of the current cross-border merger rules.

<sup>171</sup> Data relates to period 2008-2012, Bech-Bruun/Lexidale, 2013 p.80

<sup>172</sup> Subsection 2.3.1. of the evaluation in Annex 5 for deficiencies as regards effectiveness of the current cross-border merger rules.

common draft terms of the cross-border division/conversion and their disclosure, management report to the members, examination of the draft terms and reports to the members and employees by independent expert(s), the disclosure of the independent expert report, approval by the general meeting, pre-division/conversion certificate(s) delivered by the competent authority, scrutiny of the legality of the cross-border division/conversion, registration, the date on which the cross-border division/conversion takes affect and the consequences of the cross-border division/conversion.

#### 1.14.1.2 Analysis of impacts

Impacts	Option 1
<p><b>Effectiveness in cutting the unnecessary costs/burdens for companies</b></p>	<p>Compared to the baseline scenario, this option would significantly cut the legal fees and operational costs for companies that wish to execute a cross-border division or a cross-border conversion. Companies would no longer be in reliance on costly indirect procedures, incompatible national procedures or CJEU case law but would have a direct procedure for which they can convert or divide cross-border. This would in turn remove barriers faced by companies and thus enable companies to fully benefit from the Single Market.</p> <p>The introduction of new procedural rules is expected to result in and cross-border divisions costing 130% - 200% of national division and cross-border conversions costing 130% - 180% of a national conversion.<sup>173</sup> This is estimated to result in costs savings of €12,000 - €37,000 for cross-border divisions and €12,000 - €19,000 for cross-border conversions. It is important to note that the estimated cost reductions for cross-border conversions apply to situations where the operation is permitted through analogous application of CJEU case law or analogous application of the CBMD. Therefore, the cost reductions will be significantly higher in MS where conversions are carried out though an indirect procedure (additional procedures of a cross-border merger is estimated to cost €80,000 - €100,000 while transfer of an SE is estimated to cost €30,000).</p> <p>The exact costs savings would depend on the detailed procedural rules adopted. For example, if the independent expert report is not obligatory for micro and small enterprises, this means significantly less costs for such companies (again depending on whether and under which circumstances it could be required).</p>
<p><b>Effectiveness in offering cross-border protection for the other stakeholders/</b></p>	<p>Compared to the baseline scenario, the introduction of procedural rules will enhance the legal situation for stakeholders as employees, minority shareholders and creditors will have a reliable legal framework upon which they can enforce their rights. This would therefore improve legal certainty. In particular, in addition to the management report and the report to the employees, the draft terms of cross-border divisions and conversions</p>

<sup>173</sup> EY study on cross-border operations of companies, pp. 102 & 117. Study estimated that the lowest cost of the procedure would be slightly higher than the national procedure but slightly higher, without being twice as high. The procedure is expected to require some additional time (i.e. to prepare additional documents than during domestic procedures). Costs are based on the legal advisory costs (60%), registration costs with public services (5%) and costs to execute the procedure (i.e. production of documents, organisation of general meetings, man days etc. – 35%). The estimation was used to obtain a range of expected saving per unit, when compared to the initial costs of cross-border transfers today (data collected from Member State Fiches – see EY Annex, p. 48).

<b>third parties</b>	and the expert report which would be disclosed would significantly enhance the information/consultation rights of these stakeholders. These stakeholders would be further protected by the policy options that are chosen in relation to employee participation in boards of companies, creditor and minority shareholder protection as discussed below.
<b>Efficiency: compliance costs for companies</b>	Companies would need to comply with the new procedural rules and would thus incur compliance costs such as drawing up draft terms of the operation, preparation of management report to the members. In cases where an independent expert report is required, companies would also bear the costs of such a report. Compliance costs would also arise from any measures taken as regards protection of employees, creditors and minority shareholders which are considered in turn below. However, the compliance costs would be lower than in baseline scenario. This is because companies would need to comply with one set of harmonised rules instead of overlapping and double MS' requirements or in case of indirect operation with several consequent procedures.
<b>Impacts on MS including on national legal systems (including implementation)</b>	MS would have to transpose the EU rules into national law and, therefore, modify their rules and procedures (in case MS have rules) for cross-border divisions and conversions or adopt new rules. The introduction of new procedures for cross-border conversions and divisions would have a particular impact on those MS that do not currently authorise these operations. However, to the extent that the rules follow cross-border mergers, the costs for MS should be rather limited. The introduction of procedural rules for conversions will provide clear and unambiguous rules for national business registers to distinguish the point in time to which the converting company leaves the business register in the departure MS and enters the business register of the destination MS and when the conversion in turn becomes effective. This will significantly increase legal certainty in this area and reduce likelihood of companies being simultaneously registered in the business registers such as was the case in <i>Polbud</i> . <sup>174</sup> This is likely to result in less litigation costs for MS.

#### 1.14.1.3 Comparison of impacts

The results of the 2017 public consultation showed strong support from national public authorities, business organisations and legal academics for the introduction of new procedural rules for cross-border divisions. The vast majority of notaries were moderately supportive of this initiative while the overwhelming majority of trade unions were extremely sceptical but submitted that cross-border divisions could work if there was an appropriate solution found in respect of employees' rights.<sup>175</sup>

As for cross-border conversions, the 2017 public consultation showed that there was considerable support from all stakeholder groups for the introduction of new procedure for cross-border conversions. Approximately 73% of all respondents felt the lack of legislation in this area was creating problems for the internal market. Furthermore, in

<sup>174</sup> Polbud C-106/16 – delivery of judgement is scheduled on 25 October 2017

<sup>175</sup> For further discussion see Annex 2. It was submitted by the European Trade Union Confederation that while they do not see the need for new legislation in this area, there must be strong employee rights by way of information, consultation and participation rights should it be passed.

comparison to other areas of the package, the introduction of new rules for conversions was deemed the highest overall priority – approximately 85% approval.<sup>176</sup>

In its recent resolution of 13 June 2017<sup>177</sup>, the European Parliament *inter alia* called for a comprehensive EU framework for conversions and divisions. In its 2009<sup>178</sup> and 2012<sup>179</sup> resolutions the European Parliament also specifically asked the Commission to come forward with a proposal on cross-border conversions.

When compared to the baseline, the option 1 introducing new harmonised rules for cross-border divisions and conversions would provide significant clarity for companies and result in significant cost savings. For cross-border divisions, such cost savings are expected to be between €12,000 - €37,000 per operation and for cross-border conversions approximately €12,000 - € 19,000<sup>180</sup>. It is important to note that the estimated cost reductions depend on the final procedural rules adopted. For cross-border conversions, the estimations apply to situations where the operation is permitted through analogous application of CJEU case law or analogous application of the CBMD. Therefore, the cost reductions will be significantly higher in MS where conversions are carried out through an indirect procedure.

In terms of stakeholder protection, the introduction of harmonised procedural rules for both operations will result in a reliable legal framework for employees, creditors and minority shareholders and enhance the exercise of their information/consultation rights. In addition, these stakeholders would be further protected through harmonisation of the safeguards in relation to employee participation in boards of companies, creditor and minority shareholder protection as discussed below.

For MS the costs resulting from the implementation of such rules should be rather limited, also because they follow to a large extent the procedure that is already laid down in the existing CBMD. Moreover, the increased legal certainty is likely to result in fewer contentious litigation costs concerning the validity of a conversion. Therefore, Option 1 is the strongly preferred option for both operations.

#### *1.14.2 Employee information, consultation and participation*

##### 1.14.2.1 Description of the policy option

**Option 0 - baseline scenario** means keeping the existing rules on the employee participation in CBMD unchanged. Also there are no employee participation rules at EU level in cross-border divisions and conversions which implies that MS are free to choose whether to provide for employee participation rules or not. For more information about employee participation systems, see Annex 10.

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<sup>176</sup> Combined % number of respondents who clicked "to some extent", "to a large extent" and "to a very large extent" to Question 1.1 and "low priority", "priority" and "top priority" to Question 1.2 in the consultation. For further explanation see Annex 2.

<sup>177</sup> European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)).

<sup>178</sup> European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

<sup>179</sup> European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)).

<sup>180</sup> For explanation of the estimates see above in section 5.2.1.2.

**Option 1** would apply the existing rules on the employee participation in boards from cross-border mergers to cross-border divisions and conversions. The existing system in cross-border mergers originates from the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees<sup>181</sup>. According to the rules in cross-border mergers, companies that are subject to employee participation rules must either enter into negotiations with employees to determine specific rules of employee participation or choose to apply immediately standard rules<sup>182</sup> without any prior negotiation. These standard rules lay down the composition of the body representative of the employees, rules for information and consultation and rules for participation. In case a company chooses to conduct negotiations, it must create a special negotiation body, which shall comprise of the representatives of the employees of the merging companies. If negotiations fail, the standard rules shall apply.

**Option 2** would build on option 1 and add a number of safeguards for employees. This option is composed of several elements which as a combined effect aiming to provide the necessary protection for employees. The option consists of targeted amendments to the existing cross-border mergers rules, while at the same time providing specific measures for the perceived higher risks for employees in cross-border divisions and conversions. While the report on employees aims to inform the employees about the cross-border operation in question, all the other elements are linked to the employee participation system.<sup>183</sup>

Such safeguards would include for all cross-border operations (cross-border mergers, divisions and conversions):

- a new special report prepared by the company's management to describe the impact of the cross-border operation on jobs and the situation of employees in case of cross-border mergers, divisions and conversions with a possibility for employees to provide their opinion. This would go beyond the current requirement in cross-border merger rules of a general management report, which is predominately addressed to shareholders and does not sufficiently take into account the employment context. The newly introduced report addressed to employees could not be waived, unless the companies including their subsidiaries involved in the cross-border operation do not have any employees;
- an "anti-abuse" rule providing that during 3 years following the cross-border merger, division or conversion, the company would not be able to perform a subsequent cross-border or domestic operation which would result in undermining the system of employee participation. The rule is based on the existing cross-border mergers which would be adapted to cover not only subsequent domestic merger but also other cross-border and domestic operations.

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<sup>181</sup> OJ L 294, 10.11.2001, p. 22.

<sup>182</sup> As defined in the Annex 1 of the directive 2001/86/EC

<sup>183</sup> These different elements are bundled in one option because it is considered that they together (as combined effect) achieve the necessary protection for the employees in each relevant cross-border operation. However, it is clear that it can be decided to adopt only some of the elements in which case the effect would be reduced.

For cross-border divisions and conversions, this option 2 would maintain the existing rules on employee participation for cross-border mergers but would introduce the following modifications compared to cross-border mergers:

- as in the European Company (SE), in cross-border divisions and conversions, negotiations would always need to be carried out and companies could not choose to apply standard rules without negotiations. This would mean that, in contrast to cross-border mergers, where standard rules could be immediately applied by the management, without negotiations, in the cross-border divisions and conversions the negotiations would be obligatory. As a result of negotiations, the representatives of the employees would have a choice: either to accept the result of negotiations or accept standard rules<sup>184</sup>;
- companies would be obliged to negotiate an employee participation system in case of the cross-border division or conversion even if the company being divided or carrying out a cross-border conversion would not be operating under the employee participation system, but the company dividing or converting across borders is governed by national law which provides for the employee participation rules and has at least 4/5 of the number of employees required for the application of the employee participation (in contrast to 500 employees in the cross-border merger directive).

The reason for differentiation between the approaches for cross-border mergers and cross-border conversions would be the perceived higher riskiness of cross-border divisions and conversions for employee participation: in mergers, two or more companies merge into one so that the threshold from which the employee participation is applied would be met even quicker. In contrast, cross-border divisions or conversions could potentially be used to "escape" the employee participation rules as the company divides into smaller ones or maintains its current size but changes the law applicable to it.

Under both options 1 and 2, the following EU legislation, which provides the rights for employees, including the rights to information and consultation, remains fully applicable:

- Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community scale undertakings and Community scale groups of undertakings for the purposes of informing and consulting employees (Recast),<sup>185</sup>
- Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the MS relating to collective redundancies<sup>186</sup>, Council Directive 2001/23/EC of 12 March 2001 on the safeguarding of employees' rights in the event of transfers of undertakings<sup>187</sup>,

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<sup>184</sup> See Annex to Council Directive 2001/86/EC called "standard rules".

<sup>185</sup> OJ L 122, 16.5.2009, p. 28.

<sup>186</sup> OJ L 225, 12.8.1998, p. 16.

<sup>187</sup> OJ L 82, 22.3.2001, p. 16.



- Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community<sup>188</sup>.

**Discarded options.** The option of directly importing the employee participation rules from the SE Regulation and Directive is discarded, as the European Company (SE) is a special company law form which has its own statute. The rules on employee participation in SE were negotiated in this specific context of a separate EU legal form and therefore are not directly transferable to the cross-border operations of other company types than SE. The cross-border operations such as divisions or conversions would be performed by limited liability companies other than SEs (SEs already have their own rules on cross-border conversions). Also, the SE form is only accessible for very large companies as EUR 120,000 minimum capital is required. As in cross-border merger rules, the rules in cross-border divisions and conversions refer to SE rules where appropriate.

In addition, the option of providing employee participation rules for all limited liability companies in the EU was discarded. The system of employee participation in companies' boards is embedded in MS' company law and corporate governance traditions. Current systems are very divergent, with many MS not providing for any participation systems of employees in boards (see Annex 10). Therefore, an EU wide participation system would not be politically feasible at this stage.

#### 1.14.2.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Compared to the baseline scenario, whereby harmonisation at EU level exists only for cross-border mergers and not for cross-border divisions and conversions, the harmonised rules on employee participation should provide legal certainty and in this way lead to less need for legal advice, reduce the costs and delays in the procedure. However, the practical implementation of the rules would incur costs for companies (see below on compliance costs). However, these compliance costs should be seen in the context of overall cost savings due to harmonised procedures for cross-border divisions and conversions explained above in section 5.2.1. Also the long-term benefits of employee participation in boards as well as the benefits of negotiations	As in option 1. However, the compliance costs would be higher (see below).  A further limitation in cutting costs for companies would come from the anti-abuse clause which would limit the freedom of companies. Companies would not be able to perform domestic or cross-border operations which would undermine the participation rights at least for 3 years.

<sup>188</sup> OJ L 80, 23.3.2002, p. 29.

	(involvement of employees in taking important decision for the company) could offset, at least partially, the initial costs.	
<b>Effectiveness in offering cross-border protection for employees</b>	<p>Employees would be better protected than in the baseline scenario through harmonised rules not only for cross-border mergers but also for cross-border divisions and conversions. However, the protection would be limited only to employees of those companies and would not be effective in offering protection to the employees of those companies approaching national thresholds.</p> <p>Moreover, the protection would not be fully effective, as companies would be able to perform a domestic or cross-border operation (other than a cross-border merger) right after the cross-border division or conversion to abolish participation rights.</p> <p>Also employees would not benefit from any extended reporting on the implications of cross-border operations focusing on employment.</p>	<p>The protection for employees would be very high. As in option 1, employee representatives would always have the right to negotiate the employee participation system once companies decide to perform cross-border conversions or division and already operate under the employee participation system. Moreover, the protection would be enhanced compared to option 1, since companies having 4/5 of employees required for the participation system and not currently operating under an employee participation system, but established in MS having participation rules, would also be obliged to negotiate employee participation when performing cross-border division or conversion.</p> <p>In addition, the effectiveness of protection would be reinforced in comparison to option 1, since companies would be prohibited to carry out any subsequent operation which would undermine the employee participation system.</p> <p>In addition, employees would be properly informed about the implications of the cross-border operation (i.e. report to the employees) and would be able to have their say on it. Currently, insufficient information to employees is criticised by trade unions<sup>189</sup>.</p>
<b>Efficiency: compliance costs for companies</b>	There would be higher compliance costs for companies than in the baseline scenario since they would need to comply with the new rules on employee participation when performing cross-border divisions and conversions, although given that these rules would be the same as for cross-border mergers, the compliance costs for cross-border divisions and conversions would not	The compliance costs would be higher than under option 1. The costs for companies would increase, as there would be more companies subject to these rules (not only those already subject to employee participation but also the ones which have 4/5 of the employees required for the participation system and which operate in MS that have employee participation rules). Also companies

<sup>189</sup> T. Biermeyer/M. Meyer, Identification of cross-border mergers where the issue of employee participation has arisen (2008-2012), European Trade Union Institute, 2015.

	<p>be much higher than for cross-border mergers.</p> <p>Overall, requirements for employee participation, on the basis of the current employee participation rules in MS (see Annex 10), would apply to a very small percentage of companies, although with a large workforce, and most SMEs would not be impacted.</p> <p>Moreover, companies, similarly to cross-border mergers, would need to take a legal form allowing for the exercise of the participation rights in the new MS. This may generate additional compliance costs in comparison to the base-line scenario.</p>	<p>subject to these rules would need to negotiate instead of applying standard rules which would create additional costs in comparison to option 1. However, this option, similar to option 1, on the basis of the current employee participation rules in MS (see Annex 10), would apply to a very limited percentage of companies, although with large workforce, and most SMEs would not be impacted. The EU wide figure for companies where the employee representatives in boards have a significant role (e.g. AT, DE) is very small as it concerns only large companies. For instance, studies carried out by the Hans Böckler Foundation found that there are 1,477 companies in DE with between 500 and 2,000 employees and 640 with 2,000+ employees and therefore subject to employee participation rules.<sup>190</sup> These figures are relatively small when compared to the total number of limited liability companies in Germany which is approximately 1,338,000.</p> <p>Therefore, for most companies and for most SMEs in AT and DE, there would not be any additional impact.</p> <p>Also preparing a special report on the employment situation could be an additional burden for companies. For example, it is estimated that in Italy a preparation of a management report/general report costs between €5,000 to €8,000 depending on the complexity of the operation<sup>191</sup>. On the other hand, the possibility to waive the management report to the members under certain conditions can offset the cost of preparing the report to employees</p>
<p><b>Impacts on MS including on national legal systems</b></p>	<p>The impact on MS would be higher than in the baseline scenario as MS would need to extend the cross-border merger rules on the employee participation to cross-border</p>	<p>Compared to option 1, MS would also need to transpose the additional rules (i.e. the report) as well as the mandatory negotiation (in case of cross-border divisions and</p>

<sup>190</sup> Drittelbeteiligung in Deutschland – Ermittlung von Gesellschaften, die dem DrittelbG unterliegen, by W. Bayer Hans-Böckler-Stiftung; Mitbestimmung in Deutschland: Daten und Fakten 2014, Hans-Böckler-Stiftung 2014 and Statistiken zur Mitbestimmungslandschaft, Hans-Böckler-Stiftung

<sup>191</sup> EY study on cross-border operations of companies, p. 86

	divisions and conversions. MS would also need to check that the employee participation is determined according to the rules and properly enforced.	conversions). As in option 1, MS would also need to check that the employee participation is determined according to the rules and properly enforced.
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### 1.14.2.3 Comparison of impacts

Overall, in the 2017 public consultation trade unions and notaries considered the introduction of safeguards for employees as very important. It was less important for MS (mainly those without employee participation rules) and businesses. Against this background, option 0 which would not introduce any employee participation rights for cross-border divisions and conversions would not appear appropriate.

The consultation was not conclusive as to whether these safeguards needed to be the same in cross-border mergers, divisions and conversions. 41% of the respondents (especially those from trade unions) to the 2015 consultation were in favour of modifying the CBMD employee participation procedure whereas 28% saw no necessity to change the rules.

As for the comparison of options 1 and 2, the analysis of the impacts show that option 1 would entail less compliance costs for companies and at the same time offer less protection for employees whereas option 2 creates more compliance costs for companies, but offers more protection for employees. The impacts of both options on MS are not significantly different. It would therefore be necessary to weigh the elements of compliance costs and employee protection against each other while also assessing whether it appears appropriate to propose different approaches on employee participation in cross-border mergers on the one hand and cross-border conversions and divisions on the other hand in order to conclude upon a preferred option.

All cross-border operations entail consequences for employees. Therefore, a special report explaining the economic reasoning of the operation and its consequences to employees combined with the possibility for employees to have a say on it would greatly enhance their stake in the operation. Currently, trade unions argue that employees are not sufficiently informed. As to the employee participation, divisions and conversions are perceived by trade unions as more risky operations which could aim at getting rid of the system of employee participation by dividing into a company size below the employee participation thresholds or converting into a less stringent employee participation regime. Against this background, option 2 has a much more positive impact on employees than option 1, as it empowers employees by providing them specific information about the implications of the operation to the employees and prevents companies from moving out of a legal regime providing for employee participation before the thresholds for employee participation are reached.

This perception of the aim of such operations undertaken to circumvent the participation rights is based on the argument that a number of transformations into SEs (European

company) took place only to by-pass the German system of employee participation<sup>192</sup>. Also trade unions responding to the 2015 consultation were concerned that cross-border divisions could be used to selectively divide the assets and liabilities, which might leave employees in the resulting companies in a financially weaker situation. Furthermore, as a result of a division the size of the dividing company is reduced, which might result in lower number of employees below the employee participation threshold and the employees losing their rights to participate in the board.

In contrast to a stronger protection need for employees in divisions and conversions, the risk of bypassing the employee participation rules in mergers is smaller for the reasons mentioned above. Also, there is no evidence that companies merge cross-border in order to avoid employee participation rules (in contrast to the creation of SEs where such evidence has been referred to by ETUC<sup>193</sup>). It has also to be considered that the difficult compromise on mergers was only achieved after years of negotiations and therefore it should not be opened without a pressing need.

Companies and their associations might be critical of option 2 given the compliance costs related to the preparation a report to the employees. In addition, they already find the cross-border merger procedure related to employee participation cumbersome (e.g. in their comments to the 2015 consultation). At the same time, having a uniform procedure and being able to carry out a cross-border division or conversion in a legally certain manner, without the current high costs of legal advice, would be likely to encourage companies to use the rules regardless of the reinforced protection measures. In addition, the compliance cost resulting from the need to prepare a special report to the employees could be offset by the possibility to waive the management report if all members agree and the rules on employee participation would only apply to companies which have a board level employee participation system. There are relatively few such companies in the EU. Therefore, option 2 would not create extra burden for most companies (mostly SMEs which in most cases do not have an employee participation system as in DE or AT).

In weighing the options against the objectives, namely, cutting the costs of companies and yet providing protection for stakeholders, both options would contribute to the increased protection of employees, while creating compliance costs for companies. As outlined, option 2 would provide for higher protection of employees than option 1, but at the same time also for higher compliance costs for companies. However, the costs for companies resulting from the application of the rules under option 2 should be considered in the context of the overall legal framework providing for a direct procedure for cross-border conversions and divisions and weighted against the cost savings resulting from harmonised procedures. While option 2 would provide the necessary protection and anti-abuse mechanisms, it would nevertheless allow companies to perform much easier the cross-border conversions or divisions which today are very difficult or impossible to perform. The assessment should also take into account the wider political objective of

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<sup>192</sup> ETUC response to European Commission's First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees) C(2011) 4707 final.

<sup>193</sup> ETUC response to European Commission's First phase consultation of Social Partners under Article 154 TFEU on the possible review of Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees) C(2011) 4707 final.

promoting an upward convergence of social standards and workers' rights within the Single Market in line with the European Pillar of Social Rights. Therefore, the overall benefits of option 2 including societal benefits and the political acceptability of the proposed solutions would outweigh its costs. After all, therefore, the **preferred option 2** provides the best balance between cost reduction on the one hand, and the high level of protection on the other.

### 1.14.3 *Creditor protection*

#### 1.14.3.1 Description of options

**The option 0 - baseline scenario** means keeping the existing references to national creditor protection in the CBMD unchanged and no EU rules on creditor protection in cross-border conversions and divisions. The current cross-border merger rules do not provide for harmonisation of creditor protection rules. They only require MS to provide for creditors' protection, while leaving the details of this protection to national law. They also require the inclusion of the analysis of implications for creditors of a cross-border merger in the in the management report. The evaluation of the CBMD (see Annex 5) considers the lack of harmonisation of creditor protection rules as one of the major shortcomings of the existing rules.

**Option 1** would provide the same harmonised rules to protect creditors' for cross-border mergers, divisions and conversions, building on existing creditor protection mechanisms in national laws. It means that the existing cross-border merger rules would be modified and that new rules would be provided for cross-border divisions and conversions. The rules for cross-border divisions and conversions would be identical, *mutatis mutandis*, with the new rules for cross-border mergers. These rules would provide that the situation of creditors should be assessed in the draft terms of any cross-border operation. Creditors who are not satisfied with the protection offered by the company would be able to petition the court to offer adequate protection. The creditors would be presumed not to be prejudiced by the cross-border operation if a company offered them security or guarantee that their claims would be met, or an independent expert report concluded that there was no reasonable likelihood that the creditors would be prejudiced. If the expert report found that the creditors were to be prejudiced, then a company would not be able to benefit from the presumption in the procedure. This option would provide for the deadlines to apply to the court and would thus comply with all stakeholders' views on the need to harmonise the deadlines. This option would also include contingent and future liabilities which would offer protection to those creditors whose liabilities are known at the moment of the cross-border operation and yet their amount cannot be fully determined. In this way, the liabilities connected to pensions or environmental damage (if it occurred before the cross-border operation) would be protected. MS would not be able to provide any other safeguards.

**Option 2** would provide for the same harmonised rules as option 1, but MS would be able to provide for additional safeguards. Such additional safeguards could be the same for all cross-border operations or MS could alternatively provide different safeguards depending on the operation in question. For example, some MS may consider that divisions may need additional rules to protect creditors, in comparison to mergers, since divisions raise a specific problem of liability. During a division assets and liabilities of

the dividing company are transferred to different companies, rather than to one company as in the case of mergers. There is therefore a risk that the allocation of assets and liabilities may be done in a manner that would not enable creditors to recover fully their debts after the division. In such a scenario, creditors may find it more difficult to sue for any owed debts and to claim back what is owed to them if the assets were divided in such a way that the debtor company was not able to repay debts, yet other companies were not obliged to take over this responsibility. As to the conversions, their volume might be much more important than mergers and divisions and therefore cross-border enforcement of claims in a different jurisdiction on a big scale could potentially be costly. The cross-border conversion may also result in the change of the applicable law into less favourable for creditors in case of future insolvency. MS may offer additional measures to protect creditors which are already in place in case of domestic operations. Such measures may be of an informative or substantial nature.

**Discarded option:** An option which would provide for a harmonisation for all cross-border operations, but which would provide more far reaching harmonisation for cross-border divisions and conversions than for cross-border mergers is discarded at this stage. The considered options 1 and 2 would provide for the harmonisation of essential rules at EU level which would provide legal certainty for companies and stakeholders. The issue of creditor protection is sensitive to MS and is often embedded into a larger framework beyond company law and therefore the option 2 provides flexibility for Member States to apply additional rules in particular in cross-border divisions and conversions.

#### 1.14.3.2 Analysis of impacts

Impacts	Option 1	Option 2
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<p><b>Effectiveness in cutting the unnecessary costs/burdens for companies</b></p>	<p>Compared to the baseline scenario whereby no harmonisation at EU level exists in any of cross-border operations, companies would benefit from harmonised rules on creditor protection in all of them. This should lead to less need for legal advice, reduce significantly the costs and delays in the procedure. Therefore, it would be effective in cutting the unnecessary costs/burdens for companies.</p>	<p>Impact would be similar to option 1, as it would provide more legal certainty, cutting the costs of legal advice and reducing significantly the delays in procedure as compared to the baseline. However, if MS introduced additional protective measures, then this could lead to more costs for companies than option 1. The protection offered to creditors in this option is high and resembles the one offered by most MS. Therefore, it is not expected that MS would provide for fundamentally different remedies than the ones provided by this option, especially knowing that all contingent or future liabilities (like the ones of pensioners) would be protected.</p>
<p><b>Effectiveness in offering cross-border protection for creditors</b></p>	<p>Creditors would benefit from a harmonised level of protection because they would not face legal uncertainty due to differing national rules. Providing the creditors whose claims would be endangered by a cross-border merger, division or conversion with a possibility to petition the court for adequate security/ guarantee, would offer them high level of protection across the EU.</p>	<p>In addition to option 1, in those MS which decide to introduce a higher level of protection, creditors would benefit from increased protection. If there are certain specific risks for creditors in certain specific MS, this option would provide for taking care of such specificities.</p>
<p><b>Efficiency: compliance costs for companies</b></p>	<p>The compliance costs would depend on how many creditors successfully claim securities/guarantees in the courts. The better protection offered to creditors in draft terms of cross-border mergers, divisions or conversions, the smaller compliance cost for companies (less litigation). Also companies may invest in the independent expert report which could also diminish the costs of litigation by creditors.</p>	<p>In principle, the compliance costs would be the same for companies as in option 1 if MS decided not to introduce additional protective measures. If they decided to introduce such measures, then the compliance costs for companies might be higher for cross-border divisions and conversions than for mergers.</p>
<p><b>Impacts on MS including on national legal systems</b></p>	<p>MS would have to transpose the EU rules into national law and, therefore, adapt their current creditor protection rules and procedures for</p>	<p>As in option 1, MS would have to transpose the EU rules into national law and, therefore, adapt their current creditor protection rules and procedures</p>



	<p>cross-border mergers, divisions and conversions. There might be some administrative costs for courts when dealing with petitions from creditors, but in most MS the creditor protection is offered in a very similar way and therefore only the number of cases could potentially increase. This option, however, provides for uniform rules for all operations and these rules cannot be adapted to the national specificities. Therefore the impact of this option on MS laws would be bigger than in option 2, at least as regards cross-border divisions and conversions.</p>	<p>for cross-border mergers, divisions and conversions. However, the impact on MS' laws might be smaller than in option 1, as MS would be able to maintain or introduce additional protection for creditors adapted to the national specificities.</p> <p>The precise impact would then depend on national specificities and the role of creditors in their national legal systems.</p>
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### 1.14.3.3 Comparison of impacts

In the 2015 public consultation, 80% of respondents were in favour of harmonising the rules on creditors' rights including a preference for granting guarantees/securities to creditors and for having the creditor protection period start before the cross-border merger becomes effective ('ex-ante'). This is confirmed also by the results of the 2017 public consultation. For MS and businesses the protection of creditors was very important. Trade unions preferred other measures which related more directly to rights of employees, but were not against the harmonisation of rights of creditors. Therefore, option 0 – baseline scenario which does not offer protection at all for cross-border divisions and conversions, and for cross-border mergers essentially provides for complete divergence of MS rules on creditor protection, is not considered to be appropriate.

As to whether the safeguards needed to be the same for cross-border mergers, divisions and conversions, the views of the stakeholders varied. In the 2017 consultation, businesses, notaries, private individuals and others had a preference for minimum harmonisation. The position of trade unions was not very clear. Those MS, which participated in the 2017 consultation, preferred rather uniform safeguards, whereas most MS during the meetings with stakeholders expressed their preference for minimum standards.

However, MS, businesses and notaries seemed to have rather a preference for minimum safeguards for divisions and conversions rather than uniform safeguards, although input was not very clear.

Both options 1 and 2 would significantly reduce cost and burdens on companies in comparison to the baseline scenario, as the harmonised rules on creditor protection would provide for more legal certainty and less need for legal advice for any cross-border operation. Option 1 would offer the biggest savings for companies, while savings in option 2 might be smaller, since MS could provide for additional safeguards which could be costly or burdensome for some companies (e.g. need to provide guarantees for all creditors). The protection offered to creditors in option 2 is high and resembles the one offered by most MS. Therefore, it is not expected that MS would provide for

fundamentally different remedies than the ones provided by this option. Especially those MS which attach importance to the transfer of liabilities attached to pensions or environmental damage would not need to introduce additional rules, as such liabilities would be covered by the protection offered in this option.

Options 1 and 2 would also differ in terms of effectiveness in offering creditor protection. Option 1 would improve the creditor protection in all cross-border operations compared to the existing situation by giving them material safeguards, instead of the description of implications presently offered in management report in cross-border mergers. Option 2 would provide for more complete and targeted protection due to the possibility granted to MS to assess the national specificities of creditor protection and to introduce more safeguards.

In weighing the options against the objectives, namely, cutting the costs of companies and yet providing protection for stakeholders, both of the options would contribute to the increased protection of creditors, while at the same time creating compliance costs for companies. As outlined, option 2 would provide for higher protection of creditors than option 1, but at the same time potentially for higher compliance costs for companies. However, the overall benefits of option 2 including societal benefits and the political acceptability of the proposed solutions would outweigh its costs. Achieving effective protection offered for creditors in a cross-border context is important for stakeholders concerned. At the same time the costs for companies resulting from the application of the rules from option 2 should be considered in the context of the overall legal framework providing for a direct procedure for cross-border conversions and divisions. While option 2 would provide the necessary protection, it would nevertheless allow companies to perform much easier all cross-border operations, but in particular the cross-border conversions or divisions which today are very difficult or impossible to perform. Also the impact on MS would be higher in option 1 than in option 2. Therefore, the **preferred option 2** provides the best balance between cost reduction, a high level of protection and an appropriate impact on MS.

#### *1.14.4 Minority shareholder protection*

##### 1.14.4.1 Description of options

**The option 0 - baseline scenario** encompasses existing rules on minority shareholders' protection in cross-border mergers. These rules are fairly general and include information in the reports (management and independent expert) and the ultimate approval of the cross-border merger by the general meeting. There are currently no EU rules for minority shareholder protection in cross-border divisions and conversions and this option would not introduce any EU rules for divisions and conversions.

**Option 1** would build on the rules for cross-border mergers, but in addition it would provide for harmonised rules. Moreover, this substantive harmonisation of protection of minority shareholders would be introduced for all cross-border operations (merger, division and conversion). Minority shareholders would be offered a same level of protection at EU level and MS would not be able to introduce additional safeguards. In this option minority shareholders would be able to sell their shares against compensation if they did not agree with the cross-border operation. They may challenge the adequacy of it. Moreover, in cross-border mergers and divisions, where the share exchange ratio

plays a role – as there is more than one company involved – the minority shareholders might also challenge the adequacy of the share exchange ratio. The information provided by companies to the minority shareholders would also be significantly improved by the detailed description of mandatory information in the management report.

**Option 2** would provide for the same harmonised rules as option 1, but MS would be able to provide for additional safeguards. The protection of minority shareholders is embedded in the MS' overall company law and corporate governance frameworks and is therefore a part of a broader picture of the existing national legal framework. Given that such frameworks differ, MS should be able to continue to apply the national safeguards as long as they do not contradict the harmonised safeguards or the harmonised procedural framework.

**Discarded options:** An option which would provide for a harmonisation for all cross-border operations, but which would provide differentiation between cross-border mergers, divisions and conversions is discarded at this stage. The considered options 1 and 2 would provide for the harmonisation of essential rules at EU level which would provide legal certainty for companies and minority shareholders. However, given the MS' different traditions as regards minority shareholder protection as part of their broader company law framework, the option 2 provides flexibility for Member States to apply additional rules in line with their existing systems.

#### 1.14.4.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Compared to the base line-scenario, rules would be the same in all MS for all cross-border operations, which should lead to less need for legal advice, reduce significantly the costs and delays in the procedures. Therefore, it would be effective in cutting the unnecessary costs/burdens for companies	Impact would be similar to option 1, as it would provide more legal certainty, cutting the costs of legal advice and reducing significantly the delays in procedure as compared to the baseline. However, if MS introduced additional protective measures, then this could lead to more costs for companies than option 1. However, it is not expected that all MS would avail themselves of this opportunity.
<b>Effectiveness in offering cross-border protection for minority shareholders</b>	Minority shareholders would be better protected than in a baseline scenario since there would be a uniform and comprehensive rules in terms of an exit right against cash compensation and additional compensation in case the share exchange ratio is inadequate (as they were not always guaranteed such rights under the national protection <sup>194</sup> ).	In addition to option 1, in those MS which decide to introduce higher level of protection, minority shareholders would enjoy even more benefits from increased protection. Moreover, the protection would be much more complete with rules possibly adapted to the nature of different operations in line with the existing safeguards in national law.

<sup>194</sup> For instance, several out of 30 EEA MS (e.g. Belgium, Lithuania, Lichtenstein, Norway) have chosen not to use the option to implement additional minority shareholder protection rules in case of cross-border

<p><b>Efficiency: compliance costs for companies</b></p>	<p>Compared to the baseline scenario, also companies carrying out cross-border divisions and conversions would need to prepare the management and expert reports and to seek the approval of the general meeting for the operation (as in the current rules for cross-border mergers). Companies would need to comply with harmonised rules. The compliance costs would depend on how many minority shareholders would exit the companies or claim additional compensation. This would depend on the offer to shareholders prepared by the companies and whether the company took enough care to provide for the adequate share-exchange ratio. Even with the best intentions of companies, there would always be a group of shareholders who would not support the cross-border operation. This would mean that in some cases this option may require companies to keep liquid assets in order to assure the cash payments against exit right and the additional compensation. However, the burden on companies would be reduced if compensation could be provided not by the company, but by majority shareholders or third parties.</p>	<p>Compliance costs would be similar to option 1, as the requirements would be the same. If MS introduced additional protective measures, then this could lead to more costs for companies than option 1. However, it is not expected that all MS would avail themselves of this opportunity, because the protection offered to minority shareholders by this option is already comprehensive and includes the most important remedies.</p>
<p><b>Impacts on MS including on national legal systems</b></p>	<p>All MS would have to transpose the EU rules into national law and, therefore, adapt, at least to some extent, their current protection of minority shareholders. Additionally, there might be some administrative costs for judicial authorities when dealing with addition compensation claims from minority shareholders (in particular for those MS who did not offer such an option to minority shareholders in their national rules so far).</p>	<p>As in option 1, MS would have to transpose the EU rules into national law and, therefore, adapt their current minority shareholders' protection rules and procedures for cross-border mergers, divisions and conversions. However, the impact on MS laws might be smaller than in option 1, as MS would be able to maintain or introduce additional protection for creditors in line with the national specificities.</p>

#### 1.14.4.3 Comparison of impacts

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mergers; and although most of the other MS offer exit right against cash compensation, only some provide for additional compensation in case of an inadequate share exchange ratio (e.g. Estonia, Germany, Greece, Slovenia).

In the 2017 public consultation, MS and businesses considered the issue of the protection of minority shareholders as important, although less important than the creditor protection. It was not the priority issue for trade unions. For notaries the issue was equally important as the creditor protection. Against this background, it does not appear preferable to maintain the option 0 – baseline scenario.

The consultation was not conclusive as to whether these safeguards need to be the same for cross-border mergers, divisions and conversions. In the consultation, businesses, notaries, private individuals and others had a preference for minimum harmonisation. The position of trade unions was not very clear. Those MS, which participated in 2017 consultation, preferred rather uniform safeguards, whereas most MS, during the meetings with stakeholders, expressed their preference for minimum standards. 65% of respondents to the 2015 consultation supported harmonisation of minority shareholders' rights and this included a preference for allowing minority shareholders to request compensation and for harmonising the starting date of the protection period.

Both options 1 and 2 would significantly reduce cost and burdens on companies in comparison to the baseline scenario, in which there is no harmonised protection for cross-border divisions and conversions and the protection offered to minority shareholders in cross-border mergers is mainly left to MS. The harmonised rules on minority shareholders protection would provide for more legal certainty (including on deadlines for protection) and less need for legal advice, especially for cross-border divisions and conversions for which there are currently no EU rules at all. Option 1 would offer the biggest savings for companies, while savings in option 2 might be smaller, since MS could provide for additional safeguards. The protection offered to minority shareholders in option 2 is high and comprehensive. Therefore, it is not expected that MS would provide for fundamentally different remedies than the ones provided by this option.

Both options 1 and 2 could also cause some compliance costs for companies as they would be obliged to pay the shareholders in case of them exiting the company or provide them with additional compensation for the inadequate share exchange which could in turn impose more liquidity constraints. The draft terms of mergers, divisions or conversions together with the management report and expert report should constitute sufficient guaranties that the issue of minority shareholders protection was taken seriously during the preparation of the respective cross-border operation which should reduce surprises for companies. Moreover, possible liquidity concerns should be mitigated by the companies establishing the correct share-exchange ratio and a possibility for majority shareholders or third parties to acquire the shares of those shareholders who would like to exit the company following the cross-border operation.

Both options 1 and 2 would increase the minority shareholder protection across the EU. However, the option 2 would provide the most adapted protection of minority shareholders – minimum standards would be the same across the EU, but MS could go beyond and introduce additional rules. The impact on MS of option 2 would be smaller, as they could introduce more safeguards taking into account national specificities. The additional rules introduced by MS, if any, could be coherent with the existing protection, in particular with these applicable to domestic operations. As the system of minority shareholders protection is often part of the core of company law, it does not seem politically feasible to provide for rules which would not leave enough flexibility to MS.

In weighing the options against the objectives, namely, cutting the costs of companies and yet providing protection for stakeholders, both of the options would contribute to the increased protection of minority shareholders, while at the same time creating compliance costs for companies. Option 2 would provide for higher protection of minority shareholders than Option 1, but at the same time potentially for higher compliances costs for companies. However, the overall benefits of option 2 including societal benefits and the political acceptability of the proposed solutions would outweigh its costs. Achieving effective protection offered for minority shareholders in a cross-border context is very important for a number of stakeholders concerned. At the same time, the costs for companies resulting from the application of the rules from option 2 should be considered in the context of the overall legal framework providing for a direct procedure for cross-border conversions and divisions. While option 2 would provide the necessary protection, it would nevertheless allow companies to perform much easier the cross-border operations, particularly cross-border conversions or divisions which today are very difficult or impossible to perform. Also the impact on MS would be higher in option 1 than in option 2. Therefore, **the preferred option 2** provides the best balance between cost reduction, the high level of protection and the impact on MS.

#### *1.14.5 Cross-border conversions – risk of abuse*

Many stakeholders and MS have called for an EU legal framework for cross-border conversions that stimulates growth but does not lead to abuse, including a proliferation of "letter-box" companies for abusive purposes such as for avoiding labour standards or social security payments as well as aggressive tax planning. Therefore, the connection that the converting company's business activity has with the new MS is crucial.

During the public consultations, certain stakeholders, in particular trade unions, called for a solution whereby the company carrying out cross-border conversion would need to transfer the registered office together with the head office to the destination MS. However, the very recent Court decision in the Polbud case, which was delivered only after the public consultations were already closed, stipulates that the freedom of establishment applies to cases where only the registered office is moved cross-border. Therefore, such a solution cannot be envisaged. Other equivalent means to fight against use of letter box companies for abusive purposes would therefore need to be considered.

##### 1.14.5.1 Description of options

**Option 0 – baseline scenario** means no EU rules would be introduced for cross-border conversions. Cross-border conversions would need to be carried out on the basis of divergent national rules, when they exist, and of the case-law of the CJEU. Following the Polbud judgement and in the absence of EU harmonised rules, MS could set out rules for the fight against fiscal or other abuses. However, such rules would need to comply with EU law and, in particular, with the right of establishment.

**Option 1** would introduce rules and procedures according to which MS would need to assess on a case-by-case basis whether the cross-border conversion in question constitutes an artificial arrangement aiming at obtaining undue tax advantages or unduly prejudicing the rights of employees, minority shareholders or employees. The assessment would draw from the independent expert report and take into account the views of the

relevant stakeholders. Based on its in-depth assessment, MS could decide not to authorise the conversion in question in case it constitutes such an artificial arrangement i.e. a letterbox company used for abusive purposes.

#### 1.14.5.2 Analysis of Options

Impact	Option 1
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Overall, introduction of harmonised procedural rules is expected to lead to a reduction in costs and burdens for companies compared to the baseline scenario whereby companies must comply with non-existent or divergent national rules. In addition, the harmonised rules and procedures for the assessment of a possible artificial arrangement would lead to enhanced legal certainty and thus less need for legal advice as in the case of baseline scenario whereby MS can apply their own rules. However, there would be compliance cost for companies (see below).
<b>Effectiveness in offering cross-border protection for creditors, minority shareholders, employees</b>	Compared to the baseline scenario, this option would improve the protection for stakeholders by providing legal certainty about the applicable rules and procedures and through stakeholder involvement in the assessment of possible fraudulent/abusive behaviour of the company intending to carry out the cross-border conversion. Finally, the fact that MS could block a cross-border conversion which constitutes an artificial arrangement would provide stakeholders with the ultimate protection against fraudulent or abusive use of freedom of establishment. The effectiveness of Option 1 for protecting stakeholders should be read in the light of the preferred policy options concerning protection for employees, creditors and minority shareholders.
<b>Efficiency: compliance costs for companies</b>	Companies would need to comply with the procedure established by the new rules and MS' decisions. The compliance cost for companies related to the MS' assessment about possible artificial arrangement are mainly embedded in the harmonised procedures and result from the need to prepare draft terms and relevant reports including costs related to the appointment of the independent expert by those companies subject to this requirement. However, these costs should be weighed against overall cost savings resulting from harmonised procedures as explained in section 5.2.1. The ultimate cost for the companies resulting from the MS' assessment related to artificial arrangement is that the envisaged operation could be blocked while the company must bear all the incurred procedural costs. However, this should be not the case for any company planning to move to another MS for genuine business reasons.
<b>Impacts on MS including on national legal systems</b>	MS would need to transpose the new rules into their national legislation. In addition, MS would incur costs associated with the carrying out the assessment including collection of companies' and stakeholders' views.

#### 1.14.5.3 Comparison of options

When compared to the baseline scenario, the option 1 would be a part of the procedure allowing companies to convert cross-border and therefore the additional compliance costs would not specific to the assessment of the possible artificial arrangement. They would result from the need to prepare draft terms and relevant reports including costs related to the appointment of the independent expert for certain companies embedded in the harmonised procedure. The ultimate cost for companies would stem from the fact that the envisaged cross-border conversion could be blocked by the MS, while the company

would need to bear all incurred procedural costs. However, for companies that envisage a genuine move, this procedural step should not present any risk. As to the MS, they would need to transpose and implement those rules which incur some administrative and organisational costs.

Option 1 would lead into enhanced stakeholder protection. Stakeholders would be able to provide their views throughout the procedure and ultimately be protected against circumvention of rules by fraudulent companies. Option 1 would thus directly contribute to the fight against circumvention of rules and thus against abusive or fraudulent use of letterbox companies.

Similarly to the options on employees, creditors and minority shareholders, in weighting the objectives of cutting the costs of companies and yet providing protection for stakeholders, the preference is given to the objective of protection. Although option 1 might not be fully supported by businesses due to the procedural costs and it might discourage some companies from using the procedure, it would allow striking the balance between the freedom of establishment and social protection. It would respond to the calls to make the Single Market fairer. Option 1 would also be in line with the European Pillar of Social Rights and the objective of the fight against aggressive tax planning. In addition, the overall costs for companies would be cut in comparison to the baseline scenario through the harmonised procedure for cross-border conversion that would make possible for companies to exercise the freedom of establishment in practise. The Option 1 is therefore the preferred option.

Given that inherent risks are similar in divisions as in conversions, it could be considered to also extend this option to divisions. It can be expected that the impacts would be similar to those described for conversions.

### **1.15 Conflict of laws rules**

An instrument on conflict of laws would complement the harmonisation of substantive company law. The instruments are complementary because they have common objectives – cutting costs and unnecessary burdens for companies and offering effective protection for the other stakeholders, but they address different aspects of the problems. The cross-border operations (mergers, divisions, conversions) part is aimed at harmonising the requirements for the operation to be completed in procedural terms in MS in order for such operations to be effective, whereas conflict-of-law rules determine the applicable law where no such harmonisation has occurred (or where harmonisation is only partial) and more than one national law could be applicable to a company's internal and external matters. Conflict-of-law rules would come therefore into play where substantive rules are not harmonised and can generate therefore conflicts of laws.

But conflict of laws rules go further than the substantive harmonisation in terms of personal and material scope of application. In contrast to substantive law instruments which concern only cross-border operations (i.e. cross-border mergers, conversions and divisions), the conflict-of-law instrument would apply and determine the applicable law in all situations, even where no cross-border operation has been carried out (e.g. recognising companies incorporated in another MS without further conditions being attached). In terms of personal scope of application, whereas the instruments concerning cross-border operations cover only limited liability companies, the conflict-of-law rules



would cover all companies, whether incorporated or unincorporated, limited liability companies as well as any other types of companies possible under the laws of the MS. Finally, for the substantive company law issues it is considered sufficient to deal with the existing problems in Directives and leave room for national legislation, whereas the legal certainty to be achieved by the harmonisation of conflict-of-law rules could be attainable only in a Regulation which is directly applicable in MS<sup>195</sup>.

Whilst some private international law rules could be included in substantive company law instruments, this would not have the same benefits as a separate conflict of law instrument. A separate instrument would have a horizontal coverage and be wider, for instance, in terms of scope and coverage of non-harmonised situations. For this reason, from the legal perspective and if politically feasible, it would be more appropriate to put separate instruments in place<sup>196</sup>.

Together, substantive and private international law rules would constitute a legal framework which provides legal certainty to companies in areas where such certainty does not exist today.

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<sup>195</sup> See all EU private international law instruments adopted in the past 17 years, inter alia the Rome I and Rome II Regulations, the Insolvency Regulation, the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments.

<sup>196</sup> See also below on choice of legal basis and type of instrument.

*1.15.1 Connecting factor for determining the law applicable to a company's formation and internal functioning*

1.15.1.1 Description of options

**Option 0:** No EU rules. National conflict of laws rules continue to apply (see annex 7).

**Option 1:** Harmonised connecting factor on the basis of the incorporation theory, meaning that the law applicable to a company will be the law of its incorporation (or its registered seat).

**Option 2:** Option 1 (i.e. connecting factor on the basis of the incorporation) and in addition some specific rules pointing to the law of the 'real seat', more specifically the law of the MS within the territory of which the central administration of the company is located at the moment of formation of the company or another law in specific situations, such as when the place of incorporation cannot be determined or for rules on disclosure, for the protection of third parties.

**Discarded option:** Harmonised connecting factor on the basis of the real seat. The Court of Justice of the EU has considered that certain practices in MS imposing their company law rules on companies incorporated in other MS on the basis of the real seat approach are unjustified restrictions of the freedom of establishment where they lead to the non-recognition of foreign companies not having their real seat in the MS of incorporation. A general real seat connecting factor would lead to the non-recognition of companies established in other MS. This would happen in a situation when the real seat is not in the same MS where the company is incorporated. Therefore it would not be compatible with the freedom of establishment enshrined in the Treaty, as interpreted by the Court of Justice. For this reason, this option has been discarded. However, real seat elements are possible as long as they do not touch upon the issue of recognition of companies established in other MS. Therefore a default connecting factor based on the real seat of a company in cases where the place of incorporation cannot be determined as in option 2 is in line with the Treaty.

1.15.1.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Building on the case law of the Court of Justice on freedom of establishment, this option provides more legal certainty to companies and promotes the choice of law. Companies will be subject to one single legal regime. Furthermore, for 80% of companies, there is presently an obligation to make public the registered office – information which is accessible from any other MS. The registered seat indicates the place of incorporation and is legally unambiguous and in line with	Same as option 1, but in addition this option will provide even more legal certainty through a fall-back rule in cases where the place of incorporation of a company cannot be determined. In such cases, a 'real seat' connecting factor could apply. This rule is of relevance in particular for unincorporated companies.

Impacts	Option 1	Option 2
	<p>the principle of party autonomy in private international law.</p> <p>The increase of legal certainty could further reduce still existing obstacles to the mobility of companies. In particular, the harmonised connecting factor would provide clarity that a company formed in accordance with the law of a MS in which it has its registered office exercises its freedom of establishment in another MS. The Treaty and the case law of the Court of Justice require that MS recognise the company.</p> <p>This option will NOT oblige MS to give up requirements under national substantive company laws that companies registered on their territory also have the real seat there. Applicable law rules only determine the applicable substantive company law. MS remain free to determine conditions on substance (effective residence or real seat requirements).</p> <p>In conclusion, the increase of legal certainty can contribute to cutting unnecessary burdens.</p>	
<p><b>Effectiveness in offering cross-border protection for the other stakeholders (employees, creditors, minority shareholders)</b></p>	<p>Whilst the connecting factor in itself does not have a direct impact, shareholders will be protected better and across the whole EU through a provision that in case of a change of the law applicable, the law applicable before the change continues to apply to measures for the protection of minority shareholders and creditors of the company.</p> <p>National business registers are interconnected as of June 2017, therefore the information about the place of registration of limited liability companies will be easily ascertainable by third parties with important benefits for their protection.</p> <p>Employees' rights will be safeguarded by excluding labour relationships and employees rights, including rights of participation in the organs of the</p>	<p>Same as option 1, but in addition special rules pointing to the real seat with regard to rules on disclosure and capacity will provide for additional protection of third parties.</p>

Impacts	Option 1	Option 2
	<p>company, from the scope of the instrument. This will leave MS the freedom to apply the real seat as connecting factor in that respect.</p> <p>An incorporation connecting factor for the determination of the applicable law for companies would not determine the substantive requirements for the incorporation of companies, and as such will not impact on the spread of letter-box companies.</p>	
<b>Efficiency: compliance costs for companies, MS</b>	<p>No compliance costs for companies. MS will not be required to change their laws since the Regulation will be directly applicable. More clarity in the law is likely to reduce litigation and therefore costs for companies.</p>	
<b>Impact on MS including on national legal systems</b>	<p>Since many MS effectively apply the incorporation theory for intra-EU companies as a result of ECJ case-law, these options would not lead to major changes in the legal systems of MS. Both options will ensure due protection of the public interests of any other State in which the company may be operating or with which it may have connections. This will be achieved through provisions on overriding mandatory requirements and public order. This approach will guarantee a fair balance between the laws of the State of incorporation and those of any other State where the company may be operating.</p> <p>Courts will benefit significantly from increased legal certainty. In particular, they will not have to apply possibly differing national private international law rules any more, but can rely on a clear and uniform set of harmonised conflict of laws rules.</p>	

### 1.15.1.3 Comparison of options

The preferred option is Option 2, which would balance the need to comply with the ECJ interpretation of the principle of freedom of establishment, the need to reduce costs and remove obstacles for companies exercising that freedom while at the same time to ensure effective protection of third parties. Subject to political feasibility, this option would legally provide an improvement compared to the status quo since in all cases of potential and actual conflicts of law, it would be possible for the first time to determine the applicable law very easily, without any need to have recourse to the case law of the Court of Justice, national private international laws as well as national jurisprudence. This would improve legal certainty for businesses and reduce costs connected with establishing the applicable law for companies. This would also be largely in line with the answers of MS, business organisations and some trade unions in the public consultation; those MS that have expressed an opinion on the connecting factor are in favour of the place of incorporation as the connecting factor, subject to overriding mandatory provisions and public policy exceptions. A small majority of trade unions and the vast majority of notaries were in favour of a 'real seat' connecting factor. This choice would be without prejudice to any substantive law conditions for registering the company in the

host MS in case of a cross-border conversion, which would be harmonised in the substantive law part of the package.

### 1.15.2 Change of applicable law

#### 1.15.2.1 Description of options

**Option 0:** No change. National applicable law rules continue to apply.

**Option 1:** Uniform general conflict of laws safeguards, but no special rules on change of applicable law.

**Option 2:** Option 1 + specific safeguards in case of a change of applicable law, such as:

- rule to clarify that a change of applicable law shall preserve the legal personality of the company (with all the consequences);
- rule to clarify what matters should be covered by the 'old' law (e.g. creditor and minority shareholder protection) and which by the 'new' law (e.g. conditions for re-incorporation).

#### 1.15.2.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	Legal certainty for companies, since it will be clear that, when operating a change of applicable law, they will need to abide by other laws when there are overriding mandatory provisions and public policy concerns.  Furthermore, these concepts will enjoy uniform interpretation and application in the EU.	Enhanced legal certainty for companies since they will also have clarity as to which matters continue to be governed by the 'old' law and which by the 'new law'.
<b>Effectiveness in offering cross-border protection for the other stakeholders (employees, creditors, minority shareholders)</b>	Stakeholders will have certainty that any change of applicable law will take place respecting the overriding mandatory and public policy provisions of the forum or of another MS where the company has activities. However, these concepts are rather strictly interpreted by the ECJ.	In addition to the benefits under Option 1, stakeholders of the company before the change of applicable law will continue to enjoy the protection they had under the 'old' law. Since the 'new' law will regulate the conditions for re-incorporation, stakeholders of the company after the change of applicable law will be protected by the new law.
<b>Efficiency: compliance costs for companies,</b>	This option does not entail any compliance costs for companies. MS will not be required to change their laws since the Regulation will be	When compared to Option 1, this option introduces more legal certainty as to which matters are governed by which law and case of a

Impacts	Option 1	Option 2
<b>MS</b>	directly applicable. More clarity in the law is likely to reduce litigation.	transfer and therefore is likely to result in even less litigation.
<b>Impact on MS including on national legal systems</b>	<p>Both options will ensure due protection of the public interests of any other State in which the company may be operating or with which it may have connections. This will be achieved through provisions on overriding mandatory requirements and public order. This approach will guarantee a fair balance between the laws of the State of incorporation and those of any other State where the company may be operating.</p> <p>Courts will benefit significantly from increased legal certainty. In particular, they will not have to apply possibly differing national private international law rules any more, but can rely on a clear and uniform set of harmonised conflict of laws rules.</p>	

### 1.15.2.3 Comparison of options

The preferred option is option 2 which would offer the highest protection to stakeholders. This would also be in line with the answers of MS in the public consultation, which were largely in favour of addressing the possibility of a change of the applicable law through a cross-border conversion to another MS without loss of legal personality, as well as for specifying which matters should be covered by the "old law" and which by the "new law". Any procedural aspects of such transfers are a matter of substantive law which would be addressed in the substantive law directive.

### *1.15.3 Conflict of laws rules on employee participation*

#### 1.15.3.1 Description of options

**Option 0:** No change. National conflict of laws rules on employee participation continue to apply.

**Option 1:** No uniform conflict of law rules on employee participation in company boards (exclusion from the scope of a possible instrument). In contrast to option 0, there are uniform rules on the law applicable to companies, but labour law and worker representation are excluded from the scope of application of these uniform rules.

**Option 2:** Special conflict of laws rule for employee participation, pointing for example to the law of the MS where the head-office of the company is located, complemented by public policy and overriding mandatory provisions exceptions.

**Discarded option:** Subjecting employee representation to the law which is more favourable to the employees. Such a solution must be discarded since it would bring considerable legal uncertainty for both workers and companies (the most favourable law may change over time, e.g. where the company grows and therefore reaches or falls short of certain thresholds in national law). Such a connecting factor would not sit well with and does not exist in any private international law instruments which have provisions to

protect weaker parties (e.g. Rome I which harmonises the law applicable to individual employment contracts).

### 1.15.3.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	No change compared to the current situation: the employee participation will continue to be governed by national conflict of law rules.	This option may be more legally certain but also more complex for companies, since it might imply the application of three laws: law of incorporation for general matters, law of head-office for board level employee participation and in addition overriding mandatory provisions and public policy of the forum.
<b>Effectiveness in offering cross-border protection for employees</b>	No change compared to the current situation: the employee participation will continue to be governed by national conflict of law rules.	This option may potentially be more protective but also more complex for employees. It combines a 'real seat' connecting factor for board level employee participation with the standard conflict of laws protection (e.g. public policy).
<b>Efficiency: compliance costs for companies, MS</b>	No compliance costs.	Some companies may need to revise their approach to employee participation in light of the fact that the law of the MS of the head office and the forum might govern such matters. No costs for MS.
<b>Impact on MS including on national legal systems</b>	No change compared to the current situation.	This option may change the approach to employee participation in the board of companies in some MS, albeit in a direction which is positive for employees.

### 1.15.3.3 Comparison of options

The preferred option is option 1 which excludes employee participation matters from the scope of application of uniform rules. In the absence of such uniform rules, the national conflict of law rules will apply. This option is in line with the views expressed by trade unions and notaries in the public consultation.

This option is without prejudice to employee participation rules developed in the area of substantive company law.

#### *1.15.4 Territorial scope of application*

##### 1.15.4.1 Description of options

**Option 0:** No change. National conflict of laws rules continue to apply.

**Option 1:** Instrument to cover only companies established in the EU.

**Option 2:** Universal application, covering also companies established in third countries.

#### 1.15.4.2 Analysis of impacts

Impacts	Option 1	Option 2
<b>Effectiveness in cutting the unnecessary costs/burdens for companies</b>	This option will not change the current situation, although it will increase legal certainty and reduce costs for all companies.	This option could help foreign companies operating in the EU benefit from the application of the law of a third country in the EU, without any additional costs.
<b>Effectiveness in offering cross-border protection for the other stakeholders (employees, creditors, minority shareholders)</b>	This option will not change the current situation, although it will increase legal certainty and reduce costs for all stakeholders.	There could be a negative impact through unfair treatment of EU creditors or minority shareholders if the third country company law requirements are too lax.
<b>Efficiency: compliance costs for companies, MS</b>	No compliance costs.	
<b>Impact on MS including on national legal systems</b>	<p>This option would in its territorial scope correspond to the case law of the Court of Justice on the freedom of establishment of companies - which is necessarily limited to the internal market, i.e. to companies established in the EU. This option is therefore sufficient from an internal market perspective.</p> <p>Also, it would exclude possible cases in which local creditors or minority shareholders might be unfairly prejudiced by the application of the company law of a third country.</p>	<p>This option would correspond to the territorial scope of other European instruments in the area of private international law, such as the Rome I and the Rome II Regulations. Like option 2, it is compatible with the case law of the Court on the freedom of establishment, but goes beyond the case law and covers also companies established in third countries.</p> <p>This option implies, however, the risk that it could unfairly prejudice local creditors or minority shareholders by the application of the company law of a third-country, without bringing any added value to the internal market.</p>

#### 1.15.4.3 Comparison of options

The preferred option is option 1. MS would still be free to implement similar rules for third country companies. In the public consultation, MS and business organisations who answered this question were slightly in favour of universal application, while trade



unions and notaries were against. However, the majority of respondents did not express an opinion.

## PACKAGE OF PREFERRED POLICY OPTIONS AND OVERALL IMPACTS

### 1.16 Summary of preferred policy options

From the analysis above the following package of preferred options is constituted.

<b>Use of digital processes and tools throughout a company's lifecycle – preferred options</b>	
<i>Online registration and filing of documents to the business register</i>	<b>Option 3:</b> Rules on fully online registration of companies/branches and filing of company documents without any physical presence required. Safeguards for electronic identification laid down at EU level. Possibility for MS to require physical presence, on case-by-case basis, in case of genuine suspicion of fraud.
<i>Multiple submissions of the same information by companies</i>	<b>Option 2:</b> Company information submitted only once and sent electronically (a) by the business register to the national gazette (only if the MS requires publication in the national gazette) and (b) by the business register of the company to the business register of the branch in another MS.
<i>Online access to company information held in business registers</i>	<b>Option 1:</b> More information added to the set of company data provided free of charge by all business registers, but fees may still be charged for other information. Easier and non-discriminatory access to information.
<b>Cross-border operations – preferred options</b>	
<i>New procedural rules for cross-border divisions and cross-border conversions</i>	<b>Option 1:</b> Introduce harmonised EU procedures that enable cross-border divisions and cross-border conversions.
<i>Employee information, consultation and participation</i>	<b>Option 2:</b> Existing rules for cross-border mergers applied, with modifications, to cross-border divisions and conversions. In addition, a special report by the company's management on the impact of the cross-border operation on jobs and the situation of employees in cross-border mergers, divisions and conversions.  Existing rules on information and consultation of employees remain unaffected
<i>Creditor protection: Option 2</i>	<b>Option 2:</b> Same harmonised rules for cross-border mergers, divisions and conversions. In addition, MS may introduce additional protective measures.
<i>Minority shareholder protection</i>	<b>Option 2:</b> Building on the cross-border merger rules, introduction of same harmonised rules for the protection of minority shareholders at EU level for mergers, divisions and conversions. In addition, MS may introduce additional protective measures.
<i>Cross-border conversions – risk of abuse</i>	<b>Option 2:</b> Case-by-case assessment by MS to determine whether the cross-border conversion in question constitutes an artificial arrangement aiming at obtaining undue tax advantages or unduly prejudicing the rights of employees, minority shareholders or

	employees.
<b>Conflict of law rules – preferred options</b>	
<i>Connecting factor</i>	<b>Option 2:</b> Connecting factor on the basis of the place of incorporation of the company and in addition some specific rules pointing to the law of the 'real seat' or another law in specific situations, such as when the place of incorporation cannot be determined or for rules on disclosure and capacity, for the protection of third parties.
<i>Conflict of laws rules on protection for stakeholders in case of a change of applicable law</i>	<p><b>Option 2:</b> - the overriding mandatory provisions of the forum or of another country with which the company has a connection will prevail over the provisions of the applicable law;</p> <ul style="list-style-type: none"> <li>- the law of the forum will prevail where there are public policy consideration at play;</li> <li>- the CJEU will have jurisdiction to give a uniform interpretation of these concepts.</li> </ul> <p>+ specific safeguards in case of a change of applicable law, such as:</p> <ul style="list-style-type: none"> <li>- rule to clarify that a change of applicable law shall preserve the legal personality of the company (with all the consequences);</li> <li>- rule to clarify what matters should be covered by the 'old' law (e.g. creditor and minority shareholder protection) and which by the 'new' law (e.g. conditions for re-incorporation).</li> </ul>
<i>Conflict of laws rules on employee participation at board level</i>	<b>Option 1:</b> No uniform conflict of laws rules on employee participation at board level (national conflict of laws rules will apply).
<i>Territorial scope of application</i>	<b>Option 1:</b> Instrument to cover only companies established in the EU.

## 1.17 Analysis of the overall impacts of the package

This section will present the combined impacts of the package which would be composed of the preferred options presented in section 6.1.

Overall, the preferred options complement each other in contributing to the policy objectives of the initiative, i.e. making the Single Market deeper and fairer, specifically by cutting the unnecessary costs and burdens for companies and offering effective protection for the other stakeholders, in the areas of use of digital tools and processes, cross-border operations and conflict of laws. The complementarity of the options means that the maximum impact could be achieved if the package would be composed of all the five different policy issues. However, although the different elements of the package interact, the five policy issues are self-standing and therefore the package could be composed of only some of them. The interactions between five policy issues are explained below in section 6.2.9.

### 1.17.1 Overall economic impact

Introducing harmonised rules and procedures regarding the use of digital tools and cross-border operations (mergers, divisions, conversions) would make it easier and more cost-effective to set-up companies both domestically and cross-border and to establish operations in another MS. There are currently more than 20 million limited liability companies across EU<sup>197</sup> and 99% of them are SMEs.<sup>198</sup> The package would offer new opportunities to them.

#### *Impact on companies*

First, thanks to **the use of digital tools**, companies would be able to register, file and amend their data in the registers fully online, which would significantly reduce costs for EU companies. With more than 2 million new companies registering in the EU each year, the new rules would have a significant economic impact in both cross-border and domestic registrations. The following cost savings could be foreseen:

- Online registration could take on average half of the time needed to process a paper-based registration and the cost for online registration could be up to 3 times cheaper than the paper-based registration<sup>199</sup>. In addition, the introduction of rules on fully online filing of company information would also bring additional savings for companies.
- For new companies registered in the EU, the savings from the introduction of online registration are estimated to be between €42 – 84 million (see Annex 9 for details). Such savings would be higher in MS where online registration is currently not available.

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<sup>197</sup> EY study.

<sup>198</sup> Ibidem

<sup>199</sup> Based on a [World Bank report](#). The numbers apply on average percentage of income per capita.

- Costs would also be reduced by submitting required company information once (once-only principle). The reduction of submissions would contribute to the overall savings, estimated at €5 billion per year<sup>200</sup>, which can be brought by the implementation of the once-only principle at EU level.
- The online submission of documents would also bring cost savings. For example, in Belgium to file on paper an abbreviated model of annual accounts costs €226,34, as opposed to €155,67 for online filing; in the UK, the submission of annual accounts by post costs £40, while the electronic submission of the same documents costs £13.

Second, companies would be provided with EU wide **harmonised rules and procedures allowing them to perform cross-border operations** (such as divisions and conversions) which are very difficult or impossible to perform today. Existing rules on cross-border mergers would be streamlined.

- Given that the introduction of the harmonised rules for **cross-border mergers** lead to 173% increased from 2008 to 2012<sup>201</sup>, it is estimated that further streamlining of the rules would further increase cross-border mergers by making them more accessible to a broader population of companies, thereby opening up a bottleneck in economic activity across the EU.
- The operational costs of a new procedure for **cross-border divisions** are expected to amount to costs between 130% - 200% of a national procedure.<sup>202</sup> This would result in savings between €12,000 - €37,000 depending on the size of the companies and the MS involved. The current volume of cross-border divisions is expected to range between 50 – 200 operations per year.<sup>203</sup> Assuming a 10% increase of cross-border division activity the cost savings for companies could potentially amount to over €57M over 5 years, assuming a 20% increase in activity the savings could potentially amount to €73.5M companies while assuming a 30% increase (most likely scenario in line what was experienced following the introduction of the CBMD) the cost savings could amount to €94.5M over 5 years.

Cross-border Divisions	
Scenario 1 - Volume + 10% increase	
Low Volume + Low Cost (50 operations x €12,000)	€4,629,366

<sup>200</sup> Based on [Final Report: Study on eGovernment and the Reduction of Administrative Burden \(SMART 2012/0061\)](#)

<sup>201</sup> Bech-Bruun/Lexidale, 2013, p. 4

<sup>202</sup> EY study on cross-border operations of companies, p. 102. Study estimated that the lowest cost of the procedure would be slightly higher than the national procedure but slightly higher, without being twice as high. The procedure is expected to require some additional time (i.e. to prepare additional documents than during domestic procedures). Costs are based on the legal advisory costs (60%), registration costs with public services (5%) and costs to execute the procedure (i.e. production of documents, organisation of general meetings, man days etc. – 35%). The estimation was used to obtain a range of expected saving per unit, when compared to the initial costs of cross-border transfers today (data collected from Member State Fiches – see EY Annex, p. 48).

<sup>203</sup> EY study on cross-border operations of companies, p. 25. For further explanation see Annex 8.

High Volume + Low cost (200 operations x €12,000)	€18,517,464
Low Volume + High Cost (50 operations x €37,000)	€14,273,879
High Volume + High Cost (200 operations x €37,000)	€57,095,514
<i>Scenario 2 – Volume + 20% increase</i>	
Low Volume + Low Cost (50 operations x €12,000)	€5,957,952
High Volume + Low cost (200 operations x €12,000)	€23,831,808
Low Volume + High Cost (50 operations x €37,000)	€18,370,351
High Volume + High Cost (200 operations x €37,000)	€73,481,408
<i>Scenario 3 – Volume + 30% increase</i>	
Low Volume + Low Cost (50 operations x €12,000)	€7,653,618
High Volume + Low cost (200 operations x €12,000)	€30,614,472
Low Volume + High Cost (50 operations x €37,000)	€23,598,656,
High Volume + High Cost (200 operations x €37,000)	€94,394,622

- As for **cross-border conversions**, the introduction of a new procedure is expected to result in operational costs being approximately 130% - 180% of a domestic conversion procedure.<sup>204</sup> This is estimated to reduce costs by cost by €12,000 – €19,000 per operation. Currently, the volume of cross-border conversions based on national procedures and analogous application of CJEU case-law/existing EU legislation coupled with sound practitioner knowledge is relatively low. It is estimated to be between 350 – 900 operations per year.<sup>205</sup> It can be assumed that the number of cross-border conversions would significantly increase as it happened with the introduction of harmonised rules on cross-border mergers.

As a conversion is comparatively a simpler procedure than a cross-border division as it only involves one company and appeals to a much broader population of companies it can be assumed that the increase in volume is likely to be higher than that of cross-border divisions and mergers. Therefore, it can be assumed for scenario 3 (i.e. 40 % increase) a possible cost saving of €176M – 279M over 5 years.

In terms of long term impacts, the introduction of a conversion procedure could be monumental for the SME market. The accessibility of the procedure will put them on equal footing with larger companies to engage in cross-border activity and could potentially open up a bottleneck of conversion activity. By providing a direct pan-EU procedure it can be assumed that over the long-term we will see as many, if not more, small and medium enterprises engaging in cross-border activity and reaping the full benefits of the internal market as there currently are large companies. Using the Eurostat's data on foreign affiliated companies as a point of comparison, this could

<sup>204</sup> Same as footnote 169.

<sup>205</sup> EY study on cross-border operations of companies, p. 19. For further explanation see Annex 8.

potentially result in approximately €0.6BN - €2BN in savings for small and medium enterprises.<sup>206</sup>

Cross-border Conversions	
<i>Scenario 1 - Volume + 20% increase</i>	
Low Volume + Low Cost (350 operations x €12,000)	<b>€41,705,664</b>
High Volume + Low cost (900 operations x €12,000)	<b>€107,243,136</b>
Low Volume + High Cost (350 operations x €19,000)	<b>€66,033,968</b>
High Volume + High Cost (900 operations x €19,000)	<b>€169,801,632</b>
<i>Scenario 2 – Volume + 30% increase</i>	
Low Volume + Low Cost (350 operations x €12,000)	<b>€53,575,326</b>
High Volume + Low cost (900 operations x €12,000)	<b>€137,765,124</b>
Low Volume + High Cost (350 operations x €19,000)	<b>€84,827,600</b>
High Volume + High Cost (900 operations x €19,000)	<b>€218,128,113</b>
<i>Scenario 3 – Volume + 40% increase</i>	
Low Volume + Low Cost (350 operations x €12,000)	<b>€68,560,128</b>
High Volume + Low cost (900 operations x €12,000)	<b>€176,297,472</b>
Low Volume + High Cost (350 operations x €19,000)	<b>€108,553,536</b>
High Volume + High Cost (900 operations x €19,000)	<b>€279,137,664</b>

- It should be noted that that the baseline volumes for both cross-border divisions and cross-border conversions only concerns *direct* procedures. For divisions this concerns operations in MS that have their own cross-border procedures in place at MS level (CZ, DK and FI), MS that permit cross-border divisions through analogous application of the national division procedures (AT, BE, BU, ES, FR, HR, LT, PT and SE) and MS that permit cross-border divisions through analogous application of the CBMD (AT, BE, IT, LT, NL, PT and SE). The baseline volumes *exclude* cross-border mergers that have been carried out in order to achieve the same effect as a

<sup>206</sup> The only data available concerning the volume of companies operating cross-borders is contained in Eurostat's manual on Foreign Affiliates Statistics. The data concerns companies that are "controlled" by companies that are resident in other EU MS. This broadly covers branches and subsidiaries. The statistics shows that 0.7% of EU companies are controlled by a company that is resident in another EU MS - the majority of which are large companies which hold a disproportionately high representation of employment, turnover or value added. Assuming the introduction of a conversion procedures allows as many small and medium sized companies engage in cross-border activity as there currently are large companies we could see the following savings: low scenario (0.2% SMEs in engaging in cross-border activity) - €595,200,000; mid scenario (0.5% SMEs in engaging in cross-border activity) - €1,488,000,000; and high scenario (0.7% SMEs in engaging in cross-border activity) - €2,083,200,000. For further information see:

[http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign\\_affiliates\\_statistics\\_-\\_FATS](http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_affiliates_statistics_-_FATS)

cross-border division. Similarly, cross-border mergers that are carried out to achieve the same effect as a cross-border conversion are also excluded.

- Due to the difficulties in estimating the number of cross-border mergers at EU level and isolating the mergers that used to achieve the result as a cross-border division or cross-border transfer, a significant volume of indirect operations were not taken into account. Therefore, in reality the overall cost savings will be significantly higher given that the costs of an additional merger amount to approximately €80,000 - €100,000.<sup>207</sup>
- Similar rationale applies to conversions carried out through an SE transfer where the procedure for the transfer, without accounting for the creation of the SE, amounts to approximately €30,000<sup>208</sup>.
- Overall, it is important to note that the final cost reductions which companies will be able to enjoy depend on the final procedural rules adopted and on the compliance costs arising from these.

Overall, the combined impact of these would lead to efficiency gains to companies which could have an impact on consumers in terms of price and offer. Companies would be better adapted to market realities (volatile business opportunities appearing in some parts of the Single Market and disappearing in others), leading to increased competition. This would in turn have a positive impact on growth, jobs (net) and EU competitiveness through enhanced business opportunities in the Single Market.

### *Impact on Member States*

The package would cause costs for national administrations associated with the introduction of legislative rules at national level (preparation, consultation, adoption, adaptation of existing ones). In MS where there are no cross-border procedures or no rules on online registration the impact would be bigger than in other MS where such procedures exist and they would only need to be adapted. Moreover, there would be impact on national authorities such as registration bodies, courts or notaries which would have more cross-border cases to handle.<sup>209</sup>

There will especially be an impact on administrations in those MS where digital tools are not fully developed (e.g. BE, DE, NL, RO). However, as shown in the assessment of options related to digitalisation, the initial costs for IT development are recovered in the medium or even short term and the use of digital tools<sup>210</sup>, combined with the application of the once-only principle, bring benefits and efficiency in the longer term.

- For example, in the case of the Danish business register where, following the introduction of online registration and filing system, between 2011-2015 the

<sup>207</sup> EY study on cross-border operations of companies, p. 56.

<sup>208</sup> EY study on cross-border operations of companies, p.66.

<sup>209</sup> The impact is difficult to measure as it depends on too many variables: the increase of number of cross-border divisions and conversions per Member State. The overall increase does not tell us

<sup>210</sup> See also the costs of developing the system of online registration in Poland in Impact Assessment on the Single Member Company.

average time for case handling decreased by 69% and the average ramp-up time for a new employee decreased by 90%<sup>211</sup>.

In addition, the online registration together with well-structured business register will have positive spill-over effects on tax administration through better connection of company related data and tax data. Moreover, some costs deriving from the adaptation of IT systems could be borne by intermediaries and costs related to electronic identifications or electronic signatures are part of the more general costs of the modernisation of MS' digital systems.

MS would also incur administrative costs where they need to set up new administrative procedures, including collection of companies' and stakeholders' views, which would be for instance the case as regards the assessment concerning an artificial arrangement.

### *1.17.2 Impact on SMEs*

The impact on SMEs would be particularly significant, as they constitute 99% of all limited liability companies. SMEs are especially sensitive to the reduction of costs. They do not have in-house lawyers so in most cases SMEs have to rely on external expertise in cross-border situations. Therefore any initiative that increases legal certainty has significant positive impact on them thanks to the reduction of legal costs. Especially, cross-border conversions would be designed for SMEs, as bigger companies have today the means to perform alternative operations to reach the same results and SMEs do not. In addition, the use of digital tools for online registration and filing would reduce costs for SMEs by eliminating the need for physical presence and travel costs.

In particular, most SMEs (93%) in the EU have less than 10 employees (and do not have employee participation at board level). Therefore, those micro enterprises would not be impacted by the rules concerning employee participation. Those rules could only be exercised if a company was operating under the participation system or has at least 4/5 of the number of employees required for the application of the employee participation before division or conversion – but this would not be the case for at least for 93% of all SMEs.

The use of digital tools in company law should also stimulate entrepreneurship and innovation, as it would offer more chances to set up innovative start-ups. Given that SMEs employ 2 out of every 3 employees in the EU, this could lead to creation of new jobs (directly or indirectly)<sup>212</sup>.

### *1.17.3 Social impacts (impacts on social rights, fraud, access to information)*

The package includes measures which enhance employees' rights (discussed separately below), increase the access to information contained in business registers and reduce fraud. Research shows that in most cases it is impossible to establish any causal link

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<sup>211</sup> European Commerce Registers' Forum report, 2017, p. 56

<sup>212</sup> In 2015, SMEs generated €3.9 trillion in value added and employed 90 million people which equates to 67% of total non-financial business sector employment. Annual Report on European SMEs 2015/2016, European Commission



between the use of digital tools in company law and fraudulent or anti-social behaviour of companies. Moreover, it is shown that using digital tools has rather a positive impact by reducing undesired or fraudulent behaviour<sup>213</sup>. In cases of genuine suspicion of fraud, there is always a possibility of enhanced safeguards such as requesting physical presence before a notary or a lawyer.

Moreover, the package contains provisions which will contribute to the fight against negative phenomena often caused by letter-box companies.<sup>214</sup> In case of conversions, the company converting in another MS should not be able to circumvent the rules and create an artificial arrangement aimed at obtaining undue tax advantages or unduly prejudging the rights of minority shareholders, creditors or employees. Conversions should be driven by real business needs and carried out by companies which intend a genuine move to another MS. SMEs would be most interested in this possibility. In most cases small companies would move abroad for personal reasons or in order to seize a new business opportunity or have a new business partner, rather than for tax optimisation which is generally performed by larger companies or groups.

Although some cross-border operations (e.g. mergers) could lead to reduction in number of jobs, this should be balanced against the fact that the cross-border operation in question may have been the way to keep the business alive and avoid that all jobs could have been lost. The overall net impact in the EU should therefore be positive. In addition, as a result of the cross-border operations employees may also benefit from the employee participation system which otherwise they would not (in MS which do not provide for such an opportunity)

#### *1.17.4 Impact on employees (information, consultation, participation in the board)*

In case of cross-border operations by companies, the package would provide employees with enhanced protection across the Single Market compared to the situation today. The report on the impact of the cross-border operation (mergers, divisions and conversions) on jobs and situation of employees would provide information to employees or their representatives about the consequences of the operation on jobs as well as possible changes in employment conditions. Moreover, in those companies that already have an employee board level participation system, the cross-border divisions or conversions could not be completed without negotiation with the employees. This would mainly apply to large companies with a significant workforce (see the point on SMEs above).

In addition, according to the research, the use of digital tools in company law, such as online registration or filing, does not by itself create any negative effects on employees.<sup>215</sup>

#### *1.17.5 Impact on creditor and minority shareholders*

The introduction of harmonised rules for creditor protection and minority shareholders in cross-border operations would improve their protection in a cross-border situation

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<sup>213</sup> Optimity study on impacts of using digital tools

<sup>214</sup> For negative phenomena caused by letter-box companies, see ETUC' Project on letterbox companies - A hunters game : how policy can change to spot and sink letterbox-type practices, December 2016

<sup>215</sup> Optimity study impacts of using digital tools

compared to a situation today where the conflicting national rules or lack of such rules can result in varying treatment of these stakeholders or leave them without any protection at all. At present national solutions are applied to them which are often incompatible. MS could also introduce additional rules in line with their national traditions if deemed necessary.

#### *1.17.6 Impact on tax and state aid rules and other related policies*

The facilitation of creation of companies by digital tools together with the facilitation of cross-border operations (mergers, divisions, conversions) could negatively impact tax revenues in some MS (as a consequence of de-localisation of companies). Given the current state of harmonisation in the tax field, some companies may use cross-border operations to obtain tax benefits which could lead some MS to reduce their corporate tax rate to attract companies. However, this risk is mitigated by actions undertaken in the tax field to fight tax avoidance and increase tax transparency. Moreover, the cross-border operations, in particular cross-border conversions should be tax neutral in a sense that MS should receive the taxes that are due by companies even if a company is in another jurisdiction.

More precisely, Member States have adopted a number of measures to counteract corporate tax avoidance in recent years. On 8 December 2015, Member States adopted EU Council Directive 2015/2376<sup>216</sup> that provides for mandatory automatic exchange of information on advance tax rulings and advance pricing arrangements between Member States. In addition, Member States have adopted EU Council Directive 2016/881<sup>216</sup> that provides for mandatory automatic exchange of information of country-by-country reporting by MNE's. On 20 June 2016 the Council adopted the Directive (EU) 2016/1164<sup>217</sup> laying down rules against tax avoidance practices that directly affect the functioning of the internal market, including provisions on exit tax to prevent companies from avoiding tax when re-locating assets. Political agreement by Member States was reached on 13 March 2018 on the Commission proposal<sup>218</sup> for a Directive on mandatory disclosure by intermediaries for tax planning schemes, which is expected to be adopted shortly.

There should not be any direct impact on state aid rules.

The inclusion of clearer and more harmonised rules aiming at protecting companies' shareholders and at enhancing the scrutiny of the legality of the cross-border conversion, would also bring an additional step in the mitigating measures against the risks posed by organised crime organisations in the creation and business activities of legal entities, such as companies. This package would thus complement the ambitious rules that are already in place under Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and under which

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<sup>216</sup> [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en)

<sup>217</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_2016.193.01.0001.01.ENG&toc=OJ:L:2016:193:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2016.193.01.0001.01.ENG&toc=OJ:L:2016:193:TOC)

<sup>218</sup> [https://ec.europa.eu/taxation\\_customs/business/company-tax/transparency-intermediaries\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/transparency-intermediaries_en)

corporate structures should disclose their beneficial owners to entities in charge of applying anti-money laundering and terrorist financing requirements<sup>219</sup>.

#### *1.17.7 Impact on fundamental rights*

The package will facilitate the implementation of the rights of establishment in any MS, as prescribed by Article 15(2) of the Charter and ensuring the principle of non-discrimination on grounds of nationality (Article 21(2)). The proposed legal framework will enable companies to perform cross-border divisions and conversions and will make such mergers easier. The current legal uncertainty and lack of rules will not hinder anymore companies to expand their business to the MS' markets. Moreover, the proposed rules on the online registration and filing will make it more accessible for businesses to create enterprises in other MS.

There should be positive impact on companies benefiting from the opportunities offered by the Single Market, in particular concerning the freedom to conduct business set out in Article 16 of the Charter. The key obstacles to cross-border operation should be removed (at least for SMEs).

The proposal will have a positive impact on the right to property set out in Article 17 of the Charter insofar as shares can be considered under the concept of property. The safeguards proposed for shareholders in case of cross-border operations will ensure that the shareholders rights stemming from the shares are protected.

Although the initiative will provide rules for companies in the framework of company law, it will also contribute to the workers' right to information and consultation within the undertaking (Article 27 of the Charter) by providing more transparency for employees in case of cross-border operations of companies. Nevertheless, it will not change the current rules which provide for information and consultation of workers under EU law nor will it prescribe how such consultation and information should be effected.

#### *1.17.8 Impact on data protection*

The package will ensure the protection of personal data in line with Article 8 of the Charter. There will be at least some exchange of personal data, e.g. information about the person founding a company or its director in online registration, filing and also in necessary documents for cross-border operations (mergers, divisions, conversions). Also personal data would be accessible via business registers. As to the impact of the latter, the recent jurisprudence of the ECJ makes it clear that the disclosure of the data in registers is essential, since the only safeguards limited liability companies offer to third parties are their assets, which constitutes an increased economic risk for the latter. The Court held that it appears justified that natural persons who choose to participate in trade through such a company are required to disclose the data relating to their identity and functions within that company, especially since they are aware of that requirement when they decide to engage in such activity.<sup>220</sup>

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<sup>219</sup> The beneficial ownership information should, in addition, be held in a national central register.

<sup>220</sup> Judgment of the Court of 9 March 2017, Case C-398/15 *Manni*

### *1.17.9 The interlinkages between different policy issues*

The preferred options with regard to the use of digital tools and processes throughout a company's lifecycle relate to all limited liability companies and are, in most parts, independent from the companies' cross-border operations such as mergers, divisions and conversions. They relate to the establishment of companies and their functioning independently whether they merge, divide or convert cross-border. However, the use of digital tools and processes could be very useful to perform such cross-border operations.

The preferred options with regard to the cross-border operations are closely intertwined with each other, as the solutions proposed for cross-border mergers, in particular for creditor and minority shareholders' protection are the basis for solutions in cross-border divisions and conversions. However, each cross-border operation can be performed independently. The more cross-border operations are possible, the bigger is the choice for companies and bigger protection for stakeholders.

As to the cross-border conversions and conflict of laws, they are complementary in contributing to the initiative's objectives. However, the cross-border conversions procedure could improve the situation and address many of the problems identified without a separate instrument with conflict-of-law rules. Generally, the more harmonisation of substantive law is provided, the less need there is for conflict-of-law rules. The proposed options on conversions would establish a harmonised procedure for the cross-border conversions as well as harmonised rules for the protection of stakeholders. In addition, an instrument on the cross-border conversion procedure could contain some conflict of laws elements in the form of specific provisions clarifying that the company may change its applicable law and, in the interest of stakeholders, setting out which matters shall be covered by the 'old' law and which by the 'new' law. Those provisions would come into play to the extent that the respective rules are not harmonised in the substantive part, including on the protection of minority shareholders and creditors.

## **1.18 Subsidiarity and proportionality of options**

As regards the principle of proportionality, the proposed EU action seems suitable to achieve the legitimate objectives of cutting the costs for companies and providing protection to stakeholders and thus comply with the proportionality principle. Also based on efficiency analysis, the cost and benefits of every option for companies, stakeholders and MS, it appears that the proposed actions do not go beyond what is necessary to achieve the aim and that positive impacts of the proposed measures exceed the possible negative impacts.

## **1.19 Choice of legal instrument**

To ensure legal certainty, the online registration of companies and the filing requirements as well as the rules on cross-border operations such as mergers, divisions and conversions should be embedded in law and be enforceable in the MS' legal systems. Self-regulation is, therefore, excluded.

A recommendation would not succeed in creating uniform set of rules in all MS and would not be able to change already existing requirements which are laid down in

national laws. Also at EU level the law of companies is regulated by legislation (Directive (EU) 2017/1132) and not by recommendations or communications.

Thus, in order to achieve the objectives mentioned in part 4 of this IA, the EU must act via legislation. For company law operations, the legal basis is Article 50 TFEU which does not leave a choice of instrument to the European legislator. The only available instrument is a directive.

Concerning the harmonisation of conflict of law rules, the legal basis is Article 81 TFEU<sup>221</sup>. Since the desired legal certainty of conflict of law rules can only be achieved through a Regulation with direct application in all participating MS, the appropriate legal instrument is a Regulation. This choice is in line with a longstanding tradition of adopting uniform rules of private international law by means of Regulations (see the Rome I and Rome II Regulations, the Insolvency Regulation, the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments).

## **MONITORING AND EVALUATION**

The Commission will monitor the implementation of the chosen package of preferred policy options and will assess the progress achieved in meeting the objectives. In this activity, the Commission will cooperate closely with national authorities e.g. the national company law experts in the Company Law Expert Group (CLEG), business associations, trade unions, company law experts and any other relevant stakeholders in this area. The provision of information for monitoring and evaluation should not impose any unnecessary administrative burden on the stakeholders concerned.

### **1.20 Monitoring**

Initially, the Commission would closely follow the implementation of the chosen package of preferred policy options to ensure that they were clearly and consistently transposed and implemented by MS. In that context, the Commission may provide assistance and guidance (e.g. by organising implementation workshops or providing advice on bilateral basis). CLEG could also provide a good forum for exchange of best practices.

In the mid-to-long term, the Commission would focus on monitoring the effects of the initiative, in particular to what extent it will succeed in meeting the objectives defined in section 4.1. of this impact assessment.

The following main indicators would be used for the purposes of this monitoring:

To what extent the initiative has reached its goal of cutting unnecessary costs and burdens for companies could be assessed on the basis of the following indicators:

- monitoring trends in cross-border activities of companies:

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<sup>221</sup> Legislation adopted under this legal basis will not bind DK, while the UK and Ireland will have the possibility to opt in.

- through the numbers of cross-border mergers, divisions and conversions (these numbers can be collected via BRIS as there will be notifications sent for each of these operations through the system);
- through the numbers of cross-border online registration; national registers would need to collect data on the nationality of the founder or the place from which it performs its operation (where possible, this data could be collected at the occasion of the identification in the course of the registration procedure through eIDAS);
- monitoring costs of companies' operations within the scope of the initiative:
  - through collection of costs for online registration (in some MS, these costs might include the costs for compulsory involvement of intermediaries in the process; these would be included where possible);
  - through collection of costs for cross-border mergers, divisions and conversions (such costs could only be collected from companies directly, as they might be confidential it would appear difficult to obtain these costs; it could be attempted to collect such costs through studies, surveys or other stakeholder contacts).

To what extent the initiative has reached its goal of offering effective protection to the other stakeholders (employees, creditors, minority shareholders and third parties) would be monitored on the basis of the following indicators:

- the number of requests for free data on the European e-Justice portal (this data would be available through BRIS);
- whether and to what extent stakeholders and stakeholder organisations indicate satisfaction with the protection of their rights in the relevant cross-border operations;
- absence of an accumulation of court cases or complaints in the area.

In order to gather the required data, it would be necessary to include some reporting obligations for MS to provide annual statistic data on the numbers of cross-border online registration and the costs for online registration. With a view to gathering the required stakeholder input, the Commission could send questionnaires to stakeholders or organize specific surveys.

The Commission would also monitor which rules were introduced/maintained by MS which would go beyond the minimum standards of protection in cross-border divisions and conversions (notification requirement).

## 1.21 Evaluation

An evaluation of the chosen package of preferred policy options should be carried out in order to assess the impact of the actions and verify if the objectives have been achieved. It would be carried out by the Commission on the basis of the information gathered during the monitoring exercise and additional input collected from the relevant stakeholders, as necessary. An evaluation report could be issued 5 years after the end of the transposition period.

In particular, the evaluation could focus on whether:

- there has been any change in cutting the costs of setting up companies abroad and performing filing digitally ;
- there has been a cut in costs in performing cross-border mergers, divisions and conversion and whether any other practical problems for such operations remain;
- there has been increase in protection of stakeholders (especially position of employees, creditors and minority shareholders);
- the actions have been consistently implemented in MS legislation and what justification is given to possible further-going measures in specific MS, with specific focus on key elements, such as digital tools, protection elements in cross-border operations and conflict-of law rules, and whether any additional relevant developments have taken place at national level, and what possible problems may come up.

## **ANNEX 1: PROCEDURAL INFORMATION**

### **1. Lead DG**

DG Justice and Consumers (DG JUST)

### **2. Agenda planning and Work Programme References**

The Agenda Planning Reference is PLAN/2017/1091.

The company law initiative to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions was mentioned in the Commission Work Programme for 2017<sup>222</sup>. Uniform rules on applicable law to companies were called for in the 2009 Stockholm Programme. The company law initiative may consist of measures in the following areas:

- Use of digital tools and processes throughout a company's lifecycle
- Cross-border mergers
- Cross-border divisions
- Cross-border conversions
- Conflict of law rules

### **3. Inter-Service Steering Group**

An Inter-Service Steering Group (ISSG) was set up in 2017. The ISSG met three times in preparation of this impact assessment: on 25 April 2017, 29 June 2017 and 7 September 2017.

The following services were consulted: BUDG, CNECT, COMP, DIGIT, ECFIN, EMPL, FISMA, GROW, JUST, LS, MOVE, TRADE, TAXUD. The feedback received from services has been taken into account in the impact assessment.

### **4. Consultation of the Regulatory Scrutiny Board**

The Impact Assessment Report was examined by the Regulatory Scrutiny Board on 11 October 2017. A negative opinion of the RSB was issued on 13 October 2017. The recommendations below were put forward. They were addressed in a revised version of the Impact Assessment submitted to the Board on 20 October 2017. The Board gave a positive opinion with reservations on 7 November 2017.

<b>RSB considerations of 13 October 2017</b>	<b>How taken into account?</b>
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<sup>222</sup> COM(2016) 710, 25.10.2016, Annex I on new initiatives.



<b>Main considerations</b>	
<p>(1) The report does not adequately document the scope of the initiative and explain why it assesses five different issues separately in the same impact assessment.</p>	<p>The scope of the initiative has been specified (section 1.3). It is also explained (section 1.3) why five different issues are treated in the same impact assessment. A diagram has been included to show the interrelations of the different elements. It is now clearly explained (section 1.3.) that all the parts of the package are complementary and together achieve the objectives. It is also clarified that the impact assessment aims at informing the political decision whether action needs to be taken in all of the five areas or only in selected ones.</p>
<p>(2) The report does not sufficiently establish how big the alleged problems are, explain the timing of the initiative, or show how the initiative relates to existing EU legal acquis, related EU policies and planned initiatives.</p>	<p>Additional information about the size of problems (introduction to Chapter 2, sections 2.1., 2.3. and 2.4) has been introduced. Also the need for the initiative has been explained, particularly stressing the political context of the package and its parts (different sections in Chapter 2) and some current factors adding to the urgency (section 2.4.1). References to stakeholder calls for the initiative have been added in particular throughout chapter 2. More description has been included on how the various components of the package relate to existing acquis and related policies. The comments have been implemented in particular in sections 1.1., 3.2, 4.2 and 5.2.</p>
<p>(3) The policy options are not sufficiently developed. Their descriptions lack important details, including about possible choices regarding practical implementation.</p>	<p>The policy options and their assessment, in particular on digitalisation (section 5.1) and on cross-border operations (section 5.2) have been significantly developed including the practical implementation. In the section on cross-border operations, the question on whether to introduce new harmonised procedures for cross-border conversions and divisions is now assessed as a separate option (section 5.2.1). Discarded options have been added (sections 5.2 and 5.3). For the conflict of law part the IA also develops further options, e.g. on worker participation (section 5.3.3.1).</p>
<p>(4) The impact analysis does not</p>	<p>Given that the options have now been</p>

sufficiently examine how the different options might affect interests of employees, creditors and minority shareholders.	developed and described in great detail, the impacts, in particular on employees, creditors and minority shareholders (see in particular sections 5.2.1, 5.2.2, 5.2.3) have also been clearly described. The impacts on companies have also been further developed, in particular by clarifying that the specific policy options in cross-border operations have to be assessed as part of the new harmonised procedural framework for companies (see sections 5.2.1 and 6.2).
(5) The report does not justify convincingly the choice of the preferred policy options.	The weighing of the options and the balance of costs and benefits have been developed (in particular sections 5.2.2, 5.2.3 and 5.2.4.) Justifications as regards the choice of the preferred policy options have been specified, taking into account the criteria of effectiveness, efficiency, impact on MS and political feasibility (the whole chapter 5).
<b>(C) Further considerations and adjustment requirements</b>	
<b>(1) Scope and problem definition</b>	
The report should better explain the historical and regulatory context of the initiative. The report should clarify how it relates to other EU legislation on cross-border operations, and to policy initiatives such as the European company directive, the single digital gateway, and EU online registration facilities. It should also explain why it deals separately, in the same impact assessment, with five different issues.	<p>Explanations on the historical and regulatory context of the initiative have been added (section 1.3).</p> <p>Explanations as regards the interrelations between other pieces of existing legislation and the recent proposals adopted by the Commission have been added (sections 1.1, 3.2, 4.2 and 5.2).</p> <p>Also the question of five different issues in the same impact assessment has now been explained (See in particular sections 1.3, 6.2)</p>
The report should elaborate on the magnitude and the timing of the problems, referring to e.g. recent case law or demands from the private sector, the European Parliament or the Council. The report should demonstrate more responsiveness to stakeholder views, accounting for critical ones (e.g. from notaries) and explain how these have been taken into account.	More information about the magnitude of problems as well as references to the views of stakeholders and recent case-law of the Court has been added. The responsiveness to stakeholder views, including the ones from notaries and trade unions has been described and explained how these have been taken into account (see in particular section 1.1, modifications throughout chapter 2 and section 5.1).
For cross-border mergers, the annex	Taking into account the limitations in the

<p>should further specify the areas where the initiative is expected to further improve the current cross-border mergers regime. It should supplement the reported stakeholders' views with more data and economic analysis.</p>	<p>availability of data, the annex on cross-border mergers has been further developed. The areas where improvement is expected have been specified and additional available information has been added (Annex 5). Data limitations have been clarified.</p>
<p><b>(2) Policy options</b></p>	
<p>The report should flesh out the policy options. It should more fully describe their features and implementation details, and clarify the main differences across the policy options. The report should also show how options relate to the existing legal acquis (including as regards employee involvement, which comprises information, consultation and participation). In the section on options, the report should clarify the differences in regime between cross border merger, division and conversion, noting differences in the protection for employees, creditors and minority shareholders per operations.</p>	<p>The policy options and their features, in particular in digitalisation and in cross-border operations have been fully described. The relation to the existing acquis, including in particular social acquis has been explained (sections 1.1, 3.2, 4.2 and 5.2). The differences between cross border mergers, division and conversions as well as the link between substantive harmonisation of company law and uniform conflict of law rules has also been clarified (sections 5.2, 5.3 and 6.2).</p>
<p>In relation to the real seat discussion, the report should clarify how it defines economic activity. It should further explain on what grounds the option has been discarded to harmonise the connecting factor on the basis of the real seat. The report should also show how the preferred option would be an improvement over the status quo with regard to addressing conflicts of laws.</p>	<p>It is clarified that, when it is not possible to determine the connecting factor on the basis of the general rule, the default connecting factor is the place of the company's central administration at the moment of the formation of the company (section 5.3.3.1). It is further explained that the underlying case law on the basis of which the option of a real seat as a main connecting factor is not compatible with the Treaty (section 5.3.3.1), as well as the reasons why the preferred option is an improvement over the status quo (section 5.3.1.3).</p>
<p>The report should do more to anticipate problems with practical implementation of the options (e.g. recognition of electronic signatories) and discuss ways to address these.</p>	<p>The on-line procedure has been explained including how the issue of digital signatures is to be tackled (section 5.1).</p>
<p><b>(3) Impact analysis and comparison of policy options</b></p>	
<p>The report should attempt to quantify costs</p>	<p>The costs and benefits have been</p>

<p>and benefits as far as possible (in particular administrative costs for enterprises and the costs for public administrations). It should document methodologies, underlying assumptions and the sensitivity of the results to these assumptions. As the analysis has both qualitative and quantitative elements, the report needs to clarify the basis on which the preferred policy options were selected. What criteria does it use to assess the trade-off between the two specific objectives (cost/burden reduction for companies and cross border protection of employees, creditors and minority shareholders)?</p>	<p>quantified as far as possible in much more detailed way than in the original version of the IA. A separate new Annex (now Annex 8) has been added. It explains the methodologies for cross-border divisions and conversions, underlying assumptions and the sensitivity of the results. Annex 9 on calculation methods for potential savings through better use of digital tools has been further developed. The reasons for selecting preferred options are greater elaborated upon (section 5 and Annex 8).</p>
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<b>RSB considerations of 7 November 2017</b>	<b>How taken into account?</b>
<p><b>Main consideration</b>  (1) The report does not take into account the latest CJEU case law (Polbud judgement of 25 October 2017). It does not assess any potential implications for the scope of the initiative, the problem definition and the baseline, as well as for the policy options (the real seat proposal for cross border conversions, conflict of law rules, safeguards for stakeholder protection).</p> <p><b>Further considerations and adjustment requirements</b>  (1) The European Court of Justice issued a judgement on the case C-106/16 (Polbud), i.e. after the date of the second submission of the impact assessment. The report should be revised to take this judgement into account. It should explain its consequences for the relevant parts of the report (conversions, conflicts of law). It should adapt, if appropriate, the scope of the initiative, the problem definition, the baseline, the policy options and the impact analysis.</p> <p>In particular, the revised report should analyse whether and to what extent the Court ruling may have a bearing on the design of the policy options for cross-border conversions (section 5.2.4), especially regarding: (a) the proposed</p>	<p>The Impact Assessment has been revised to take into account the Polbud judgement of 25 October 2017 which was published after the second submission of the Impact Assessment to the Regulatory Scrutiny Board. Only when the Polbud judgement has a bearing on the relevant description or assessment, this has been explicitly explained and the report has been modified accordingly. These concern mainly sections (2.4.1, 2.4.2 and 5.2.5) related to cross-border conversions.</p> <p>In particular, the section 5.2.5 on the prevention of cross-border conversions for fraudulent purposes has been adapted. Following the Polbud judgement a solution whereby the company carrying out cross-border conversion would need to transfer the registered office together with the head office to the destination MS could not be envisaged any more. Therefore, the report now assesses other equivalent means to address abuse, risk including fighting against use of letter box companies for abusive purposes.</p>

<p>safeguards for employees, creditors or minority shareholders and (b) the prevention of cross border operations for fraudulent purposes (letterbox companies) and forum shopping.</p> <p>In the same vein, the report should elaborate on any implications the Court judgement may have for the policy options regarding the conflict of law rules, paying particular attention to safeguards for employees, creditors or minority shareholders.</p>	
<p><b>Main consideration</b></p> <p>(2) The report expresses uncertainty as to the final scope of the initiative. But it does not present clearly the interactions between the different elements in order to facilitate the political decision on the specific content of the initiative.</p> <p><b>Further considerations and adjustment requirements</b></p> <p>(2) Beyond the analysis of the overall impacts of the preferred policy package (section 6.2), the report should explain the extent of the interlinkages between the five policy issues. It should assess any risks or implications that may result from a reduced scope of the initiative.</p>	<p>A new section 6.2.9 has been added to explain the interlinkages between different policy issues.</p>
<p><b>Main consideration</b></p> <p>(3) The report does not elaborate on the practical implementation of the policy options and does not explain how the policy options were composed. This is particularly lacking for the definition of the safeguards.</p> <p><b>Further considerations and adjustment requirements</b></p> <p>(3) The report should be more explicit on certain practical aspects of the policy options:</p> <ul style="list-style-type: none"> <li>• Regarding the online access to company information, the report mentions that physical presence may be required for the recognition of the electronic signatories. As this seems to take away the main difference between options 1 and 2, further clarification would be useful.</li> </ul>	<p>The report has been modified to provide additional information. In particular, the section 5.1.1.1 on description of options related to online registration (creation of a company as legal entity) and filing of documents to the business register has now been developed to explain: 1) what does the physical presence required for the recognition of the electronic signatories mean and 2) how this is related to prohibition of physical presence when completing these procedures online.</p> <p>In addition, the report has been modified to explain why various policy measures were bundled into policy options and why the many policies composing option 2 were selected (section 5.2.2). The sections 5.2.3 and 5.2.4 have also been modified.</p>

<ul style="list-style-type: none"> <li>• The report should be more transparent on how the various policy measures were selected and then bundled into policy options. In particular, regarding employee protection, the policy options are now more developed. However, the report should explain how and why the many policies composing option 2 were selected. It should be more specific on the safeguards for creditors and minority shareholders protection. It should also indicate what proportionate safeguards are.</li> </ul>	
<p><b>Main consideration</b></p> <p>(4) The report does not substantiate sufficiently the selection of preferred policy options and makes no clear difference between economic/social criteria and political considerations. It does not provide credible reasons for discarding certain policy options.</p> <p><b>Further considerations and adjustment requirements</b></p> <p>(4) The report should further clarify the criteria for the selection of the preferred policy options. It should also explain, without referring exclusively to political preferences, why it discards certain policy options (such as the full harmonisation of incorporation requirements at EU level). The report should focus on explaining the economic and social pros and cons of the policy options.</p>	<p>The report now clarifies the difference between economic/social and political considerations. In particular, section 5.2.2.3 has been modified to explain how the preferred option contributes to the wider political agenda.</p> <p>The report has been developed to explain why the full harmonisation of incorporation requirements does not fall under the scope of Impact Assessment.</p>

## 5. Studies and consultation to support the Impact Assessment

The impact assessment is based on existing research/analyses done by the Commission over the last years:

- Bech-Bruun/Lexidale, Study on the application of the cross-border mergers directive (September 2013),
- LSE, Study on the law applicable to companies (June 2016),
- Everis, Study on digitalisation of company law (draft final report available)

- Optimity, Study assessing the impacts of using digital tools in the context of cross-border company operations (draft final report available)
- EY, Study on cross-border transfers of registered offices and cross-border divisions of companies (draft final report available).

Valuable input has also been found in several other studies, for example:

- Jonathan Cave, Maarten Botterman (GNKS Consult BV), Simona Cavallini, and Margherita Volpe (FORMIT): "EU-wide digital Once-Only Principle for citizens and businesses - Policy options and their impacts" (2017)
- Ecorys Netherlands in association with Mazars: "Study about administrative formalities of important procedures and administrative burdens for businesses" (2017)
- European Parliamentary Research Service, Reynolds/Scherrer: "Ex-post analysis of the EU framework in the area of cross-border mergers and divisions" (2016)
- European Added Value Assessment: "Directive on the cross-border transfer of a company's registered office 14th Company Law Directive"
- J. Schmidt: "Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?". Study for the JURI Committee (June 2016).

## **ANNEX 2: STAKEHOLDER CONSULTATION**

The Commission has actively engaged with stakeholders and conducted comprehensive consultations throughout the impact assessment process. The consultation strategy<sup>223</sup> set out a number of actions for the Commission to organise as part of the consultation process, notably an online public consultation, stakeholder meetings including discussions with Member State experts in Company Law Expert Group and Civil Law Committee Expert Group, and with academic professors and practitioners in ICLEG (expert groups) as well as with the European Judicial Network on Civil and Commercial matters. The consultation strategy also included several studies. In addition, the Commission made use of public consultations carried out since 2012 and previous research.

The information gathered through all these means fed into the impact assessment. The views of different stakeholders are indicated throughout the impact assessment where relevant.

This annex summarises the results of the stakeholder consultation process with an emphasis on the public consultation of 2017.

### **1. FEEDBACK RECEIVED ON THE INCEPTION IMPACT ASSESSMENT**

The Commission received two reactions to the Inception Impact Assessment. One was submitted by a national authority - Legal Policy Department Austrian Federal Economic Chamber, the second by the academic/research institution originating from Italy.

The Austrian Economic Chamber expressed its general support for the introduction of digital tools in the company life-cycle, however they were sceptical about abolishing the physical presence or other means of the identification of individuals and replacing it with fully online procedures, as it might lead to misuse or manipulation in case of fraudulent intention of applicants. The Italian academics showed a great support for cross-border operations, especially for SMEs, which would offer the chance to expand their activity.

### **2. PUBLIC CONSULTATIONS**

#### **2.1. Summary of the public consultation of 2017**

##### **2.1.1 Overview**

The online public consultation, entitled "EU Company law upgraded: Rules on digital solutions and efficient cross-border operation", was launched on 10<sup>th</sup> May 2017 and ended on 6 August 2017. Its aim was to collect input from stakeholders on problems in company law, gather what evidence they have on such problems and hear their possible solutions on how to address the problems at EU level.

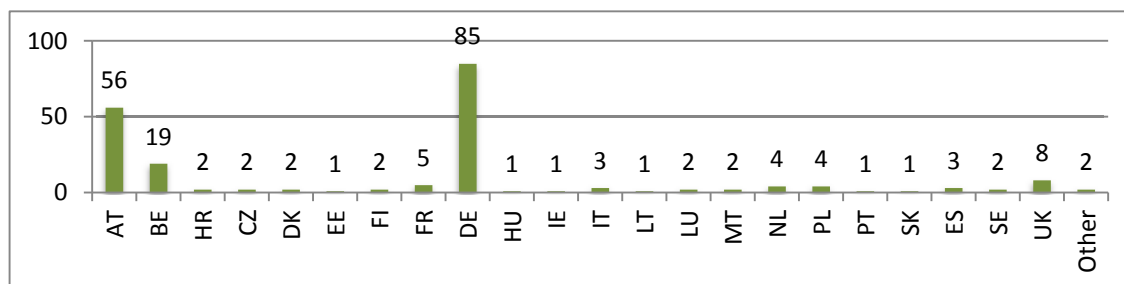
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<sup>223</sup> [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2377472\\_en#initiative-details](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2377472_en#initiative-details)



There were 207 responses submitted online through the EU Survey portal and 2 responses submitted via email. The MS with the most number of contributions was Germany followed by Austria and Belgium.

Figure 1: Numbers and origin of all respondents



The responses came from various stakeholder groups such as national public authorities, regional public authorities, business organisations, notaries, trade unions, private businesses, national business registers, legal academics as well as private individuals.

11 contributions were received from national public authorities of EU MS (AT, HR, CZ, DE, DK, EE, FI, FR, HU, MT and PL) and 1 contribution from an authority of a third country (LI). The national public authority from Germany submitted a position paper to the consultation as opposed to a direct response to the questions asked on EU Survey. Therefore, their comments will be harvested in the analysis but excluded in the percentage breakdowns.

Out of the 207 total responses, 122 responses were received from individuals responding in their professional capacity and 87 responses from individuals in their personal capacity. Within the 87 personal responses 61 responses shared nearly identical views on digitalisation and cross-border mergers and all came from 2 MS (32% from Germany and 68% from Austria). It was identified that these replies came from notaries who replied in their private capacity. Furthermore, 8 of the 11 regional public authorities that replied to the consultation came from regional chambers of notaries in Germany. For the purposes of this consultation, all notaries, notary chambers and notaries who replied in private capacity will be treated collectively as one group called "notaries".

Notaries were the largest stakeholder group represented and they make up approximately 47% of all of the responses received (36 responses from notaries acting in their professional capacity while there were 61 responses from notaries replied in their private capacity). This was followed by business organisations (25 responses), trade unions (22 responses), private individuals (22), research institutions & academic views (14) and Public Authorities (12). Other views came from legal practitioners (4) legal associations (4), private businesses (5), regional ministries (2) and national business registers (2).

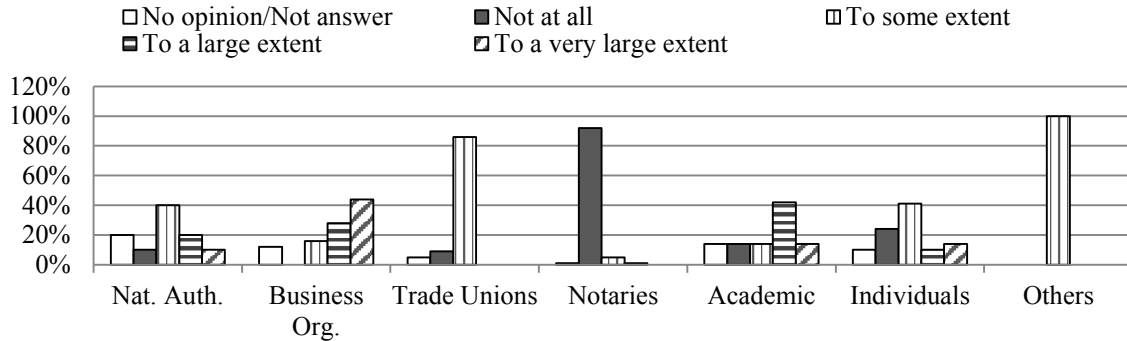
### 2.1.2 Analysis of the results

The following section will provide an analysis of the stakeholders views on all of the areas addressed in the consultation (digital processes or tools throughout the lifecycle of a company, cross-border operations and conflicts of law rules).

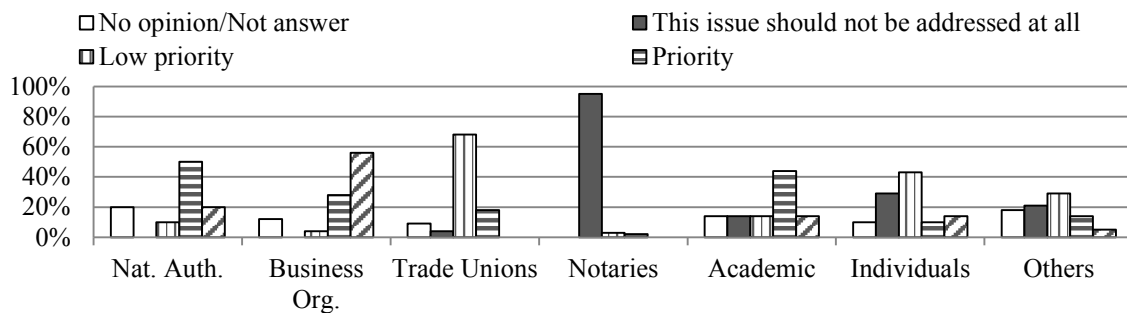
## I. The use of digital tools and processes throughout the lifecycle of a company

### i. Digital interactions between companies and Member States' authorities

**Question:** To what extent do the differences between Member States' laws or the overall lack of a legal framework, in the area of digitalisation in regards interactions with business registers constitute obstacles to the proper functioning of the single market?



**Question:** To what extent does the introduction of new measures in this area to rank as an EU priority?



The public authorities that replied to the consultation considered this to be a priority for the EU with 9 offering positive responses. Notably, the response of the Polish government illustrated the benefits of digitalisation and having an efficient online company register by disclosing that there was a 47.25% increase in the birth-rate of Polish companies in 2015 since it first began accepting online registrations in 2012. There was 1 public authority that did not feel that the lack of legislation was causing a problem.

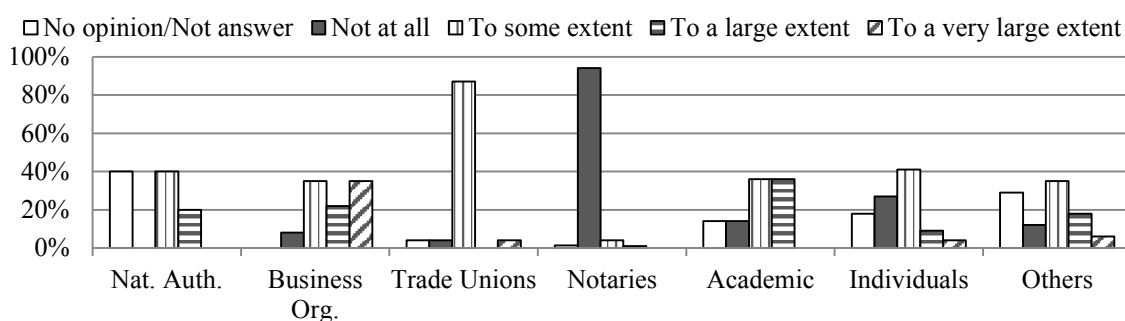
Business organisations were supportive of all of the legislative initiatives in this area (particularly end-to-end registration, electronic identification standards and the once-only principle and deemed it to be a strong EU priority for fostering economic activity and removing undue barriers for companies wishing to operate cross-borders. The majority of trade unions (i.e. 87% of the trade unions which replied) expressed moderate support for a legislative initiative in this area. They are primarily concerned with safeguards and would like to see the real seat as a precondition to online registration.

Academics and research institutions were also broadly in favour of a legislative initiative in this area with circa 68% deeming to be a priority issue. End-to-end registration/filing and safeguards being were highlighted as key points to address.

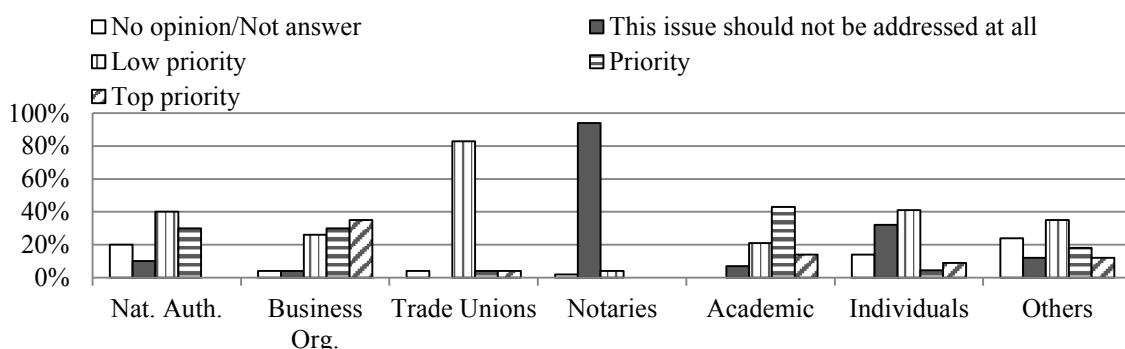
Notaries almost unanimously rejected the notion of the lack of legislation being problematic and strongly felt that the EU should not be addressing this issue at all. They made up 85% of the overall respondents who felt the EU should not be touching digitalisation.

## ii. The use of digital tools for interactions between companies and shareholders

**Question:** To what extent do the differences between Member States' laws or the overall lack of a legal framework, in the area of digitalisation in regards to corporate governance constitute obstacles to the internal market?



**Question:** To what extent does the introduction of new measures in this area to rank as an EU priority?



The national public authorities offered a mix response in regard to digitalisation from corporate governance prospective as 6 public authorities noted that, to some extent, the lack of legislation on the matter is problematic while there were 4 public authorities that did not have any express views on the matter. Notably, the Estonian Ministry for Justice submitted that the EU should not be regulating this issue at all. The chief corporate

governance issues highlighted national public authorities concerned participation and voting in general meetings (6 positive responses), communication outside of general meetings (6 positive responses) and, to a lesser extent, the communication with shareholders on general meetings (5 positive responses).

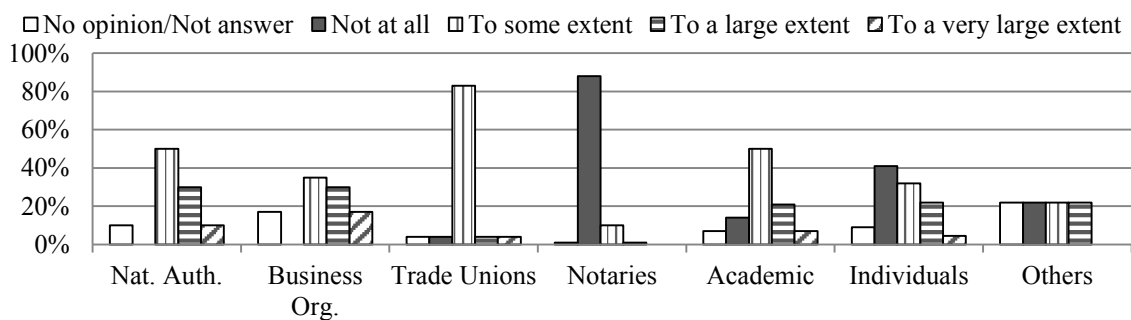
Conversely, business organisations offered roundly positive feedback as approximately 90% considered the lack of legislation on this matter to be problematic and an EU priority. Notably, 35% of business organisations were strongly of the opinion that that the lack of legislation is highly problematic and that the introduction of EU measures should be a top priority. Communication with shareholders regarding general meetings (70%), participation and voting at meetings (65%) and communication outside of meetings (52%) were highlighted as key points of concern.

Similar to digitalisation aspects discussed in section 2.1.3.1, notaries were strongly against the introduction of new measures in this area, the majority of trade unions were tentatively receptive to reform while the majority of research and academic institutions were supportive of new initiatives. Trade Unions were particularly strong on the use of digital tools for shareholder identification and felt that not only companies but also their workers should have easy access to this information.

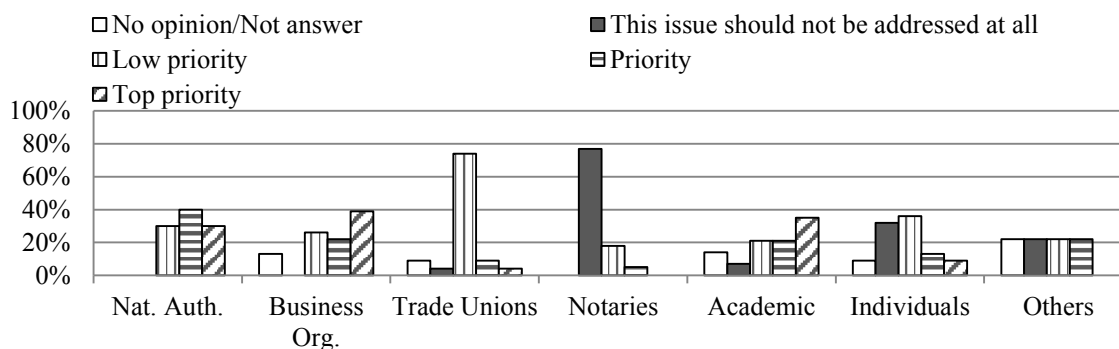
## II. Cross-border Mobility

### i. Cross-border mergers

**Question:** To what extent do the differences between Member States’ laws or the overall lack of a legal framework, in the area of cross-border mergers constitute obstacles to the proper functioning of the single market?



**Question:** To what extent does the introduction of new measures in this area to rank as an EU priority?



The majority of the national public authorities that responded to the consultation were of the opinion that there are problems with the existing Cross-border Merger Directive and that those problems do constitute obstacles to the internal market but to a varying degree (6 agreed to some extent, 3 agreed to a large extent and 1 agreed to a very large extent). When asked if they could illustrate the size of the problems, it was disclosed by the Polish Ministry of Justice that the number of cross-border mergers taking place involving Polish companies is very low (hardly a dozen). In terms of prioritisation, there was a mixed response as there were 3 authorities that considered the introduction of new directive to be a top priority, 4 a priority and 4 a low priority.

In respect of safeguards, all national public authorities which replied were of the opinion that creditor protection measures should be addressed while 70% were of the opinion that minority shareholder protection measures should also be addressed. 80% felt it important to harmonise procedural as well material aspects of creditor protection and 50% feel that it is important for minority shareholders to be able to block the merger and oppose the share exchange.

Business organisations also broadly welcome the need to amend the directive for cross-border mergers with a majority of 40% considering this to be top priority, 22% considering this to be priority and 22% considering this a low priority. Points raised by business organisations concerned simplification of rules (fast-track procedure), harmonised rules for creditor and minority shareholder protection, simplified employee protection rules and removing the requirement for merger procedures to be signed before public notaries as is the case in certain MS.

Similarly, trade unions were also receptive of the need to modify the cross-border merger rules - 83% agreeing that the problems with the existing directive to some extent constitute obstacles to the proper functioning of the internal market and 73% considering reform to be a low priority. However, they are primarily concerned with strengthening employee protection by way of stronger information, consultation and participation rights.

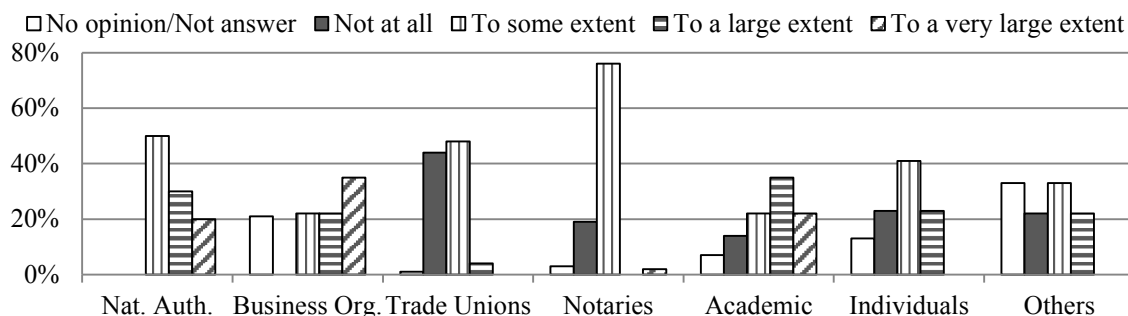
The prevailing view from the academics and research institutions was that the lack of harmonised as well as simplified rules circumvents the full effectiveness of the directive (30% to a large extent and 43% to some extent). However, there were 2 research institutions that heeded caution in this regard due to the social consequences stemming from cross-border mergers.

Conversely, notaries were overwhelmingly of the opinion that the existing directive functions very well and they do not see the need for any EU measures in this regard (88% and 77% respectively).

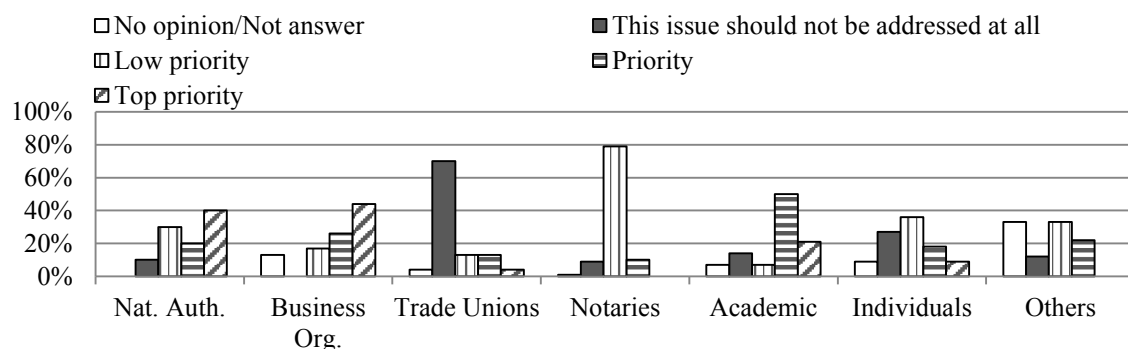
Legal groups such as the Deutscher Anwaltsverein and the Bar Council of England and Wales called for simplified procedures such as the possibility to omit a joint merger report in certain situations as well as providing a merger procedure allowing the company to merge only part of their business rather than in its totality.

## ii. Cross-border divisions

**Question:** To what extent do the differences between Member States' laws or the overall lack of a legal framework, in the area of cross-border divisions constitute obstacles to the proper functioning of the single market?



**Question:** To what extent does the introduction of new measures in this area rank as an EU priority?



The majority of public authorities were in favour of new rules for cross-border divisions and they marginally appear to deem an initiative in this area as an EU priority more so than cross-border mergers (4 authorities considering this a top priority, 3 a priority and 3 a low priority). It was highlighted by the Finnish Ministry for Justice that the lack of a division procedure in certain MS means that divisions to and from such MS are extremely difficult if not impossible. Regarding issues concerning stakeholder protection, some public authorities highlighted the importance of having strong rules on employee protection for divisions while others felt that whatever is decided for mergers should also apply for divisions.

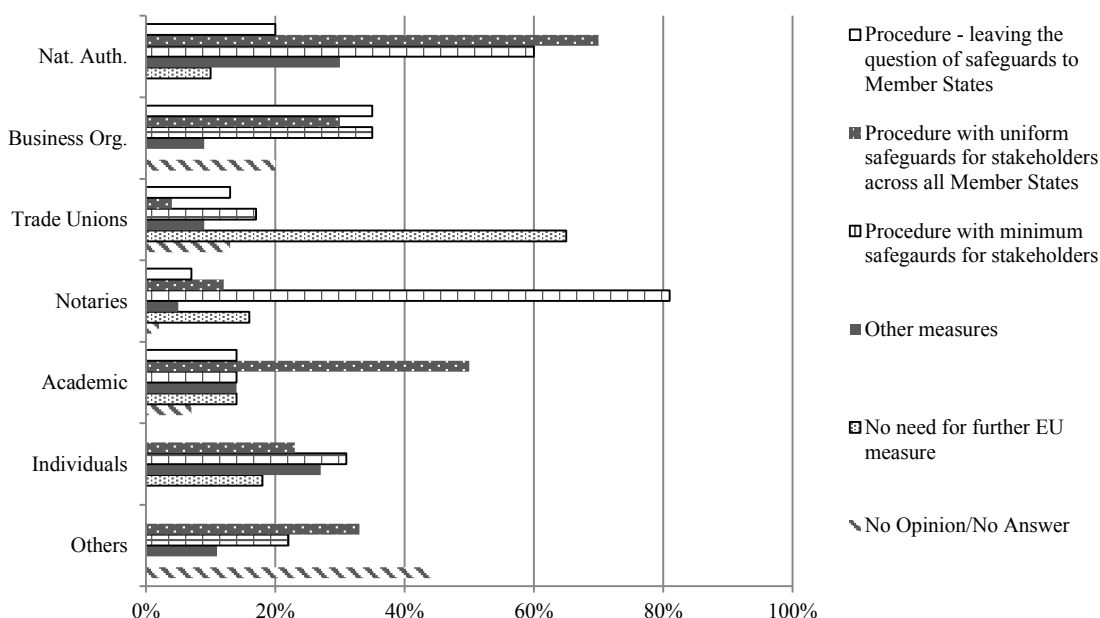
The business organisations were strongly in favour of new rules as 44% considered this to be a top priority and 26% viewed this as a priority. The vast majority of business organisations viewed the lack of procedural rules for divisions as constituting an obstacle to the proper functioning of the internal market. Furthermore, it was submitted by several organisations that its procedural framework should follow what is in the existing Cross-border Merger Directive.

Notaries also appear to support divisions with the vast majority (80%) expressing moderate support for new rules by deeming it a low EU priority. They feel that the procedure for divisions should be identical to what is in the existing Cross-border Merger Directive (i.e. no harmonised rules for stakeholder protection or fast-track procedure).

Trade Unions were extremely sceptical regarding divisions due to the dilution of employee protection thresholds and the risk of appropriating employees and liabilities in a financially weaker company – 70% of Trade Unions were of the opinion that the EU should not be legislating for this. ETUC commented that should MS decide favourably for divisions, rules concerning information and consultation of employees would have to be strengthened.

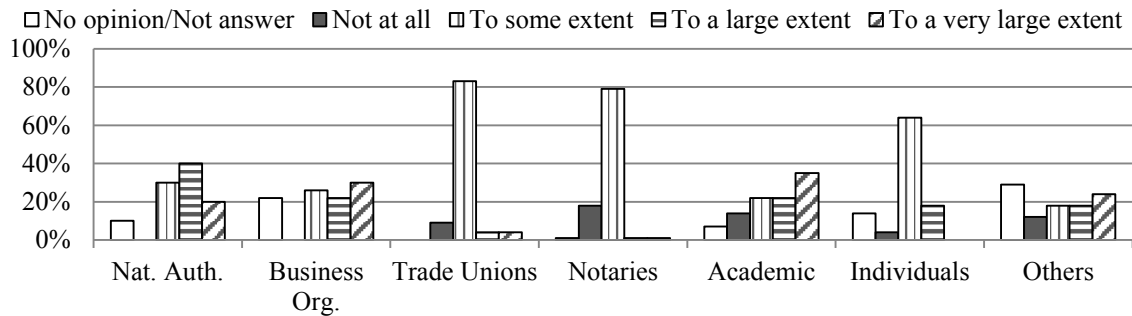
Approximately 70% of academics were in favour of the introduction of procedural rules and that it should follow what is/will be laid out for mergers. It was submitted by one academic that should minimum safeguards be applied, and MS in turn go beyond and provide stronger protection for stakeholders, the Commission should be notified and the safeguards be published.

The following graph provides an overview of the feedback received from stakeholders when asked what areas a possible instrument on of cross-border divisions could address:

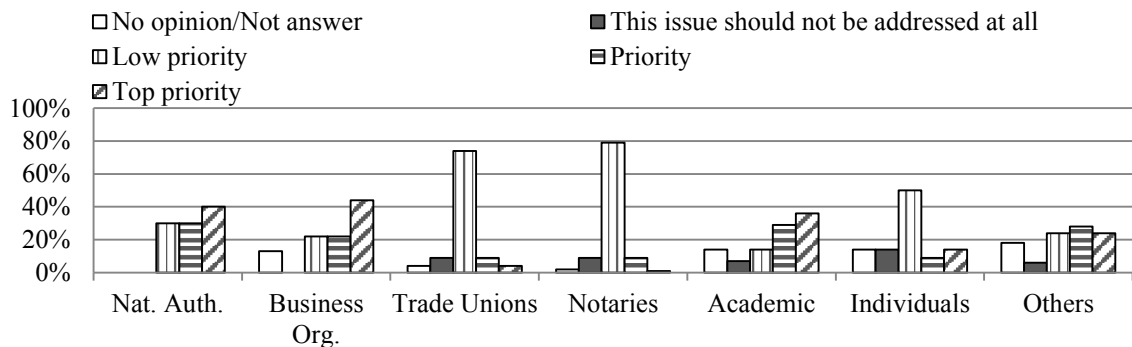


### iii. Cross-border conversions

**Question:** To what extent do the differences between Member States' laws or overall lack of a legal framework, in the area of cross-border conversions constitute obstacles to the proper functioning of the single market?



**Question:** To what extent does the introduction of new measures in this area rank as an EU priority?



There is a higher distribution of positive feedback for cross-border conversions than for any of the other cross-border operations. The majority of public authorities agreed that the lack of procedural rules for conversions do constitute obstacles to the internal market with 3 agreeing to some extent, 4 agreeing to a large extent and 3 agreeing to a very large extent. There were 5 considering this top priority, 3 considering this a priority and 3 considering this a low priority. Several authorities submitted that they were more concerned with the issue of seat than they were with stakeholder protection mechanisms and said that they would support a conversion initiative to the extent that companies can only move their real seat for genuine business purposes rather than conclude transfers of letterbox companies for fraudulent purposes.

The business groups supported the introduction of a conversion procedure with similar percentage as the public authorities. Approximately 44% of business groups considered this to be a top EU priority, 22% a priority and 22% a low priority. On the issue of seat there were some organisations that suggested that the mere transfer of registered office should be sufficient (BDI & BusinessEurope). Concerning stakeholder protection, certain business groups urged to apply the employee protection rules set out in the existing CBMD rather than what is laid out in the SE Regulation.

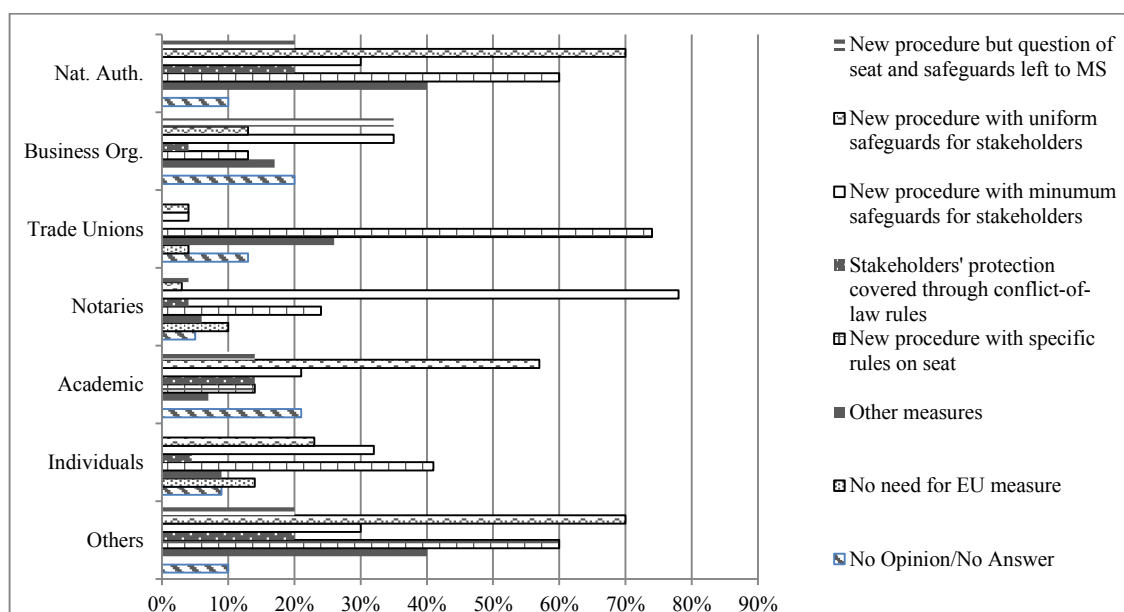
Trade unions and notaries were both moderately supportive of new procedural rules concerning conversions (74% and 79% deeming this a low EU priority respectively). Both the trade unions and the CNEU (representative body of notaries) were keen to stress



that companies should only be allowed to transfer their registered office if it is accompanied by the transfer of their real seat with Trade Unions further stressing the need for a horizontal instrument for employee information, consultation and participation rights.

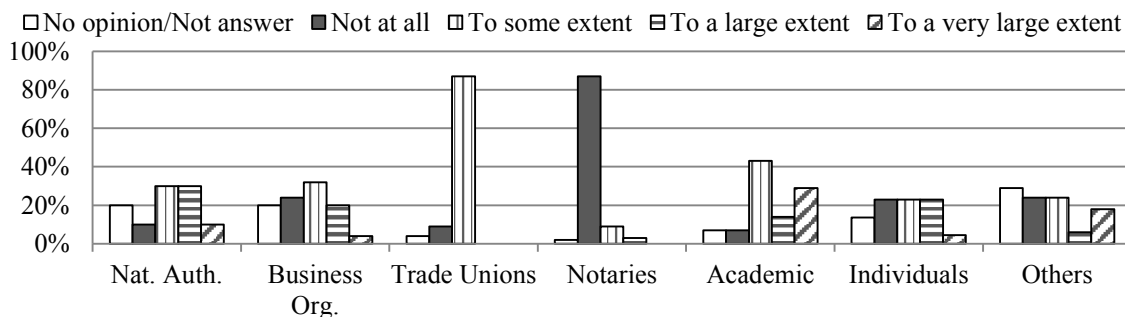
Academics were also broadly in favour of the introduction of a conversion procedure. Some academics submitted that MS should be able to determine their own requirements to be recognised under their law and indeed whether they require that the real seat be transferred. It was further submitted that digitalisation should be used as much as possible (i.e. for publication of information and for the company registries to communicate). Others suggested that a MS should only be able to block a conversion in very exceptional circumstances on grounds of public interest.

The following graph provides an overview of the feedback from stakeholders when asked what areas a possible instrument on of cross-border conversions could address:

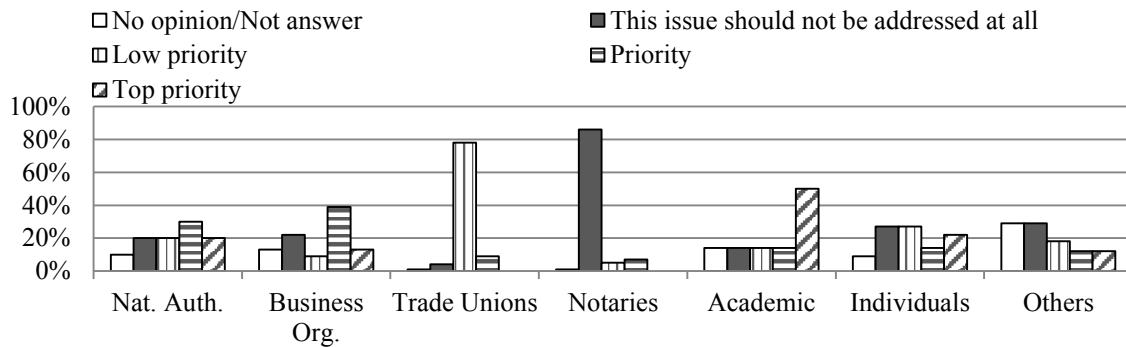


### III. Conflicts of Law

Question: To what extent do the differences between Member States' laws or the overall lack of a legal framework, in the area of applicable law for companies constitute obstacles to the proper functioning of the single market?



**Question:** To what extent does the introduction of new measures in this area rank as an EU priority?



A majority of 60% of the national public authorities and business organisations that replied to the consultation considered that the differences between the Member States' laws or the overall lack of legal framework in respect to conflict-of-law rules for companies to a certain extent constitute obstacles to the proper functioning of the internal market - with 28% considering it as an obstacle to a large or very large extent. It is important to note that there was only one national authority from an EU Member State (from France) which considered that there is no internal market obstacle at all. The picture is different among trade unions (which predominantly see it only as a problem to some extent), and notaries (who predominantly do not see it as a problem at all).

Varying support came from 60% of the national public authorities and business organisations with 34% considering it a priority, 14% a top priority and 11% a low priority, – among which around half of business organisations considered it to be either a priority or top priority. Conversely, most answers from trade unions considered it a low priority and most replies from notaries considered that this issue should not be addressed by the EU. Again, it is important to note that only public authority from an EU Member State (from France) was of the opinion that this issue should not be addressed by the EU and that only for two public authorities (from Austria and Malta) it is a low priority whereas for the others it is a priority or top priority.

National public authorities and – to a lesser extent – business organisations considered that various problems arise when national conflict-of-law rules differ, in particular problems with the connecting factor, problems related to the possibility that the company law of more than one MS may apply to a company, problems with the applicable company law and other fields of law and problems with the application of overriding national rules of domestic law. On the other hand, trade unions largely considered that there were problems related to the protection of employees' rights, in particular concerning employee participation in cases of split seats, whereas a majority of notaries considered that there is no problem at all.

A vast majority of public authorities and a large majority of business organisations considered that companies should be governed by the law of the country of incorporation. The authorities in favour of the place of incorporation included countries which traditionally followed the real seat approach (such as Germany) or where the connecting factor in national law is not clear (such as Poland). The only national

authority that chose the real seat option in the questionnaire was the Austrian Ministry for Justice which in its explanation, however, suggested that the place of incorporation should be the connecting factor, but that MS can continue to apply real seat requirements under their substantive company laws. Therefore, in fact, all national public authorities that have chosen one of the two options are in favour of the place of incorporation as the connecting factor. In its reply, the public authority from France has not chosen one of the two options, but expressed the opinion that a harmonisation of the connecting factor would be difficult and that therefore in this regard the current status quo on the basis of the ECJ case law should be maintained. By contrast, a vast majority of notaries and a large majority of trade unions answered that the applicable law should be the law of the country where companies have their real seat.

Notaries were mostly (circa 80 %) in favour of an extensive list of internal and external matters which the *lex societatis* should cover, whereas trade unions were in favour of an extensive list to the least extent. National public authorities (circa 40 %) and – to a lesser extent business organisations – were to a certain extent in favour.

Notaries and trade unions were to large extent in favour of excluding certain matters from the scope of a uniform conflict-of-law instrument, reflecting wider policy goals and choices. Most national public authorities and business organisations did not express an opinion. The by far most frequently mentioned example for an exclusion from the scope are employees' rights and in particular employee participation.

Answers from public authorities were slightly in favour of universal application, business organisations clearly in favour. However, in both cases, the majority of replies did not express an opinion. By contrast, trade unions were rather against universal application, and notaries were strongly opposed.

The majority of public authorities and of business organisations was in favour of addressing the possibility of a change of the applicable law through a cross-border conversion to another MS without loss of legal personality. Trade unions were rather opposed, but a majority had no opinion, notaries were strongly opposed.

The majority of public authorities and of business organisations was in favour of specifying which matters should be covered by the "old law" and which by the "new law". Trade unions were rather opposed, but a majority had no opinion, notaries were strongly opposed.

## **2.2 Summary of the public consultation of 2015**

In 2014-15 the Commission carried out a public consultation on cross-border mergers and divisions. The questions focused on two main sets of issues: the improvement of the existing framework for cross-border mergers and a possible framework for cross-border divisions<sup>224</sup>.

151 responses were received from public authorities, academia (e.g. universities, research institutes, think-tanks), liberal professions (lawyers and notaries), EU-wide and national business organisations and chambers of commerce, trade unions and employee bodies,

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<sup>224</sup> See a detailed summary of the responses in the Feedback statement of October 2015 [http://ec.europa.eu/internal\\_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf).

companies and individuals. The business federations, chambers of commerce and other organisations<sup>2</sup> constituted the biggest group of respondents (25%), followed by companies (19%) and lawyers and notaries (15%). Over a half (57%) of replies submitted on behalf of companies or persons advising, owning or working for those companies, came from large businesses (with more than 250 employees) and over a quarter – from micro (with up to 9 employees) and small (with between 9 and 49 employees) ones, 10% and 16% respectively. Most of those respondents mentioned that they were engaged in cross-border business activities in the EU. The same number of replies was linked to private as to public limited liability companies (15 each).

Replies originated in 27 EU Member States, 1 EEA country and a couple of third countries. Most replies were submitted by German respondents, followed by the Spanish and the French; at the same time, few replies were received from Bulgaria, Croatia, Cyprus, Greece, Hungary, Ireland, Latvia, Malta, Slovakia and Slovenia, and none from Portugal.

In regards to cross-border mergers, 88% of the respondents were in favour of harmonisation of creditor protection – 75% of which favoured a full harmonisation approach. The vast majority of those felt that a guarantee was the best form of protection and that the date determining the beginning of the creditor protection period should be harmonised. Furthermore, in regards to minority shareholder protection, a majority of 66% were in favour of harmonisations with 71% of which in favour of harmonisation on a maximum basis. 70% of those in favour of full harmonisation felt that minority shareholders should be given an exit right against adequate cash compensation. Moreover, 62% of the respondents welcomed the introduction of a fast-track procedure.

As regards to divisions, the introduction of a new procedure was broadly welcomed by the respondents. 72% of respondents who expressed an opinion thought that harmonisation of legal requirements concerning cross-border divisions would help enterprises and facilitate cross-border activities by reducing the costs directly related with the cross-border division. Procedural issues as well as stakeholder protection were identified as key issues to address.

### **2.3 Summary of the public consultation of 2013**

In 2013, the Commission carried out a public consultation on the cross-border transfers of registered offices of companies. The purpose of the consultation was to acquire more in-depth information on the costs currently faced by companies transferring their registered offices abroad and on the range of benefits that could be brought by an EU action in this respect. In total 86 responses were received from public authorities, trade unions, civil society, companies, business organization, individuals and universities, allowing for a broad representation of society. Only 28 companies responded directly to the consultation providing a sample not entirely satisfactory when compared to the total amount of companies in the EU. Replies have come from 20 EU MS and also from outside the EU.

It was found that the majority of respondents, who would consider the possibility of moving their company cross-border, would broadly welcome the introduction of a conversion procedure. They cited economic benefits, cost savings for the internal market and the broader possibilities for SMEs to transfer cross-border as reasons for answering

in the affirmative. Moreover, it was submitted a majority of 43% of respondents that the CJEU jurisprudence in *Vale* and *Cartesio* did not provide enough clarity on the issue.

## **2.4 Summary of the public consultation of 2012**

In 2012 the Commission carried out a public consultation in order to assess the key interests of stakeholders in regard to European company law and determine where the future priorities of EU company law should lie. 496 responses were received from public authorities, trade unions, civil society, business federations, liberal professions, investors, universities, think tanks, consultants and individuals, allowing for a broad representation of society. Replies originated in 26 EU MS and in a number of countries from outside the EU.

Improving the business environment and fostering cross-border mobility was found to be a key focus of majority of stakeholders who responded to the survey with over 2/3 of respondents clicking in the affirmative. Enhancing the protection of creditors, shareholders and employees in cross-border situations came second with more than 50% of respondents in favour. Facilitating the creation of companies and fostering regulatory came in 3<sup>rd</sup> and 4<sup>th</sup> respectively with a little over 40% of the respondents clicking in the affirmative to each.

## **3. STAKEHOLDER MEETINGS**

### **3.1 Company Law Expert Group**

The process of the consultation on the company law package within the Company Law Expert Group (CLEG) began in 2012. Meetings have taken place on a regular basis. In 2017, three meetings took place. The Commission presented to the experts its intentions and ideas in the relevant areas, asking the MS experts their opinion as regards the specific issues like the composition of the package, types of companies to be covered and possible substantive rules in the package. Generally the MS representatives showed support for the initiative, although the particular solutions, especially originating from the different legal traditions, appeared to remain to be discussed.

In 2017, the Commission invited to the CLEG meetings not only Member States experts but also stakeholders' representatives. Stakeholders represented both businesses and employees, in particular Business Europe, European Issuers, Association Française des Entreprises Privées (AFEP), Mouvement des Entreprises de France (MEDEF) and European Trade Union Confederation (ETUC), European Trade Union Institute (ETUI). The representatives of legal professions (Notaries of Europe - CNUE, Council of Bars and Law Societies of Europe - CCBE) also shared their views on the discussed topics. The outcome of these meetings showed that each group have in many areas similar expectations, while also helped to identify different expectations in other areas. Most of CLEG members and stakeholders' representatives highlighted the need to facilitate cross-border operations, however, interests of companies' members, employees and creditors should be protected throughout adequate safeguards.

### **3.2. Informal Company Law Expert Group**

The Informal Company Law Expert Group (ICLEG) was established by the Commission in May 2014 to assist it with expert advice on issues of company law. The ICLEG members were selected from highly qualified and experienced academics. At the first stage of the group work, ICLEG members identified the shortcomings of existing EU legal framework and gathered information on the situation in the areas not covered by the EU law. ICLEG members gave their recommendation to the future development of existing framework governing cross-border mergers and use of digital tools in the company law, and also prepared recommendations for the future initiative on cross-border divisions and cross-border conversions. ICLEG held 15 meetings since its establishment.

### **3.3 Targeted outreach to key stakeholders**

Information from stakeholders were also gathered though bilateral meetings. In this framework, meetings took place in particular with:

- representatives from trade unions, such as the European Trade Union Confederation (ETUC), the German Trade Union Confederation (DGB) and the Czech-Moravian Confederation of Trade Unions. In these meetings, the representatives of trade unions emphasised the importance of preservation of employee participation rights and that companies should only move for real purposes, thus avoiding that letterbox companies are created through cross-border operations;
- business representatives, such as BusinessEurope, the Federation of German Industries and the Finnish Confederation of Businesses. These organisations showed interest in facilitation of companies' mobility and the increase of use of digital tools in registration proceedings;
- notaries and their representatives, such as the German and Austrian Chamber of Notaries, and in the annual conference of Civil Law Notaries. In these meetings, notaries mainly explained their role in notarial Member States and their role in using digital tools; they also shared concerns as regards the use of digital tools without appropriate safeguards.

## **4. CONFERENCES**

A dedicated conference was held in September 2017 in Tallinn, Estonia: 21st European Company Law and Corporate Governance Conference: Crossing Borders, Digitally.

The conference covered three topics: the digital company law, cross-border mobility of companies i.e. cross-border merger, division and transfer of registered office (conversion) and applicable law in company law matters.

The conference was attended by representatives of company law policy makers and experts of the Member States and EU institutions, entrepreneurs, legal advisers and other interested parties.

In October 2015, the Commission organised a conference on "Company Law in the Digital Age – Adapting company law and corporate governance to the digital world"<sup>225</sup>.

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<sup>225</sup> [http://ec.europa.eu/justice/events/company-law-2015/index\\_en.htm](http://ec.europa.eu/justice/events/company-law-2015/index_en.htm)

The conference analysed different aspects of the use of digital tools and processes in company law and corporate governance. The conference brought together Member States representatives, representatives of EU, international and national organisations of stakeholders who would be affected by digitalisation of company law and corporate governance (organisations representing businesses, employees, investors, chambers of commerce, etc.) and representatives of EU institutions to discuss recent developments, remaining problems and necessary changes as regards digitalisation of company law and corporate governance.

## **5. STUDIES**

The stakeholder consultation was complemented by the following research/analyses done for the Commission over the last years:

- Bech-Bruun/Lexidale, Study on the application of the cross-border mergers directive (September 2013),
- LSE, Study on the law applicable to companies (June 2016),
- Everis, Study on digitalisation of company law, (2017)
- Optimity, Study assessing the impacts of using digital tools in the context of cross-border company operations. (2017)
- EY, Study on cross-border transfers of registered offices and cross-border divisions of companies (2017).

### **ANNEX 3: WHO IS AFFECTED AND HOW?**

The foreseen options included in this initiative would affect the following stakeholders:

#### *Businesses*

The simpler and faster registration and filing procedures through digital tools will reduce costs and administrative burdens for companies. Harmonised rules will enable companies to conduct cross-border operations faster and at lower costs, in particular lower costs of legal assistance and will limit the risks for companies caused by legal uncertainty. This will help businesses to adjust and reorganise their structures to their changing needs that will help them to be more competitive in the Single Market. The use of digital tools in company law should stimulate entrepreneurship and innovation, as it would offer more chance to set up innovative start-ups. Companies will, however need to comply with the new requirements safeguarding the legitimate interests of minority shareholders, creditors and employees. This will entail compliance costs for companies. The legal certainty provided for by the conflict of law rules will also reduce the costs of legal advisory presently widely used by businesses. All of this will be particularly important for SMEs who, in general, have fewer resources to cover operational costs and to overcome significant administrative burdens. Especially the new rules on cross-border conversions will be helpful for SMEs since bigger companies can use the alternative operations to reach the same result.

#### *National authorities, courts, legal professionals*

The procedures for company registration and for filing of documents will be faster through the increased use of online tools. It will also provide savings for national authorities in terms of more efficient handling of registration proceedings. The use of digital tools will improve correctness and completeness of data.

A significant number of the Member States has already introduced online registration of companies. These Member States will have to adjust their national rules and systems only to a limited extent or not at all. Other Member States will have to introduce national provisions and provide necessary infrastructure for online proceedings.

Moreover, there would be impact on national authorities such as registration bodies, courts or notaries. The initiative aims at facilitating cross-border operations what will increase the number of cases to handle.

Legal professionals (mainly notaries and in some countries also lawyers and legal counsels) will need to adjust professional activities to the new rules. More legal certainty however will help them in their work when dealing with cross-border operations of companies. The proposed rules on online registration and filing might require for some the setting up of the necessary infrastructure (e.g. equipment for videoconference and for authentication of identification). The proposed rules will maintain the possibility to the Member States to require the involvement of notaries, lawyers and legal counsels in the process.



### *Shareholders*

The initiative will offer shareholders enhanced ways to reorganise the structure of their business in the EU through cross-border operations, if needed. The impacts on companies will be applicable indirectly also to shareholders. The initiative will safeguard rights of minority shareholders when companies carry-out cross-border operations. The initiative will focus on the protection of minority shareholders by providing them with adequate rights which can be easily exercised, in some cases without engaging administrative or judicial authorities. Minority shareholders will benefit from the harmonised rules by enjoying the same level of safeguards in all Member States.

### *Creditors*

The initiative will provide safeguards for creditors of companies in case of cross-border operations. The change of companies' structure involving cross-border operation may affect the creditors' rights or may cause difficulties to enact those rights resulting from changing jurisdictions. The initiative therefore aims at helping companies to exercise freedom of establishment while ensuring that creditors will not be negatively affected in case of such cross-border operations and they will be able to enforce their claims. The proposal aims to ensure legal certainty and benefits for creditors by providing the same level of safeguards and compatible rules in the EU.

### *Employees*

Cross-border reorganisation of the company may result in changes in the employees' rights. Such rights are mainly protected through safeguards provided by EU employment law. This initiative will introduce safeguards for employee board level participation - to protect employees' acquired rights. Existing employees' board level participation systems will either remain unchanged or be modified according to the arrangement between company and employees' representatives. In addition, in cross-border divisions, mergers and conversions, employees will be provided transparency about the impact of the cross-border operation on jobs. It is also important to note that, as a result of cross-border operations employees may benefit from the more favourable employee participation system and improved job situation.

### *Consumers, third parties*

Consumers and the general public will have easier access to company information which will thus improve transparency. Simpler rules for cross-border operations will lead to efficiency gains to companies and increase the competitiveness which could have an impact on consumers in terms of price and offer.

#### ANNEX 4: PROBLEM DEFINITION – ADDITIONAL EVIDENCE

This annex presents further examples and data that complement the information presented in Chapter 2 – The problem definition.

##### 1. Use of digital tools and processes throughout a company's lifecycle

Section 2.1 of this Impact Assessment presents the main problems caused by the lack of rules or the divergence in rules between the Member States in respect to the use of digital tools in company law.

Table 1 below shows how national requirements for online **company registration** vary between the Member States. While several Member States allow for completion of the procedure fully online by the company founder or representative and no intermediaries need to be involved (so called "end-to-end"), other Member States do not allow for a direct online registration of companies, as the involvement of notaries or legal professionals is still part of the process. Admittedly digital tools are used for part of the procedure, which is why certain stakeholders claim that online registration is already possible; however such tools are not available to company founders who cannot complete the procedure by themselves fully online.

The situation is very similar for the online **filing of documents**. Table 2 shows how Member States differ in their implementation of the current EU rules in this respect. Even though in principle companies are already able to file documents "by electronic means", de facto they cannot do this by themselves – it is only accredited intermediaries (namely notaries) that can submit documents online to the business register.

For Member States that are already using digital tools in company law, table 3 presents an overview of the **solutions for electronic identification** in 14 Member States.

Section 3.1.2 already presents examples showing how **online applications for company registration are usually cheaper and faster than paper-based applications**. In addition to those examples, the case study below highlights such differences by comparing the procedure for registering a new company in two Member States.

- *Example of Company Registration in Estonia and Germany*<sup>226</sup>

The following example illustrates the differences between the costs of registration of a company in two Member States:

- Estonia, where the online registration is fully performed online, and
- Germany, where the presence of the founder or representative as well as the involvement of intermediaries (notaries) is mandatory.

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<sup>226</sup> This case study is based on the Study on digitalisation of company law, Everis 2017.

In Estonia, completing the online procedure takes approximately 20 minutes and the application is processed within 1 to 2 days. The administrative fee is €145 for normal registration and €190 for an expedited procedure. The involvement of a notary is optional and costs €35.75. There is also a one-off cost of €20 for the eID and the eID reader. The total costs vary therefore between €202,75 and €252,75.

In Germany, the procedure as such takes 1 to 2 days but the physical presence of the company founder is mandatory. Taking an appointment with a notary also adds time and cost to this, including traveling time depending on where the company founder or representative is located. The notarial fees range from €105 to €580 and administrative fees for registration from €150 and €240, resulting in total fees to be assumed by companies between €255 and €820.

Comparing the two examples shows that the face-to-face procedure, including mandatory involvement of intermediaries, can be from €110 up to €630 more expensive than fully online procedure. This does not include travelling costs and the possible difference in the time needed to complete the procedure.

**Table A.1: Comparative summary of the availability of digital tools for company registration 14 Member States (Optimity study)**

Member State	Availability of digital tools for company registration	Electronic platforms available for the registration of limited liability companies	Intermediaries required	Summary of the registration process for limited liability companies
<b>Estonia</b>	Digital tools are available for company registration.	Companies can be registered directly through the <i>Company Registration Portal</i> , available online at: <a href="https://ettevotjaportaal.rik.ee/">https://ettevotjaportaal.rik.ee/</a>	No intermediaries are required. The electronic company registration process can be carried out in a <b>direct, end-to-end manner</b> .	For the registration of limited liability companies through the <i>Company Registration Portal</i> , the applicant needs to be in possession of an Estonian ID-card (Latvian, Belgian, Finnish, and Lithuanian ID cards or mobile IDs are also acceptable) for identification and digital signature authentication purposes.
<b>Portugal</b>	Digital tools are available for company registration.	In Portugal, companies can be created and registered through an online register service within the wider electronic platform known as <i>Citizen's Portal</i> , at: <a href="https://www.portaldocidadao.pt">https://www.portaldocidadao.pt</a>	No intermediaries are required. The electronic company registration process can be carried out in a <b>direct, end-to-end manner</b> .	In order to create and register a limited liability company through the <i>Citizen's Portal</i> , the applicant(s) must have a <i>Citizen's Card</i> (i.e. Portuguese national ID card). For applicants of a nationality other than Portuguese, a prior step is required: obtaining a Fiscal Identification Number from the Portuguese Financial Services Authority. Estonian and Spanish nationals can use their corresponding ID cards and are exempted of this pre-requirement.
<b>Poland</b>	Digital tools are available for company registration.	Limited liability companies can be registered directly online through a web portal, i.e. <i>S24 / ePUAP</i> . This must be preceded by online registration on the website of the Ministry of Justice, i.e. <i>eMS</i> .	No intermediaries are required. The electronic company registration process can be carried out in a <b>direct, end-to-end manner</b> .	The Polish Commercial Companies Code provides for the possibility to register limited liability companies in a simplified manner (i.e. S24), without the need of intervention by a notary. However, there is one exception to this provision: if the share capital contribution to a company is to be made as a non-cash contribution, the company registration process must be carried out in the traditional manner, i.e. signing a notary act.
<b>Denmark</b>	Digital tools are available for company registration.	A direct online solution provided by the Danish Business Authority is available for the registration of limited liability companies at: <a href="https://www.virk.dk/">https://www.virk.dk/</a>	No intermediaries are required. The electronic company registration process can be carried out in a <b>direct, end-to-end manner</b> .	The online solution provided by the Danish Business Authority for the registration of companies (including limited liability companies) can only be accessed through a digital key known as <i>NemID</i> , which can be obtained by creating a login at <a href="http://www.virk.dk">www.virk.dk</a> . The process is “self-service”-oriented, with clear guidance at every step of the company registration process.
<b>United Kingdom</b>	Digital tools are available for company registration.	In the UK, limited liability companies can be registered using	No intermediaries are required. The electronic company	It is worth noting that limited liability companies can only be registered using the Companies House online tool for

Member State	Availability of digital tools for company registration	Electronic platforms available for the registration of limited liability companies	Intermediaries required	Summary of the registration process for limited liability companies
		the Companies House online tool (i.e. <i>Web Incorporation</i> ).	registration process can be carried out in a <b>direct, end-to-end manner</b> .	companies limited by shares and if they are to use standard articles of association. The online registration process is considerably cheaper and can be concluded in up to 24 hours.
<b>France</b>	Digital tools are available for company registration.	In France, limited liability companies can be registered using a “one-stop shop”-like online tool: <i>CFE – Centres des Formalités des Entreprises</i> .	No intermediaries are required. The electronic company registration process can be carried out in a <b>direct, end-to-end manner</b> .	In France, a person wishing to register a company shall provide the same information through the CFE online portal, which shall then transmit the full file to the registry of the concerned commercial court or chamber of handicraft. The verification of the files is then performed either by the online portal (i.e. the CFE) or by the registry of the commercial court or chamber of handicraft. The CFE shall also transmit the file to the concerned authorities, in particular the tax and social contributions authorities.
<b>Italy</b>	Digital tools are available for company registration but not for <i>company formation</i> <sup>227</sup> .	Company registration can be made through the filing of a single communication through the <i>ComUnica</i> system, i.e. an electronic procedure developed by the Italian Chambers of Commerce.	<b>Intermediaries are required</b> for the creation of limited liability companies, i.e. articles of association must be signed as a public deed before a notary. However, company registration can be done electronically in an end-to-end manner through the <i>ComUnica</i> system.	In Italy, company registration must be preceded by company creation. For limited liability companies, the company creation process cannot be carried out electronically, and requires signing the articles of association as a public deed before a notary. Conversely, the company registration process can be carried out electronically in a direct, end-to-end fashion using the <i>ComUnica</i> system, as long as applicants are in possession of a (i) certified email address (i.e. <i>posta elettronica certificata</i> ), (ii) a username and password from the Business Registry, (iii) a smart-card or USB key for authenticated digital signatures.  In the case of “innovative start-ups”. Such start-ups are not required to sign their articles of association before a notary but using their digital signature.
<b>Germany</b>	Digital tools are available for company registration, but	In Germany, company registration through digital tools takes place	<b>Intermediaries are required</b> for the registration of limited	Registration of limited liability companies in Germany imply the intervention of a notary for filing the necessary

<sup>227</sup> In Italy, company registration must be preceded by *company creation*, a process through which the applicant(s) / shareholder(s) produce articles of association, which must be signed as a public deed before a notary. This is directly applicable to limited liability companies.

Member State	Availability of digital tools for company registration	Electronic platforms available for the registration of limited liability companies	Intermediaries required	Summary of the registration process for limited liability companies
	have to be used by notaries rather than applicants.	through the <i>Elektronisches Gerichts-und Verwaltungspostfach</i> (i.e. <i>EGVP</i> ), and can only be handled by notaries. The <i>EGVP</i> is an electronic communication platform for court communication.	liability companies, i.e. notaries have to file all the required documentation for registering a company in the <i>EGVP</i> platform. Therefore, the process cannot be considered to be direct nor end-to-end.	documentation through the <i>EGVP</i> platform. In addition, applicants must provide further official certified copies of specific documentation in order to initiate the process, e.g. the list of directors, the company contract.
<b>Netherlands</b>	Digital tools are available for company registration, but have to be used by notaries rather than applicants.	The registration of limited liability companies can only be filed electronically by a notary. This electronic registration takes place through the use of an online platform hosted by the KvK ( <i>Kamer van Koophandel</i> , i.e. Chamber of Commerce).	<b>Intermediaries are required</b> for the registration of limited liability companies, i.e. notaries have to file all the required documentation for registering a company in the <i>electronic</i> platform hosted by the KvK. Therefore, the process cannot be considered to be direct nor end-to-end.	In order to proceed with the electronic company registration process, notary offices must request a certification key from the notary chamber and a PKI certificate from the KvK, i.e. a digital certificate providing proof of a person's or institution's online identity. Additionally, no electronic registration is possible for cross-border company registration, and the whole process must be carried out through paper forms. Applicants must also provide further official certified copies of specific documentation in order to initiate the process, e.g. the list of directors, the company contract.
<b>Bulgaria</b>	Digital tools are available for some aspects of registration of limited liability companies, namely the electronic submission of documentation after acceptance of a request form for registering a new business	In Bulgaria, limited liability companies can be registered using the electronic system of the Commercial Register, which is maintained by the Registry Agency, upon acceptance of the request form for starting a new business.	<b>Intermediaries are required</b> for the registration of limited liability companies. Applicants must appear before a Registry Agency and submit a request form for registering a new company. The process cannot be considered direct not end-to-end.	The entire process of online company registration is carried out before the Registry Agency, after acceptance of the initial request form. The electronic platform hosted and operated by the Commercial Register is widely used in Bulgaria, but can only be accessed for lodging an official registration upon acceptance of this form.
<b>Luxembourg</b>	Digital tools are available for some aspects of company registration, but have to be used by notaries rather than applicants	The registration of limited liability companies can only be filed electronically by a notary. This electronic registration takes place through the use of an online platform hosted by the Trade and Companies Register (RCS) using a digital tool called <i>LuxTrust</i>	<b>Intermediaries are required</b> for the registration of limited liability companies, i.e. notaries have to file all the required documentation for registering a company in the <i>electronic</i> platform hosted by the RCS. Therefore, the process cannot be considered to be direct nor end-	The articles of association must be drawn up before a notary in order to register a limited liability company in Luxembourg. Any further lodging of documentation in the online platform hosted by the RCS has to be handled by the notaries directly. Additionally, notarised acts must be first submitted for registration by the notary in its original paper format. The notary is then required to electronically submit the deed to the RCS for publication at the latest one month after the signature

Member State	Availability of digital tools for company registration	Electronic platforms available for the registration of limited liability companies	Intermediaries required	Summary of the registration process for limited liability companies
		<i>certificate.</i>	to-end.	of the articles of association.
<b>Hungary</b>	Digital tools are available for some aspects of company registration, but have to be used by notaries or lawyers representing the applicant(s).	In Hungary, all the required documentation necessary for registering a company can be pooled together in an <i>E-acta</i> . Electronic documents must be authenticated by means of qualified electronic signatures and time stamping (e.g. <i>E-Szignó</i> ). However, legal representation is necessary to carry out these processes.	<b>Intermediaries are required</b> for the registration of limited liability companies, i.e. legal representatives of the applicant have to file all the required documentation for registering a company in the court of registry of the appropriate jurisdiction.	The process of registering a company in Hungary is not direct nor end-to-end. All the documentation submitted to <i>County Courts</i> must be countersigned by an attorney who possesses the required digital signature and time-stamp platforms. Thus, legal representation is mandatory with obligatory technical safeguards. However, the process itself is entirely digitalised.
<b>Belgium</b>	Digital tools are not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.	Digital tools are not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.	<b>Intermediaries are required</b> for the registration of limited liability companies, i.e. applicants are required to appear in-person at the registry and before a notary. Therefore, the process cannot be considered to be direct nor end-to-end.	Digital tools are not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.
<b>Romania</b>	Digital tools are mostly not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.	Digital tools are mostly not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.	<b>Intermediaries are required</b> for the registration of limited liability companies, i.e. applicants are required to appear in-person at the registry and before a notary. Therefore, the process cannot be considered to be direct nor end-to-end.	Digital tools are mostly not available for registration of limited liability companies, as applicants seeking to register a new company are required to physically appear before a notary and a registry court.

**Table A2: Comparative summary of the availability of digital tools for filing and disclosure of company information 14 Member States (Optimity study)**

Member State	Availability of digital tools for filing and sharing of company information	Electronic platforms available for filing and sharing of company information	Intermediaries required	Summary of the filing and disclosure of information process for limited liability companies
Estonia	Digital tools are available for filing and sharing of company information.	Companies can file annual reports and disclose company notices directly through the e-reporting environment at the <i>Company Registration Portal</i> , available online at: <a href="https://ettevotjaportaal.rik.ee/">https://ettevotjaportaal.rik.ee/</a>	No intermediaries are required. The electronic process for filing and sharing company information can be carried out in a <b>direct, end-to-end manner</b> .	When filing annual reports, the e-reporting environment available in Estonia's <i>Company Registration Portal</i> verifies whether the required forms and fields are adequately completed. Companies can input the data directly from accounting themselves. However, if an account submits the data, the shareholders or management board members who hold an Estonian ID-card need to sign the accounts digitally in order for the information to be forwarded to the Business Registry.
Portugal	Digital tools are available for filing and sharing of company information.	In Portugal, companies can publish notices in the Portuguese Official Gazette directly through a website, available at: <a href="http://publicacoes.mj.pt/Index.aspx">http://publicacoes.mj.pt/Index.aspx</a> Moreover, companies can directly file accounting, tax and statistical data directly through another dedicated website, available at: <a href="http://ies.gov.pt">http://ies.gov.pt</a>	No intermediaries are required. The electronic process for filing and sharing of company information can be carried out in a <b>direct, end-to-end manner</b> .	The two electronic platforms available in Portugal for filing and sharing of company information allow for direct, end-to-end publication of company notices in the Portuguese Official Gazette and filing of tax, statistical, and accounting information that would otherwise have to be submitted to four different entities, i.e. Ministry of Justice, Ministry of Finance, Portuguese Central Bank, and Statistics Portugal (INE).
Poland	Digital tools are available for filing and sharing of company information.	There are three electronic platforms in Poland that allow for filing, sharing and browsing of all public company information: (i) the electronic search tool and website of the National Court Registers, which contains information on legal entities; (ii) E-publications portal of Court and Business Gazette	No intermediaries are required. The electronic process for filing and sharing company information can be carried out in a <b>direct, end-to-end manner</b> .	In Poland, a broad scope of company information can be disclosed through digitals, i.e. virtually all information that would otherwise be submitted not through the use of digital tools. However, it is worth noting that according to Polish Law, public administrative authorities are entitled to require the submission of the original documents if they wish. All information to be filed and shared can be done so in three dedicated electronic platforms: (i) the electronic search tool



Member State	Availability of digital tools for filing and sharing of company information	Electronic platforms available for filing and sharing of company information	Intermediaries required	Summary of the filing and disclosure of information process for limited liability companies
		websites, which contain information on announcements of legal entities as required by Polish law (e.g. announcements on liquidations and mergers); (iii) Central Electronic Register and Information on Economic Activity, which provides information on natural persons conducting business activities.		and website of the National Court Registers, which contains information on legal entities; (ii) E-publications portal of Court and Business Gazette websites, which contain information on announcements of legal entities as required by Polish law (e.g. announcements on liquidations and mergers); (iii) Central Electronic Register and Information on Economic Activity, which provides information on natural persons conducting business activities.
Denmark	Digital tools are available for filing and sharing of company information.	All the required information with regard to company registration, dissolution, and mergers can be filed and disclosed in a direct online solution provided by the Danish Business Authority: <a href="https://www.virk.dk/">https://www.virk.dk/</a>	No intermediaries are required. The electronic process for filing and disclosure of company information can be carried out in a <b>direct, end-to-end manner</b> .	The online solution provided by the Danish Business Authority for the registration of companies (including limited liability companies) can only be accessed through a digital key known as <i>NemID</i> , which can be obtained by creating a login at <a href="http://www.virk.dk">www.virk.dk</a> . The process is “self-service”-oriented, with clear guidance at every step of the company registration process. The same online portal can be used for filing and disclosure of all necessary company information in the context of registration, dissolution and mergers.
United Kingdom	A breakdown of information that can be filed and shared through digital tools in the UK is provided in <i>Table 4</i> .	A breakdown of information that can be filed and shared through digital tools in the UK is provided in <i>Table 4</i> .	A breakdown of information that can be filed and shared through digital tools in the UK is provided in <i>Table 4</i> .	A breakdown of information that can be filed and shared through digital tools in the UK is provided in <i>Table 4</i> .
Italy	Digital tools are available for filing and disclosure of company information.	In Italy, a digital tool – Telemaco - exists for filing of the annual financial report, available online at: <a href="https://webtelemaco.infocamere.it">https://webtelemaco.infocamere.it</a> Moreover, disclosure of company information is done directly through the website of the Business Registry ( <i>Registro imprese</i> ), which is maintained	No intermediaries are required. The electronic process for filing and disclosure of company information can be carried out in a <b>direct, end-to-end manner</b> .	In Italy, companies can file annual reports in a direct, end-to-end manner by using the electronic platform Telemaco. Company information can also be disclosed (i.e. other than VAT numbers and date of incorporation) in a direct, end-to-end fashion, but through the website of the Business Registry.

Member State	Availability of digital tools for filing and sharing of company information	Electronic platforms available for filing and sharing of company information	Intermediaries required	Summary of the filing and disclosure of information process for limited liability companies
		by the Italian Chambers of Commerce.		
Germany	Digital tools are available for filing and sharing of company information, but have to be used by notaries rather than the companies themselves.	In Germany, filing and sharing of company information takes place through two channels: (i) commercial register; (ii) the Official Federal Publication Gazette (i.e. <i>Bundesanzeiger</i> ).	<b>Intermediaries are required</b> for the filing and sharing of company information. Therefore, the process cannot be considered to be direct nor end-to-end.	The filing and sharing of company information in Germany follows the same general procedures as those of company registration, with regard to the availability of digital tools, i.e. an official deed by a notary is required for certain company information to be filed electronically, e.g. VAT number.
Netherlands	Digital tools are available for filing and sharing of company information.	In the Netherlands, with the exception of large enterprises (i.e. micro, small and medium enterprises) all information filing of financial statements take place by electronic means via the website of the KvK, using an <i>Eherkennung</i> certificate. The KvK makes all filed financial statements public through electronic means, and displays these on its website.	No intermediaries are required. The electronic process for filing and disclosure of company information can be carried out in a <b>direct, end-to-end manner</b> , as long as an <i>Eherkennung</i> certificate is used for signature authentication.	In the Netherlands, small, micro and medium-sized enterprises must file all financial statements by electronic means, through the website of the KvK. These have to be authenticated through an <i>Eherkennin</i> certificate. The KvK publishes all filed information directly on its website.
Bulgaria	Digital tools are available for filing and sharing of company information.	Electronic filing and disclosure of information is possible through the online portal maintained by the <i>Registry Agency</i> , which is directly hosted by the Ministry of Justice. The scope of information that is allowed to be filed and shared using this portal encompasses data relating to registration, dissolution and mergers.	<b>Intermediaries are required</b> for the filing and sharing of company information, which must be carried out by civil officers within the <i>Registry Agency</i> .	In Bulgaria, the Commercial Register (i.e. the unified register which stores the whole information concerning companies) allows for filing and sharing of company information in an indirect way, i.e. data has to be entered through the <i>Registry Agency</i> portal by specialised civil officers.
France	Digital tools are available for filing and sharing of company information.	Filing and disclosure of company information is made available in France through an online platform called <i>Infogreffe</i> , which is sources data directly from Commercial Registers.	<b>Intermediaries are required</b> for the filing and sharing of company information. The available tool (i.e. <i>Infogreffe</i> ) operates in an indirect way, sourcing information directly	In France, the Commercial Registers collect all the relevant company data regarding company registration, dissolution and mergers. This information is then sourced by an online tool (i.e. <i>Infogreffe</i> ), which publishes it.

Member State	Availability of digital tools for filing and sharing of company information	Electronic platforms available for filing and sharing of company information	Intermediaries required	Summary of the filing and disclosure of information process for limited liability companies
			from the Commercial Registers.	
<b>Luxembourg</b>	Digital tools are available for some aspects of filing and disclosure of information, e.g. amendments to consolidated articles of association.	Electronic filing and disclosure of company information takes place through the use two online platforms: (i) one hosted by the Trade and Companies Register (RCS) using a digital tool called <i>LuxTrust certificate</i> ; (ii) another dedicated specifically to filing of financial and accounting data - <i>Plateforme électronique de Collecte des Données Financières – eCDF</i> .	<b>Intermediaries are required</b> for the filing and disclosure of some company information e.g. notaries have to file all the required documentation for registering a company in the <i>electronic</i> platform hosted by the RCS. Other information (e.g. accounting information and financial statements) can be filed directly and in an end-to-end manner through the eCDF platform.	National-level research still ongoing
<b>Hungary</b>	Digital tools are available for some aspects of filing and sharing of company information, but have to be used by notaries or lawyers representing the applicant(s).	In Hungary, all the required documentation about a company a company can be pooled together in an <i>E-acta</i> . Electronic documents must be authenticated by means of qualified electronic signatures and time stamping (e.g. <i>E-Szignó</i> ). However, legal representation is necessary to carry out these processes.	<b>Intermediaries are required</b> for filing and sharing company information, e.g. legal representatives of the applicant have to file all the required documentation for registering a company, or making an amendment to the articles of association, in the court of registry of the appropriate jurisdiction.	The process of filing company information in Hungary is not direct nor end-to-end. For example, all the documentation submitted to <i>County Courts</i> must be countersigned by an attorney who possesses the required digital signature and time-stamp platforms. Thus, legal representation is mandatory with obligatory technical safeguards. However, the process itself is entirely digitalised.
<b>Belgium</b>	Digital tools are available for filing and disclosure of minor information (e.g. company address, contact data).	Digital tools are only available for filing and disclosure of minor information in Belgium (e.g. company address, contact data). This is done directly through the national business database.	<b>Intermediaries are required</b> for filing and sharing of substantial company information. Therefore, the process cannot be considered	In Belgium, filing and disclosure of company information can only be carried out without the presence or interference of a notary for minor, non-structural information (e.g. company address, contact details). Conversely, for substantial filing and disclosure of company information, documentation must be submitted to the court of commerce via a notary and, in some

Member State	Availability of digital tools for filing and sharing of company information	Electronic platforms available for filing and sharing of company information	Intermediaries required	Summary of the filing and disclosure of information process for limited liability companies
			to be direct nor end-to-end.	cases, in paper format.
<b>Romania</b>	Digital tools are mostly not available for filing and disclosure of company information.	Digital tools are mostly not available for filing and disclosure of company information.	<b>Intermediaries are required</b> for filing and disclosing company information. In addition, the common manner to carry out this company law operation is in paper format.	Digital tools are mostly not available for filing and disclosure of company information.

**Table 3: Overview of eID schemes used in 14 Member States (Everis study)**

Member State	eID Schemes per Member State	Use in Company Law	Cross-border use
Belgium	Belgium's national eID scheme is based on the public national ID card, BELPIC. Nationals from other countries residing in Belgium also have access to a foreigner's ID with the same high Level of Assurance. The card contains three private 1024-bit RSA keys, one of the keys is card-specific and the two others are citizen-specific. The card-specific key (the so-called basic private key) is used to perform a mutual authentication between the ID card and the National Register. The National Register, is the only authority able to verify signatures created by this private key. The first citizen-specific key is used for signing electronic documents. The second citizen-specific key is used for authentication in eBusiness and eGovernment applications and is linked to a non-qualified certificate.	<ul style="list-style-type: none"> <li>- Only by Notaries, along entire company life-cycle</li> <li>- By company representatives and accountants when submitting annual accounts</li> </ul>	<ul style="list-style-type: none"> <li>- Belgian citizens can register a company in Estonia with their eiID</li> <li>- For the rest, the requirement of Notaries' involvement</li> </ul>
Cyprus	Cyprus is starting to introduce implementation of an eID card and eSignature but does not have a national eID scheme at present	Non-applicable.	Non-applicable.
Czech Republic	Czech Republic has implemented a system, MojeID, which is based on online certificates provided by Czech accredited certification authorities, with a validity of 1 year.	Not used in Company Law procedures.	Non-applicable.
Denmark	The NemID itself is a credit card sized card that provides a single use password of six numeric digits which is used in conjunction with a traditional username and password combination to sign onto services securely and electronically. It was developed as an improved version of a prior identification system and offers a simpler procedure (single sign in without the necessity of other hardware or certificates). NemID provides a uniform way to identify citizens, companies and employees to any digital service, contributing to significant savings.	Used by companies and their representatives ( <i>Reporter</i> ) at all stages of the company life-cycle.	eID not used for cross-border activities
Estonia	Besides the national ID card, another card is also available: the Digit-ID, giving access to public services online. Estonia was also one of the first countries to introduce a mobile eID scheme that is now fully operational. This scheme uses a certificate stored in a cryptographic device, to which access is granted to the subscriber of the certificate thanks to his/her username and password combination. An extract of the resulting	Used by companies and their representatives at all stages of the company life-cycle	<ul style="list-style-type: none"> <li>- The Estonian Company Registration Portal accepts Portuguese, Belgian, Finnish and Latvian ID-cards and Lithuanian Mobile-ID;</li> </ul>

Member State	eID Schemes per Member State	Use in Company Law	Cross-border use
	signature is then sent to the citizen's mobile phone. After his/her confirmation, the signature is sent to the requesting application.		- Additionally, if company founders do not have any of the mentioned national eIDs, Estonia offers the possibility to request e-resident cards. Holders of e-resident's card can sign documents digitally and log into every portal and access every information system that accepts Estonian ID-card.
Finland	The Finnish Electronic Identity (FINEID) card is a non-mandatory electronic identity card that is intended to facilitate access to e-Government services for Finnish citizens and permanent residents of Finland as from 18 years. This smart card includes qualified certificates supporting authentication, encryption, and digital signature. In addition, health insurance information may be included in the ID card, replacing the KELA card.	Used by companies and their representatives at all stages of the company life-cycle	eID not used for cross-border activities
France	France does not issue eID cards. However, digital certificates are available through the French Chamber of Commerce Certification Authority. The duration of the authentication and qualified electronic signature certificates stored in the tokens is 3 years.	Not used in Company Law procedures	Non-applicable.
Germany	Germany implemented a national eID system, nPA, based on smart cards that has been working from 2010. These cards are contactless (RFID), protected against unauthorised access with the PACE protocol. Only service providers authenticated at the German Federal Office for Information Security can have access to this card. The access to this eID by service providers is not limited by the requirement of an approval of BSI as the nPA.	Not used in Company Law procedures.	Non-applicable.

Member State	eID Schemes per Member State	Use in Company Law	Cross-border use
Greece	There is no official eID card in Greece. However, a Digital Signature-Authentication Card is delivered for services based on ID card information. Two other eID tokens are also available, all being valid for a period of 5 years. The electronic Identity provider "ERMIS" is connected, in preproduction, to eIDAS. TAXIS is the other widely used card, mostly used in G2G services.	Not used in Company Law procedures.	Non-applicable.
Hungary	<i>Described as a "one-stop card", the eID combines personal identification including fingerprint data and an electronic signature – if the user opts for these – along with social security and tax identification information</i>	Not used in Company Law procedures.	Non-applicable.
Poland	<i>Not available</i>		
Portugal	The Portuguese Citizen Card ("Cartao de Cidadao") is mandatory and issued to any person in the population register at the age of 6. The Portuguese Citizen Card is a physical identity document, which allows citizens to use a multichannel system in their interactions with services from the public and private sectors.	Under the Empresa Online method, the company founders or their legal representatives need to authenticate their identity through the existing e-ID system implemented in Portugal. In order to proceed with this authentication, company founders or their legal representatives need to have access to an e-reader for their citizen cards	eID not used for cross-border activities
Spain	Spanish national ID card is fully operational. The system is complemented by more than 27 authorised entities that issue soft certificates and certificates in crypto devices. In 2015 a new eID system called Cl@ve has been introduced. This system is based on username and password, sometimes reinforced with an SMS. The most used eID is the certificate issued by the FNMT (Royal Mint).	Partially used by company founders through the CIRCE platform; however notarial deeds and notaries' involvement is required in any case.	eID not used for cross-border activities
United Kingdom	The gov.uk verify service is a gateway to identity services offered by specialised companies like CitizenSafe, Digidentity and SecureIdentity, as well as such services offered as an additional product of other public or private entities like Barclays, Post	Not used in Company Law procedures.	Non-applicable.

<b>Member State</b>	<b>eID Schemes per Member State</b>	<b>Use in Company Law</b>	<b>Cross-border use</b>
	Office and Royal Mail.		



## 2. Cross-border operations (mergers, divisions and conversions)

Section 3 of this Impact Assessment presents the main problems caused by the lack of rules or the divergence in rules between the Member States in respect to cross-border operations (mergers, divisions and conversions). Below are several examples and case studies that provide more detailed insight into the problems concerning these operations and their impact on stakeholders (creditors, minority shareholders and employees).

### 2.1. Cross-border mergers

- *Example: a cross-border merger between Dutch and Italian companies*

In a potential case of a merger between a Dutch and an Italian company, creditors in the Netherlands can file an opposition to the merger at the competent court, ask for a guarantee during one month after the announcement in the national official gazette and may block the merger (as the merger cannot be executed until the opposition is withdrawn or the court dismisses it). In Italy, the merger is suspended for 60 days after the filing with the registry of the merger deed unless creditors consented to the merger, all non-consenting ones have been paid in full or the necessary sum was deposited in a bank (i.e. during that time the creditors can block the merger).

In practice, the two different periods for creditor protection would need to be added up; this could lead to high delays and uncertainty. This might lead, as legal advisors mentioned, to companies deciding not to carry out the merger at all.

- *Examples of divergences in national creditor and minority shareholder protection regimes*

**Creditor protection:** Member States' rules diverge on the time limit for the protection of creditors' claims<sup>228</sup>. The period of time during which creditors can exercise their rights also differs<sup>229</sup>. The rules also vary on the nature of protection, e.g. in all Member States with rules creditors can demand a guarantee/security to guarantee that the company resulting from a merger will meet their claims but in many countries creditors even have a veto right over the merger<sup>230</sup>.

**Minority shareholder protection:** The duration of the period when minority shareholders can request protection varies (from 10 days to 3 months) and so does the substance of the protection. In most Member States minority shareholders have a right to

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<sup>228</sup> Member States are evenly divided between those setting a date before a certain point of time, "ex ante" and those setting the date after, "ex post".

<sup>229</sup> ranging from one month (e.g., DK, FR, EE, HU), six months (CZ) to no specific date (Lithuania or the UK)

<sup>230</sup> 14 EU/EEA countries offer veto rights to creditors and 15 – not. Bech-Bruun/Lexidale, p. 54-57.

sell their shares against adequate cash compensation (so-called "exit rights"), e.g. in Germany, Ireland, the Netherlands, but some countries offer also a right to additional cash compensation if the share exchange ratio is not adequate (e.g. Germany) or a right of investigation (e.g. in the Netherlands), and/or additional procedural safeguards (e.g. a 75% majority is required in the general meeting to approve a cross-border merger, e.g. in the UK, Ireland, Germany).

At least five Member States have not opted to introduce minority shareholder protection in national law<sup>231</sup>.

## 2.2. Cross-border divisions

- *Example: Direct cross-border division*

The division was carried out in order to reorganise the business of the Italian company to create synergies and uniform management at EU level for part of the business of the group of companies. The Italian company transferred a part of its business to the UK company (both of them being wholly owned by the same company).

Both Italy and UK allow for cross-border divisions but do not have specific national rules setting out the procedure. The division was carried out by applying Italian and UK rules for domestic divisions and, in addition, some provisions of the CBMD, e.g. by publishing an excerpt of the draft terms of the cross-border division in the Italian national gazette. The operation lasted about five months and its cost was estimated at between EUR 30,000 and 100,000. The interviews undertaken for this case study showed that the lack of specific rules created fiscal, legal and administrative uncertainties and that the need for coordination between the Italian and the UK formalities was seen as one of the most difficult aspects of this operation. Those resulted in high costs for specialised international professional legal advice and assistance in addition to the ordinary fixed (stamp duty, Registrar of Companies fees) and notarial ones (in Italy)<sup>232</sup>.

- *Example: Indirect cross-border division through a transfer of assets and liabilities*

A multinational group with 5,000 employees with activities across the EU (e.g. in the UK, Germany, Portugal), Asia and North America wanted to restructure its UK and German businesses to consolidate the European sales and R&D activities of the company in one European entity to create synergies and reduce costs. In order to undertake this restructuring, the company considered a number of different solutions including the creation of a new company in Germany and merging into it cross-border, and the transfer of the relevant assets and liabilities to that company. At the time of writing this impact assessment, the division was to be carried out through the transfer of business and assets

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<sup>231</sup> Belgium, Hungary, Lithuania, Luxembourg and Sweden, see Bech-Bruun/Lexidale, p. 118.

<sup>232</sup> EY study on cross-border operations of companies,

and the company was still deciding whether to go ahead with this operation and was also considering a division involving Portugal and Germany.

This operation was expected to take about 6 months and the typical costs were estimated to be:

- between €25,000 and €100,000 for the legal fees for a business and asset transfer in the UK, depending on the size and complexity of the business and the role of legal advisers;
- between €40,000 and €50,000 for the costs of a cross-border division via a cross-border merger, plus €10,000 for the cost of a UK barrister required to represent the UK entity in front of the UK court.<sup>233</sup>
- *Examples of divergences in national provisions to protect creditors and minority shareholders*

**Creditor protection:** In case of domestic divisions, in Austria, France, Ireland, Poland and the UK creditors have a right to petition the court for protection. In Denmark, an independent expert evaluates if creditors' claims would be endangered and in Italy, this can be assessed either in an expert report or by a court. For cross-border divisions, in Czech Republic creditors of legal entities participating in the cross-border division who submitted their undue claims within the prescribed timeline are entitled to seek a guarantee provided that it will be more difficult to recover their claims after division whereas in Denmark creditors can claim protection if the valuation expert concludes that the creditors would not be sufficiently protected after the division or if no such valuation declaration was made and creditors of a Finnish dividing company have the right to object to the division if their receivables have arisen before the registration of the draft terms of division without any pre-conditions needing to be met. The timing to provide creditor protection also varies: e.g. according to the Danish law on cross-border divisions, creditors can claim protection up to four weeks after the general meeting and according to Finnish rules – within three months from the issuance of the public notice by the registration authority (so before the division takes effect) and in line with the Czech cross-border division law - within six months after the cross-border divisions becomes effective. (or 3 months – in case the resulting company has its seat abroad). In Italy and Sweden, cross-border merger rules are usually applied by analogy, and in Belgium (a right to claim a security) and France – domestic division ones.

**Minority shareholder protection:** There are different ways in which national rules for domestic divisions protect shareholders against the risk when shares in the resulting companies are allocated non-proportionately to the dividing company's shareholders. Some Member States (e.g. Denmark, Ireland, Italy, Poland) allow shareholders to sell their shares for adequate compensation, some require high majorities when voting in the shareholders' meeting (e.g. 90% in Austria as compared to 75% in case of proportionate divisions, 75% in Denmark as compared to 66% for the proportionate ones), some others provide for an ex-ante court scrutiny of the fairness of the terms of division (UK) or the possibility to set aside a resolution tainted by abuse of majority power (France). As

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<sup>233</sup> EY study on cross-border operations of companies

regards cross-border division rules, there are exit rights for minority shareholders in Denmark, Czech and Finnish laws; in Italy and Sweden the rules on cross-border mergers (with exit rights) would be likely to be applied by analogy for cross-border divisions, and in Belgium – the ones for domestic divisions (where a special majority of 75% of the votes while half of the share capital is represented will be required to decide on the division).

**Employee protection:** In case of domestic divisions, some Member States provide for protection, e.g. in Belgium, where in principle, the employment contracts of the employees are transferred automatically to the receiving company while maintaining acquired rights, or Denmark (considerable protection where a business changes ownership) or the Netherlands (a works council – if at least 50 employees – has the right to provide formal advice on all reorganisations of a company and could bring a dispute before a court if the company board goes against their advice), whereas in a number of others (e.g. in France, Ireland, Italy, Lithuania, Spain or the United Kingdom) there are no specific provisions in place. As regards cross-border divisions, the provisions differ between protection based on information and procedure in Denmark and based on information rights in Czech Republic and no specific rights in Finland; in Member States where other national rules are applied by analogy, e.g. in Belgium safeguards from domestic divisions would apply whereas in Sweden – the ones from cross-border merger rules .

### 2.3. Cross-border conversions

- *Case study 1*

A company based in Luxembourg wished to transfer its registered office to Germany and convert into a GmbH (*German private limited liability company*) on foot of the Court's jurisprudence. In the first decision of 13<sup>th</sup> February 2012, the national court held that a cross-border conversion was not possible. In the second decision on the 19<sup>th</sup> June 2013, the higher court said that on the basis of *VALE*, a cross-border conversion was in principle possible but referred the case back to the lower court for further deliberations (*Moor park I & Moor park II*)

- *Case study 2*

A French private limited liability company (S.a.r.l.) wanted to convert into a German equivalent legal form (GmbH). The national court decided that, on the basis of the *VALE* principles, a cross-border conversion was, on principle, possible. However, similar to the Moorpark, it referred the case back to the lower court because it found that the statutes were currently insufficient and that there was a number of further (though remediable) obstacles.

### 2.4. Conflict of laws

The example below is linked to section 5.3 of this Impact Assessment which looks into the problems caused by the lack of uniform rules on conflict of laws.

- *Illustration of the relevance of conflict of laws for corporate mobility*

An online retail company<sup>234</sup> with a registered office and operations in Italy undergoes financial difficulties and needs to restructure to avoid insolvency. An investor is willing to bring new financing needed to modernise the business, on condition that, as part of the restructuring plan, the company relocates its registered seat to a MS where the investor's rights are better protected in the future, e.g. Finland. Main operations and head office remain in Italy. The financing could be jeopardised or become more expensive if there are remaining doubts as to whether Finnish law will really be applicable to that company.

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<sup>234</sup> 27% of EU companies are active in the retail and wholesale sector. Italy is the country with most registered companies, i.e. 16% of the total 23 million EU companies.

## ANNEX 5: EVALUATION OF THE FUNCTIONING OF RULES ON CROSS-BORDER MERGERS

### Summary

This evaluation measures the existing Cross Border Mergers Directive<sup>235</sup> against the evaluation criteria in line with 'Better regulation' requirements.

Main inputs to the evaluation are the study on "*The Application of the Cross-Border Mergers Directive*" carried out by an external contractor for the Commission<sup>236</sup>, additional studies<sup>237</sup> and two public consultations (2015 and 2017) to collect stakeholders views about the functioning of the cross-border mergers.

The analysis results in an overall positive evaluation of the CBMD in terms of effectiveness, efficiency, relevance, coherence and EU added value. Overall the CBMD has led to a significant increase in cross-border merger activity, in line with its objective to facilitate cross-border mergers and increase the opportunities offered by the internal market.

However, despite the overall positive assessment, the evaluation identifies certain problems which impede the full effectiveness and efficiency of the Directive. The main obstacles concern the lack of harmonisation of substantive rules in particular for creditor protection and minority shareholder protection as well as the lack of fast track procedures in the Directive. Making more use of the interconnection of business registers could increase synergies and thus coherence with other company law legislation.

### 1. Introduction

In line with the 'Better Regulation' requirements, the purpose of this evaluation is to assess the existing rules for cross-border mergers under the CBMD in terms of effectiveness, efficiency, relevance, coherence and EU added-value.

This evaluation has been carried out in parallel to the Impact Assessment on policy options for cross-border operations of companies which includes cross-border mergers.

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<sup>235</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1); the directive has now been replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (OJ L 169, 30.6.2017, p. 46).

<sup>236</sup> Bech-Bruun/Lexidale, *Study on the application of the cross-border mergers directive* (September 2013) [http://ec.europa.eu/internal\\_market/company/docs/mergers/131007\\_study-cross-border-merger-directive\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf).

<sup>237</sup> Schmidt, *Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?* Study for the JURI Committee, June 2016. Reynolds/Scherrer/Truli, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, Study for the European Parliament, December 2016.

The conclusions of the evaluation will, where relevant, feed into the Impact Assessment.<sup>238</sup>

## **1.1. Background**

This section explains the objectives behind the introduction of the cross-border merger provisions and describes the regulatory situation before its introduction (i.e. the baseline scenario); it also presents the main building blocks of the directive.

### **1.1.1. Objectives of the Cross-Border Merger Directive**

The objective of the CBMD was to facilitate mergers between limited liability companies incorporated in different MS and therefore increase the opportunities offered by the Single Market (as reflected in recital 1 of the CBMD).

The explanatory memorandum of the 2003 Commission proposal<sup>239</sup> identifies "a significant gap in company law". It further refers to an "increasing need [...] for cooperation between companies from different MS" and to the fact that "companies have been calling for the adoption of a Community legal instrument that meets their needs for cooperation and consolidation between companies from different MS and that enables them to carry out cross-border mergers". It also specifies that "the costs of such an operation [cross-border merger] must be reduced, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit."

### **1.1.2. Baseline scenario**

Before the introduction of the CBMD, the situation among MS was diverse: a first step within the development of EU rules for mergers was the Third Council Directive of 1978<sup>240</sup> which led to a harmonisation of the national merger provisions, i.e. for mergers within one Member State.

However, cross-border mergers were possible only if the companies wishing to merge are established in certain MS. The explanatory memorandum of the 2003 proposal explains: "In other MS, the differences between the national laws applicable to each of the companies which intend to merge are such that the companies have to resort to complex and costly legal arrangements. These arrangements often complicate the operation and are not always implemented with all the requisite transparency and legal certainty. They result, moreover, as a rule in the acquired companies being wound up - a very expensive

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<sup>238</sup> As the initiative will – beyond cross-border mergers – not principally aim at revising the existing provisions but at introducing new provisions or complementing the existing ones, no additional evaluation seems warranted.

<sup>239</sup> [COM\(2003\)703](#).

<sup>240</sup> Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, OJ L 295, 20.10.1978, codified by Directive 2011/35/EU.

operation".<sup>241</sup> In more detail, according to the 2013 Study<sup>242</sup>, prior to the introduction of the CBMD, companies had to have recourse alternative methods: forming a European Company (SE) by merger (which implies a cumbersome procedure); cross-border conversion and subsequent merger under domestic merger laws (only possible when cross-border conversions are allowed); "non-harmonised" merger on the basis of the jurisprudence of the Court of Justice (Case C-411/03<sup>243</sup>). At the time, according to the 2013 Study, only AT, F, IT, LT, LUX, PT and ES allowed procedures for cross-border mergers without using methods such as setting up an SE.

Overall, the 2013 study found that cross-border mergers were only possible in 17 Member States<sup>244</sup>. Also, as identified by the 2013 Study, pre-existing arrangements for cross-border mergers did not provide comprehensive protection for creditors and minority shareholders. The study names LUX as an example for such a situation<sup>245</sup>.

The decision of the European Court of Justice in the above-mentioned case C-411/03, which stated that national authorities could not refuse a merger between a company registered in one Member State and a company registered in another Member State because this would be incompatible with the freedom of establishment, lead to increasing demand for the harmonisation of cross-border mergers at EU level.

### **1.1.3. Main provisions of the directive**

The Commission proposal was presented in 2003 and the directive was adopted by the co-legislators in 2005. The CBMD provides for rules enabling cross-border mergers of limited liability companies incorporated in different MS.

The CBMD applies to mergers of limited liability companies provided that at least two of them are governed by the laws of different MS (Article 1).

The CBMD specifies certain conditions for carrying out a merger (Article 4), for instance that cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States, and that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject.

The directive also sets out the precise procedure to be followed to carry out cross-border mergers, including:

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<sup>241</sup> The Bech-Bruun/Lexidale study mentions, for instance, that companies could set of a European Company that would incorporate both companies, or carry out a cross-border seat transfer followed by a domestic merger. Such a process, however, was not clearly regulated, was costly in terms of setting up an SE, and added an artificial construct—the SE—which might not have been oriented with the business goals of the companies

<sup>242</sup> Bech-Bruun/Lexidale, 2013, p. 35 et seq.

<sup>243</sup> Case C-411/03 *SEVIC* [2005] ECR I-10825.

<sup>244</sup> LUX, BE, NL, DK, DE, UK, SE, FI, EE, LV, PL, CZ, SK, HU, RO, BG and EL.

<sup>245</sup> Bech-Bruun/Lexidale, 2013, p. 39.



- drawing up of the common draft terms of the merger by the management or administrative organ of each of the merging companies (Article 5) which contain, for example: names and registered offices of the merging companies and those proposed for the resulting company; information on the impact of the merger on shares and securities (ratio applicable to the exchange of securities or shares; terms for the allotment of securities or shares); likely repercussions of the cross-border merger on employment; statutes of the company resulting from the merger; information on the procedure by which arrangements for the involvement of employees are determined. The CBMD also requires the publication of the common draft terms (Article 6);
- preparation of a report by the management of the merging companies (Article 7) explaining the economic and legal aspects and impact of the proposed mergers for the benefit of both members and employees; this report is to be made available to the members and employees/their representatives of the merging companies;
- preparation of an independent expert report (Article 8) on the implications of the merger, stating at least whether the share exchange ratio is fair and reasonable;
- approval by the general meeting of each of the merging companies of the common draft terms, after taking note of the respective reports (Article 9).

The directive allows a simplified procedure (Article 15) in two instances: i) where a merger with a whole owned subsidiary is carried out or ii) where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired.

The CBMD lays down a two-step model of legal scrutiny: each MS must designate an authority competent to issue a pre-merger certificate confirming that the pre-merger formalities have been properly completed (Article 10) and an authority to check the legality of the resulting merger (Article 11). The law of the MS governing the company resulting from the merger shall determine the date of entry into effect of the merger (Article 12).

The CBMD also determines the consequences of the cross-border merger (Article 14) which include:

- the companies being merged ceasing to exist,
- the transfer to the newly merged company of all the assets and liabilities of the merging companies,
- the members of the merging companies becoming members of the new merged company.

Provisions on the protection of stakeholders involved (employees, creditors, minority shareholders) are also included, however with a varying degree of harmonisation: as regards creditor and minority shareholder protection, the directive only contains minimum standards. In detail:

- ***Employee participation:*** Not all MS have the system of employee participation and among those MS which have such a system, the rules vary to a large extent (for

details see Annex 10). Therefore it was very difficult to agree which employee participation rules, if any, should apply after the cross-border merger. As a result of the legislative negotiations, the CBMD followed the solution on employee participation in the Directive on the European Company (SE)<sup>246</sup>, but not entirely: the general principle is that the national law governing the company resulting from the cross-border merger applies and that a negotiation procedure applies under certain conditions. These conditions include, for example, at least one of the merging companies has an average number of employees exceeding 500 and operating under an employee participation system.

Contrary to the employees' participation rules in the SE, the CBMD provides that the rules on employee participation shall follow the laws of the MS where the registered office of the successor company is situated. Since this could invite for forum shopping, the Directive includes three exceptions to this general rule in order to guarantee the status quo in terms of employee participation. If any of these exceptions apply (basically there must be some form of employee participation before the merger; one example is that at least one of the merging companies has an average number of employees exceeding 500 in the six months before the publication of the draft terms of merger, and is operating under an employee participation system), the management can either negotiate with employees a bespoke solution on the participation or apply standard rules (relating to the composition of the body representative to employees, its competence and powers, and the functioning of employee participation) provided by Directive 2001/86/EC<sup>247</sup>. The percentage of employees required to have been previously covered by an employee participation system is one third (compared to one quarter in the SE rules).

- ***Creditor protection:*** Creditor protection is relevant in order to diminish the risk that creditors will be in a worse financial situation than they were before the merger. Such a risk can materialise because the liabilities of the successor company would exceed its assets or because the new applicable law could negatively impact creditors.<sup>248</sup> The general rule of the CBMD (Article 4) provides that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. In accordance with the Directive on domestic mergers<sup>249</sup> national laws have to provide "adequate protection" for the interests of creditors.
- ***Minority shareholder protection:*** The CBMD requires that a company, which is part of a cross-border merger, has to inform the minority shareholders about the intended merger process. In order to make sure that they can make an informed decision in the

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<sup>246</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

<sup>247</sup> Annex to Directive 2001/86/EC.

<sup>248</sup> One example of such an effect is in insolvency laws, where, under the European Insolvency Regulation, the jurisdiction of insolvency proceedings is determined by the location of the registered office and the center of main interest.

<sup>249</sup> Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies, OJ L 110, 29.4.2011; the directive has been repealed and replaced by Directive (EU) 2017/1132.

general meeting, the CBMD sets out that the minority shareholders have to be provided with the draft terms of the merger, the merger report and the experts' report. However, those information requirements do not provide substantive protection to the minority shareholders. The CBMD does not require MS to provide measures to provide substantive protection rights for minority shareholders, but it allows MS to adopt provisions designed to ensure appropriate protection for minority shareholders.

## **2. Evaluation questions**

In line with the Commission Better Regulation framework, the evaluation of the existing regime for cross-border mergers under the CBMD addresses the following questions:

### ***Effectiveness:***

*To what extent have the objectives of the CBMD been achieved? If not achieved, what factors hindered their achievement?*

### ***Efficiency:***

*To what extent have the rules of the existing CMBD been cost effective? To what extent are the costs of implementing the rules proportionate to the benefits achieved?*

### ***Relevance:***

*To what extent are the CBMD rules still relevant for meeting their underlying policy objectives, and do these objectives still correspond to policy needs?*

### ***Coherence:***

*To what extent are the CBMD rules internally coherent? To what extent are the CBMD rules coherent with other EU acts with similar objectives? To what extent is the CBMD coherent with wider EU policy?*

### ***EU added value:***

*What is the additional value resulting from the CBMD, compared to what could be achieved by MS at national level?*

## **2.1. Method of evaluation**

### **2.1.1. Sources**

The evaluation has been carried out on the basis of information and data collected from several sources, in particular the study on "The Application of the Cross-Border Mergers

Directive" carried out by an external contractor for the Commission in 2013<sup>250</sup>, feedback from public consultations carried out in 2015 and 2017 to collect stakeholders' views about the functioning of the cross-border merger as well as studies carried out for other EU institutions<sup>251</sup>. In detail:

- The study on "The Application of the Cross-Border Mergers Directive" was carried out by an external contractor for the Commission in 2013<sup>252</sup>. Article 18 of the CBMD provided for a review of the Directive five years after the final date of transposition "in light of the experience acquired in applying it". The contractor consulted (both by distribution of questionnaires and in one-on-one interviews) M&A lawyers and academics from every EU and EEA MS, hundreds of legal advisors who have been involved in cross-border mergers, as well as other stakeholders, such as executives and employees. The contractor also conducted interviews with public agencies and private entities involved in the cross-border mergers procedure, such as national registries, courts, governmental departments responsible for the transposition of the Directive, accountants, and tax advisors.
- The 2015 public consultation concerned cross-border mergers and divisions and its objective was to gather more in-depth information on the existing barriers in cross-border operations, on changes that stakeholders believed were needed in the existing rules and on costs that could be saved thanks to EU level action. 151 responses were received from 27 MS, 1 EEA country and a couple of third countries. Most replies came from Germany followed by Spain and France. The respondents were i.e. public authorities, academia, EU-wide and national business organisations, companies and employee representatives.

The overall results showed that the respondents asked for an expansion of the scope of the CBMD, a harmonisation of creditor protection (88% of the respondents) and minority shareholder protection (66% of the respondents) and for an implementation of a "fast track" cross-border merger procedure (62% of the respondents). As to the employee participation, the respondents had diverging views.

- The 2017 public consultation, entitled "EU Company law upgraded: Rules on digital solutions and efficient cross-border operation", was launched on 10<sup>th</sup> May 2017 and ended on 6 August 2017. Its aim was to collect input from stakeholders on problems in company law, gather what evidence they have on such problems and hear their possible solutions on how to address the problems at EU level.

There were 207 responses submitted online through the EU Survey portal and 2 responses submitted via email. The MS with the most number of contributions was Germany followed by Austria and Belgium. Annex 2 contains a summary of stakeholder responses to 2017 public consultation (see point specifically dealing with cross-border mergers).

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<sup>250</sup> Bech-Bruun/Lexidale, 2013.

<sup>251</sup> Schmidt, *Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?* Study for the JURI Committee, June 2016. Reynolds/Scherrer/Truli, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, Study for the European Parliament, December 2016.

<sup>252</sup> Bech-Bruun/Lexidale, 2013.

- The evaluation further takes into account the study carried out by Professor Jessica Schmidt for the European Parliament in 2016 "Cross-border mergers and divisions, transfers of seat: Is there a need to legislate?". The study aims analyses this question mainly on the basis of existing literature and commentary, including by legal practitioners and academics.
- The study "Ex-post analysis of the EU framework in the area of cross-border mergers and divisions" by Reynolds/Scherrer/Truli was carried out in 2016 to accompany the Legal Affairs Committee's implementation report on cross-border mergers. It is based on existing information and data.

### 2.1.2. Data limitations

The data collection and analysis performed revealed a number of intrinsic limitations, stemming from, for example:

- Given the limited number of cross-border mergers per year, interviews with stakeholders who explained in a more qualitative way the benefits and drawbacks of the CBMD are crucial for the evaluation. This applies all the more where it comes to needs going beyond the current directive. The 2013 study is built on in-depth interviews from a broad range of interested stakeholders, which gives assurances that input from different background has been taken into account. The 2015 and 2017 public consultations were open to the general public. Still, the answers received reflect – as in all public consultations – the views of a sample of stakeholders that usually have a stake in the issue, and not those of the entire population or a representative sample.
- It has been extremely difficult to collect information on the costs associated to carrying out cross-border mergers. One of the contractors<sup>253</sup> mentioned factors such as involvement of the merging companies in the regulated financial market, shareholding structure, participation of an auditor, employee participation procedures, difficulty to distinguish direct costs (notary fees, state duties, translation costs) as making data collection difficult. Also many of the relevant company internal data are confidential. Where possible, available anecdotal data has been used to illustrate the costs of cross-border merger.
- As regards the time period of the evidence collection, the 2013 study is based on interviews held before 2013. Where possible, the study results have been supplemented by more recent data from the additional sources available. Next to the consultations carried out in 2015 and 2017, also policy discussions with Member States and stakeholders were carried out in 2017.

The evaluation has been carried out on the basis of the best available data. Lack of quantitative data has been, to the extent possible, counter-balanced with qualitative assessment and considerations.

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<sup>253</sup> EY Study on cross-border operations of companies, p. 55.

## 2.2. Implementation

MS had to transpose the directive into their national laws by 2007. However, certain MS only finished the transposition process as late as 2009. Furthermore, due to technical difficulties encountered by certain national authorities the first cross-border mergers in these MS were not possible before 2012<sup>254</sup>.

In order to be able to assess the functioning of the Directive, in particular in terms of effectiveness and efficiency, this section explains how MS have transposed those provisions of the directive into their national legislation which are relevant for this evaluation as they raise questions as regards the compliance of the directive with the evaluation criteria (see below under point 2.3.).

- **Scope of application:** Although the Directive applies only to limited liability companies, certain MS have expanded the scope to cover other company law forms.<sup>255</sup> One quarter of MS has expanded the scope to additional company forms (i.e. partnerships), such as Belgium, Italy and the UK.<sup>256</sup> The UK included general unlimited companies and unregistered companies into the scope of cross-border mergers. There have also been extensions of scope by some MS to cross-border divisions.<sup>257</sup> Although the CBMD<sup>258</sup> states that a merger involves the transfer of all assets and liabilities of companies "*being dissolved without going into liquidation*", most MS have decided also to include companies in liquidation. Only 5 MS have excluded companies in liquidation from carrying out cross-border mergers<sup>259</sup>.
- **Employee participation:** Regarding the transposition of this procedure into national law, although MS have transposed the general concept including the special negotiating body and the standard rules, a considerable number of them have modified the procedure (i.e. not transposing certain provisions or by transposing them differently).
- **Creditor protection:** MS have adopted divergent measures leading to different level of "adequate protection" guaranteed by the MS. The main differences between MS' rules concern the date when the protection commences, its duration and its consequence as well as the procedure itself. MS have adopted two different approaches based on ex-ante and ex-post models. The former model (*ex-ante*) provides for protection during the period starting with the publication of the common draft terms prior to the general shareholders meeting and ending at the point at which the cross-border merger becomes legally effective. The latter model (*ex-post*) comprises mechanisms available after the cross-border merger has taken effect. There are also differences regarding the substance of the protection offered to creditors. While in certain MS creditors are entitled to veto the merger, others simply guarantee

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<sup>254</sup> For a summary of the transposition in Member States and its timing see Bech-Bruun/Lexidale, 2013, p. 89 et seq.

<sup>255</sup> Bech-Bruun/Lexidale, 2013, p. 27.

<sup>256</sup> Idem p. 27, 98.

<sup>257</sup> e. g. Belgium, France, Romania, Spain, and Finland, see: Bech-Bruun/Lexidale, *Study on the Application of the Cross-border Mergers Directive*, September 2013, 102.

<sup>258</sup> Article 2(2) CBMD.

<sup>259</sup> Cyprus, Hungary, Romania, Slovakia, and the UK, see: Bech-Bruun/Lexidale 2013, p. 108 .

a payment to them. In practice, the *ex ante* model is often coupled with a veto for creditors whereas the *ex post* approach is not. More examples of divergences in national creditor protection regimes are laid out in detail in Annex 4, point 2.1.

- **Minority shareholders' protection:** Most of the MS have made use of this provision, but the rules and procedures differ. Depending on the MS, the procedure is initiated either at the general meeting or on the date of the registration or publication of the registration of the merger with the national registry.<sup>260</sup> Furthermore, the substance of the protection in the MS is very diverse ranging from no special rules to rather elaborate protection. There are MS that provide minority shareholders with exit rights against cash compensation. More examples of divergences in national minority shareholder protection regimes are laid out in detail in Annex 4, point 2.1.

## 2.3. Answers to the evaluation questions

### 2.3.1. Effectiveness

This subsection assesses to what extent the objectives of the CBMD – facilitating mergers of limited liability companies incorporated in different MS through cost-reduction and increased legal certainty and thus increasing the opportunities offered to companies by the Single Market – have been achieved and if not, what were the factors that hindered their achievement.

It has been found in the 2013 study<sup>261</sup> that following the introduction of the cross-border merger rules in all MS on the basis of the CBMD, the number of cross-border mergers in the EU has increased, counteracting a general trend of decreasing merger activity. Between 2008 and 2012, merger activity has increased by 173 percent, from 132 CBMs in 2008 to 361 in 2012, indicating that the new procedure has opened up a bottleneck in economic activity within the EU and EEA by improving cross-border mobility. Recent data collected through the business register interconnection results in estimations of around 500 cross-border mergers carried out in 2017<sup>262</sup> which confirms the positive trend.

Stakeholders (such as law firms, business registers and trade unions) interviewed for the 2013 study welcomed the new procedures, the procedural simplification and reported lower costs and shorter timeframes due to the harmonised framework<sup>263</sup>.

In particular, it was found that the CBMD contributed to the cost savings for companies by<sup>264</sup>: providing for procedural simplification (i.e. savings of unnecessary procedural

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<sup>260</sup> Bech-Bruun/Lexidale, 2013, p. 48.

<sup>261</sup> Bech-Bruun/Lexidale, 2013, p. 4

<sup>262</sup> Current statistics for BRIS have collected from 11 countries the information that there have been 55 cross-border mergers in the past 4 months. This leads to an estimation of  $55 \times 3 = 165$  mergers/year. 11 countries from which information is available equal about 1/3 of all countries using BRIS (EU+EEA). This leads to an estimation of  $165 \times 3 = 495$  mergers/year.

<sup>263</sup> Bech-Bruun/Lexidale, 2013, p. 5-8, 47.

<sup>264</sup> Bech-Bruun/Lexidale, 2013, p. 46-48.

costs linked to the alternative procedures that had been chosen by companies before the introduction of the CBMD); allowing that more rational business decisions were taken (seizing business opportunities cross-border); lower agency costs (i.e. costs incurred from asymmetric information within the merging companies, savings would here be due to standardized information requirements in the draft terms of merger and the management report). The introduced rules were considered to provide sufficient clarity, in particular on procedural aspects, which enabled to cut costs of legal advice and the costs of lengthy court proceedings or other unnecessary operations (especially issuing pre-merger certificates by relevant authorities and publishing common draft terms of the cross-border mergers on companies' web-site).

Based on the findings of the evaluation study and the stakeholder consultations, it can therefore be concluded that the Directive has overall met its objective in facilitating cross-border mergers across the EU. The Directive did not lay down, at the time when it was adopted, other objectives than cutting costs and facilitating the cross-border mergers (it just referred to the protection of members and others).

However, findings from the implementation in MS, the 2013 application study and the various consultations undertaken raise questions as regards the effectiveness of some provisions of the directive:

- **Scope:** Taking into that some MS have implemented the CBMD for a larger scope than the one foreseen in the directive, and that some of the respondents to the 2015 and 2017 consultations, some researchers<sup>265</sup> and the European Parliament in its June 2017 resolution<sup>266</sup> asked for the scope of the CBMD to be broadened to cover partnerships and cooperatives, it could be questioned whether the effectiveness of the directive could be increased by further enlarging the scope, e.g. to all companies within the meaning of Article 54 TFEU<sup>267</sup>.

However, in practice, such alternative forms are rarely involved in mergers. The data on mergers which have taken place reveals that 66 percent of the acquiring companies and 70 percent of the merging companies involved in cross-border mergers were private limited liability companies, whereas 32 percent of acquiring companies and 28 percent of the merging companies involved in cross-border mergers were public limited liability companies<sup>268</sup>. Also, the 2013 study found that, based on the feedback from stakeholders, there does not seem to be a demand for a revision of the directive in that regard<sup>269</sup>. Recent informal consultations in 2017 in policy discussions with stakeholders and Member States confirmed this.

It can therefore be concluded that an extension of the scope of the directive would not add to its effectiveness with a view to reaching its policy objective.

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<sup>265</sup> J. Schmidt, EP Study 2016, p. 17.

<sup>266</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0248&language=EN&ring=A8-2017-0190>

<sup>267</sup> See also the 2003 Commission proposal which aims at "enabling as many companies as possible to benefit".

<sup>268</sup> Bech-Bruun/Lexidale, 2013, p. 101.

<sup>269</sup> Bech-Bruun/Lexidale, 2013, p. 98.



- **Creditor protection:** As described in subsection 2.2. ("Implementation"), MS have adopted very divergent approaches on the basis of the existing CBMD as regards creditor protection. The divergence between national rules can make it difficult or impossible to meet certain steps of the procedure. For instance, problems arise when a company situated in a Member State where the creditor protection period starts prior to the general meeting which is due to approve the draft merger terms intends to merge with a company in another Member State where the date starts after the general meeting. Also, it might be impossible for the merging companies to meet the 6-month deadline laid down in the CBMD for submission of pre-merger certificates if due to different creditor protection periods such a certificate has not been yet issued in one of the MS concerned<sup>270</sup>.

Against this background, the 2013 application study found a number of complexities in the current regime on creditor protection which were reported by stakeholders as obstacles<sup>271</sup>, such as the starting date, duration, consequences and procedures as regards creditor protection. Also in the 2015 public consultation, 80% of respondents were in favour of harmonising the rules on creditors' rights including a preference for granting guarantees/securities to creditors and for having the creditor protection period start before the cross-border merger becomes effective ('ex-ante'). This is confirmed by the results of the 2017 public consultation. All national public authorities who replied were of the opinion that creditor protection measures should be addressed. 80 % felt it important to harmonise procedural as well as material aspects of creditor protection. Also businesses raised the need for harmonised rules for creditor protection, while other stakeholders, such as trade unions preferred other measures which related more directly to rights of employees. Also researchers<sup>272</sup> confirm that the resulting diverging national regimes and timeframes have proved to be a major obstacle in practice and that a higher degree of convergence would likely resolve most of the difficulties<sup>273</sup>.

Overall, the conclusion can be drawn that the lack of substantive harmonisation as regards creditor protection in the current CBMD hampers the full achievement of the policy objective of facilitating cross-border mergers.

- **Minority shareholder protection:** In view of divergent transposition of minority shareholder protection as described in subsection 2.2. ("Implementation"), it can be questioned whether the approach in the existing CBMD (no substantive harmonisation) hampers the effectiveness of the existing regime. Taking into account that a minority shareholder can own up to nearly half of the shares of the company, the protection regime can be very costly and requires capital reserves if compensation has to be paid, which illustrates the importance of this element for carrying out a cross-border merger.

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<sup>270</sup> Examples from Bech-Bruun/Lexidale, 2013, p. 54.

<sup>271</sup> Bech-Bruun/Lexidale, 2013, p. 52 et seq.

<sup>272</sup> J. Schmidt, EP Study 2016, p. 18,.

<sup>273</sup> Reynolds/Scherrer/Truli, Ex-post Analysis 2016, p. 41.

In interviews for the 2013 application study, business-related stakeholders regard minority shareholder protection as a concern in cross-border mergers. In this context, stakeholders also stated that if issues such as potential minority shareholders invoking protections are not rectified in advance, the merger will not be carried out because it would involve too many uncertainties.<sup>274</sup> In the 2015 consultation, 65% of respondents who expressed an opinion were in favour of harmonising the rights of minority shareholders. Also in the most recent 2017 public consultation, MS and businesses considered the issue of the protection of minority shareholders as important. Researchers<sup>275</sup> also confirm deficiencies in the current regime.

It can therefore be concluded that the lack of current substantive harmonisation of minority shareholder protection rules creates an obstacle to the current CBMD fully reaching its potential with a view to facilitating cross-border mergers.

The conclusion can therefore be drawn that while the objective of the CBMD has been overall achieved, remedying the current lack of substantial harmonisation in particular as regards creditor protection and minority shareholder protection could increase the effectiveness of the instrument.

### **2.3.2. Efficiency**

This subsection addresses the question to what extent the rules of the existing CMBD have been cost effective and to what extent the costs of implementing the rules are proportionate to the benefits achieved.

The benefits of cross-border merger rules consist in more legal certainty, more predictability, less unnecessary cost for companies (see also above in subsection 2.3.1.). More legal certainty means faster work for public authorities involved in such operations (courts, notaries, business registers), especially as the law applicable in most cases is clear-cut. As stated above, since the implementation of the rules, there has been a 173% increase of cross-border mergers showing clearly the benefit of the new rules.

Cost savings identified in stakeholder interviews for the 2013 study<sup>276</sup> relate to procedural simplification, lower agency costs, lower costs of legal advice and business efficiency gains (for more details of the description of cost savings see above under 2.3.1).

The procedures set up under the CBMD also create compliance costs for companies (e.g. for drawing up the draft terms of cross-border mergers, the report, costs for the independent expert, for arrangements relating to employee, creditor and minority shareholder protection). While, as explained under point 2.1.2, it is difficult to obtain data as regards the concrete costs for carrying out a cross-border merger procedure, it is important to note that compliance costs only arise for those companies which carry out a cross-border merger procedure.

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<sup>274</sup> Bech-Bruun/Lexidale, 2013, p. 69.

<sup>275</sup> J. Schmidt, EP Study 2016, p. 20; Reynolds/Scherrer/Truli, Ex-post Analysis 2016, p. 42.

<sup>276</sup> Bech-Bruun/Lexidale, 2013, p. 46.

At the same time, the described increase in cross-border merger activity and the clear stakeholder feedback that the CBMD has generated cost savings demonstrates that any compliance costs are not a deterrent to cross-border activity, but stay below the above-described cost savings.

However, sources used for the evaluation suggest that the disproportionality of such costs with a view to the benefits achieved requires closer examination as regards the following issues:

- ***Creditor and minority shareholder protection:*** It has been found that, due to the divergent national rules, companies often face costly legal advice and a very long delay to complete a merger due to the divergent national rules. For instance, while a simple cross-border merger takes between 2 and 4 months, some mergers can take up to 7 months depending on the MS involved<sup>277</sup>. This can be due to different protection periods for stakeholders in different MS (as described above in subsection 2.2. "Implementation"). The stakeholder views on the effectiveness of the current regime on creditor and minority shareholder protection quoted under 3.2.1. as regards effectiveness of these provisions are also relevant with a view to its efficiency. As regards creditor and minority shareholder protection, the current regime is therefore not efficient.
- ***Only limited possibilities for simplified procedure:*** Some stakeholders and research argue<sup>278</sup> that – beyond the existing Article 15 CBMD – there are other circumstances where meeting the requirements of the Directive is timely and costly and therefore a "fast-track" procedure would be needed. For instance, drawing up a management report is considered an unnecessary burden in cases where the merging companies have no employees or the shareholders agree not to require that such a report. It is estimated that drawing up such a report can amount to up to between €5,000 and 8,000 in Italy and that that legal advice for drawing up the necessary reports for a cross-border operation can sum up to € 8.000-12.000 in Belgium.<sup>279</sup> In the 2015 consultation, 62% of respondents who expressed an opinion were in favour of introducing a "fast track" cross-border merger procedure. In the 2017 consultation, business organisations raised the simplification of rules (fast-track procedure) as one of the points to be addressed in the existing CBMD. Also organisations of legal professions raised this point.

Data and stakeholder input therefore lead to the conclusion that in certain circumstances – where it would not be necessary to protect stakeholders through a fully-fledged cross-border merger procedure – the described costs and burdens are unnecessary where it would not be required for protecting the stakeholders concerned to carry out a fully-fledged cross-border mergers procedure.

- ***Employee participation rules:*** Companies also consider the employee participation procedure in the CBMD too complex and leading to unnecessary costs and delays

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<sup>277</sup> Bech-Bruun/Lexidale, 2013, p. 133.

<sup>278</sup> Bech-Bruun/Lexidale, 2013, p. 85-86.

<sup>279</sup> EY study on cross-border operations of companies

within the merger.<sup>280</sup> In particular, the negotiations on the employee participation system may take more than 6 months. On the other hand, trade unions consider that the existing rules on employee participation do not give enough protection for employees, i.e. the procedural requirements should be increased. Also, a lack of information to employees has been observed<sup>281</sup>.

Diverging perceptions on the functioning of the employee participation rules have been confirmed by the 2017 consultation where business organisations raised the need for simplified employee protection rules whereas trade unions were concerned with strengthening employee participation. Stakeholder views are therefore not conclusive as regards the cost-benefit proportionality of the existing employee participation rules. In the absence of further data it can therefore not be concluded that these are inefficient.

After all, the overall efficiency of the cross-border merger rules is positively assessed. However, as regards creditor and minority protection, and the limited possibilities for simplified procedures, it can be argued that the compliance costs exceed the benefits achieved.

### **2.3.3. Relevance**

This section assesses how well the objectives of the CBMD still match the current needs and problems.

Companies that want to keep pace with the further increased globalisation and intensified competition are required to expand cross-border. Cross-border mergers are one of the most important ways to do that and the number of cross-border mergers is constantly increasing. Mergers are used by companies for different purposes such as group reorganisations<sup>282</sup>, cutting organisational costs as well as business-oriented considerations in order to enjoy greater returns to scale, consolidated branding, or other synergies between different business activities.

Enhanced cross-border activity, such as mergers, also increases the attractiveness of the Single Market as an investment destination, not only for intra-EU investment but also for investment from third countries. Clear and predictable EU rules and procedures provided by the CBMD are essential in this respect.

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<sup>280</sup> E.g. Romanian and Lithuanian companies and legal advisors considered the rules on employee participation as being very cumbersome or complex, Polish and Italian ones saw the employee participation procedure as major obstacle for the completion of a cross-border merger, Bech-Bruun/Lexidale, 2013, p. 207, 213, 221, 226.

<sup>281</sup> T. Biermeyer/M. Meyer, Identification of Cross-Border Mergers where the Issue of Employee Participation has arisen (2008-2012), European Trade Union Institute, 2015.

<sup>282</sup> The EU cross-border merger rules (see below) are seen as an effective tool for internal reorganisation of groups of companies and over a third of cross-border mergers appear to have been carried out within groups, Bech-Bruun/Lexidale, [http://ec.europa.eu/internal\\_market/company/docs/mergers/131007\\_study-cross-border-merger-directive\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf), p. 973.

Therefore, facilitating cross-border merger activity with a view to allowing companies to better benefit from the opportunities the Single Market offers remains a valid objective.

At the same time, the protection of stakeholders involved in cross-border operations has become more important as compared to the 2003 proposal. The 2005 directive – by also referring to the protection of the interests of members and others<sup>283</sup>, as well as to employee participation<sup>284</sup> – acknowledged that the interests of stakeholders affected by the cross-border mergers would need to be protected.

Today, it is among the Commission's priorities to not only create a fairer, but also a deeper internal market. The initiative to revise substantive company law, which this evaluation is accompanying, therefore includes in its general objective the aspect of responsible use by companies of the opportunities offered by the Single Market and set as one of its specific objectives the protection of stakeholders (employees, creditors, minority shareholders and third parties).

#### **2.3.4. Coherence**

The rules enshrined in the CBMD create a logical procedure to be met in case of a cross-border merger. The directives provides for necessary steps in the procedure and the consequences of the cross-border merger. No rules have been identified which would be contradictory; the rules are thus deemed to be internally coherent.

The rules are also considered to be coherent with other EU rules in company law. Concerning the scope of application, the EU company law *acquis* generally applies to the limited liability companies (public and/or private) as the CBMD. This is particular matches with the existing disclosure requirements for companies, including for accounting documents<sup>285</sup>.

As regards digital solutions in EU company law, the interconnection of business registers<sup>286</sup> which provides for electronic communication between all MS' business registers via a European central platform and went live on 8 June 2017 includes a use-case concerning cross-border mergers: the register responsible for the registration of the company resulting from the cross-border merger notifies without delay via the central European platform the register of each of the merging companies that the cross-border merger has taken effect. Stakeholders have raised the question whether additional solutions could be provided by the business register interconnection, for instance concerning the transmission of documents in the cross-border merger procedure. It therefore appears that synergies between the cross-border merger rules and the rules on the interconnection of business registers could be increased.

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<sup>283</sup> Recitals 5, 8, 12 and 13 of the CBMD.

<sup>284</sup> Article 16.

<sup>285</sup> Directive (EU) 2017/1132, Chapter III.

<sup>286</sup> Directive 2012/17/EU of the European Parliament and the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p.1; Directive 2012/17/EU has been repealed and replaced by Directive (EU) 2017/1132.

Finally, the cross-border merger rules are generally coherent with EU wider policies. The Directive contributes to making the Internal Market deeper and fairer in line with the Commission's priorities, including as spelled out in the Single Market Strategy. It also contributes to increase the attractiveness of the Internal Market as an investment destination by enhancing corporate mobility and investment opportunities and is thus in line with the Investment Plan for Europe<sup>287</sup>.

### 2.3.5. EU added value

In the area of cross-border operations, the value of EU intervention is clearly additional to the value that could be achieved by interventions initiated at national level.

If MS were to adopt rules on cross-border merger individually, these could not be expected to be compatible. This was clearly observed at the time of the presentation of the 2003 Commission proposal (see above under section 1.1.2. "Baseline scenario"). That is why the cross-border merger activity only increased after the adoption of the common rules (as described above by 173%). The rules on cross-border mergers have therefore proven their EU added value by opening a procedural bottle-neck companies were confronted with. The EU added value also lies in ensuring an equal treatment of limited liability companies wishing to merge cross-border, and in ensuring legal certainty.

Also, the analysis of areas where the Directive does not provide for substantive harmonisation (i.e. creditor protection and minority shareholder protection) in this evaluation shows that MS' interventions in these areas are divergent, and this has triggered a demand for harmonisation of those rules as explained above. This confirms the additional value of intervention at EU level in this area of cross-border operations of companies.

## 3. Conclusions

Overall, the current cross-border merger rules are evaluated positively as they are generally effective, efficient, relevant, coherent and bring added value at EU level.

However, the analysis has identified that, based on the available evidence, the CBMD does not reach its full potential in delivering on these objectives. Some of its rules are ineffective and inefficient in achieving the objectives, mainly as (i) the directive does not provide for substantive harmonisation in all relevant areas such as creditor and minority shareholder protection and (ii) it does not fully explore the possibilities for simplified procedures.

The evaluation indicated that the provisions of the CMBD have been less **effective** as regards creditors and minority shareholder protection. The lack of substantive harmonisation as regards creditors and minority shareholder protection creates uncertainties and obstacles to cross-border merger procedures and thus hampers the

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<sup>287</sup> COM(2014) 903 final.

effectiveness of the CBMD with a view to the policy objective of facilitating cross-border mergers.

Also, while the CBMD has largely been found to provide an **efficient** framework for cross-border mergers, the evaluation shows that divergent procedures for creditors and minority shareholders protection at national level create compliance costs and burden for companies disproportionate to the benefits achieved for stakeholder protection. The findings also suggest that there is a need to better align the requirements for carrying out a cross-border merger procedure to the actual protection needs, i.e. to assess possibilities for a simplified procedure where it would not be required for protecting the stakeholders concerned to carry out a fully-fledged cross-border mergers procedure.

In addition, the **coherence** of the rules, in particular their synergies with neighbouring legislation of the business register interconnection, would increase if cross-border merger rules benefited more from the opportunities offered by digitalisation, in particular by the interconnection of business registers.

As regards **relevance**, the objectives of the cross-border merger rules are still relevant, but it appears useful, against the background of the overall Commission priorities, to pay more attention to the protection of stakeholders' interests than in the 2005 directive.

In terms of **EU added value**, the experience with the CBMD shows that introducing cross-border mergers rules at EU level considerably boosted cross-border merger activity which demonstrates the clear added value of EU rules as opposed to individual national solutions.

## ANNEX 6: OVERVIEW OF ECJ CASE-LAW ON CROSS-BORDER MOBILITY OF COMPANIES

<b>Case Number</b>	C-81/87
<b>Case Name</b>	<i>The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC</i>
<b>Date</b>	27 September 1988

<b>Facts</b>	<p>The Daily Mail, a company resident in the UK wished to transfer its residence from the UK to the Netherlands. By doing so, it wanted to avoid regular tax payments foreseen in the UK when selling part of its assets and buying its own shares.</p> <p>In 1984, the Daily Mail applied for consent to transfer its central management and control to the Netherlands.</p> <p>Different legislation existed between the two Member States. While in the Netherlands no previous consent was needed, the UK 1970 Income and Corporation Taxes Act required the Treasury's consent to allow the transfer into another Member State.</p> <p>Following the Treasury's dissenting opinion, the applicant initiated proceedings before the High Court of Justice and claimed its right to transfer its central management and control to another Member State without prior consent of the Treasury, for the sake of Articles 52 and 58 of the EEC Treaty.</p>
<b>Issues</b>	<p>1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from obstructing the transfer of residence from a Member State to another in the following cases:</p> <ul style="list-style-type: none"> <li>• where payment of tax upon profits or gains which have already arisen may be avoided?</li> <li>• where payment of tax normally chargeable would be avoided if the transfer occurred?</li> </ul> <p>2) Does the Council Directive 73/148/EEC (on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services) give the right of transfer to the companies?</p>
<b>Judgment</b>	<p><i>1. In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State.</i></p> <p><i>2. Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State.</i></p>

<b>Case Number</b>	C-212/97
<b>Case Name</b>	<i>Centros Ltd v Erhvervs- og Selskabsstyrelsen</i>
<b>Date</b>	9 March 1999
<b>Facts</b>	<p>Centros, a company incorporated in the UK, applied to register a branch in Denmark.</p> <p>Centros' application was refused and considered by the Danish Trade and Companies Board as an attempt to circumvent Danish rules and avoid payments on minimum share capital. Moreover, the Board argued that the company did not carry out any activity in the Member State of formation.</p> <p>Centros started proceedings before the Østre Landsret and then the Højesteret,</p>



	which referred the question to the CJEU for a preliminary ruling.
<b>Issues</b>	The CJEU was asked to establish whether Articles 52, 56 and 58 of the Treaty prohibit the refusal of registration of a branch of a company registered in another Member State and wanting to carry on the entire business in the Member State of new registration, considering that the purpose of this registration is to avoid domestic legislation and that the company did not carry out any activity in the Member State of first incorporation?
<b>Judgment</b>	<i>It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.</i>

<b>Case Number</b>	C-208/00
<b>Case Name</b>	<i>Überseering</i>
<b>Date</b>	5 November 2002
<b>Facts</b>	<p>Überseering BV was a company incorporated in the Netherlands, registered in 1990 in the register of companies of Amsterdam and Haarlem and acquired in 1994 by two German nationals residing in Düsseldorf.</p> <p>In 1996, the company requested compensation for defective work from a company established in Germany, the Nordic Construction Company Baumanagement GmbH (NCC).</p> <p>Überseering started proceedings before the Regional Court in Germany, the action was dismissed. The Court found that the company, acquired by German citizens, had transferred its actual center of administration to Germany. It stated that, since it was incorporated under Dutch law, it did not have legal capacity in Germany and therefore could not bring legal proceedings before German courts.</p> <p>The dispute resulted from the two contradictory theories followed by Member States: the incorporation theory and the real seat theory, whether the incorporation seat or the center of administration determines the legal capacity of the company.</p> <p>The German Federal Court of Justice referred to the CJEU for a preliminary ruling.</p>
<b>Issues</b>	1. Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of

	<p>establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?</p> <p>2. If the Court's answer to that question is affirmative:</p> <p>Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?'</p>
<b>Judgment</b>	<p><i>1. Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.</i></p> <p><i>2. Where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A').</i></p>

<b>Case Number</b>	C-167/01
<b>Case Name</b>	<i>Inspire Art</i>
<b>Date</b>	30 September 2003
<b>Facts</b>	<p>Inspire Art, a Private Limited Company formed and registered in the UK, opened a branch in the Netherlands and requested registration of the branch in the Dutch registry. The Dutch registry required however that Inspire Art was recognised as a foreign company and fell under Dutch specific laws for foreign entities. According to Dutch legislation there should be a statement added to that company's registration in the commercial register that it is a formally foreign company.</p> <p>Its arguments were that Inspire Art exclusively traded in the Netherlands and that its intention apparently was to take advantage of the most favourable and less costly rules amongst Member States.</p> <p>Inspire Art refused with regards to Articles 43 and 48 of the EC Treaty.</p> <p>The German Kantongerecht referred to the CJEU for a preliminary ruling.</p>
<b>Issues</b>	<p>Do Articles 43 and 48 of the EC Treaty preclude a Member State (in this case, the Netherlands) to require additional conditions to the establishment of a branch of a company, given that:</p> <ul style="list-style-type: none"> <li>its law is less restrictive than the one of the MS of first incorporation (in this case, the UK);</li> </ul>

	<ul style="list-style-type: none"> <li>the company does all its activities in the MS where it set its branch (in this case, the Netherlands) and therefore had no connection with the MS of first incorporation (in this case, the UK)?</li> </ul>
<b>Judgment</b>	<p>1. <i>It is contrary to Article 2 of the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen (Law on Formally Foreign Companies) of 17 December 1997 to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.</i></p> <p>2. <i>It is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.</i></p>

<b>Case Number</b>	C-411/03
<b>Case Name</b>	<b>SEVIC Systems AG</b>
<b>Date</b>	13 December 2005
<b>Facts</b>	<p>SEVIC Systems AG, a public limited company established in Germany and Security Vision Concept SA ('Security Vision'), a public company established in Luxembourg wished to merge without liquidation of the latter company and transfer of the whole of its assets to SEVIC, without any change in the latter's company name.</p> <p>The application was rejected on the ground that German domestic law provided only for mergers between legal entities established in Germany. SEVIC brought an action against the decision before the Landgericht Koblenz.</p> <p>Landgericht Koblenz decided to refer the question to the Court of Justice for a preliminary ruling.</p>
<b>Issues</b>	Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that Paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?
<b>Judgment</b>	<i>Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.</i>

<b>Case Number</b>	C-196/04
<b>Case Name</b>	<b><i>Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue</i></b>
<b>Date</b>	12 September 2006
<b>Facts</b>	<p>Cadbury Schweppes plc, a company established in the United Kingdom, was the parent company of the Cadbury Schweppes group which consists of companies established in the United Kingdom, in other Member States and in third States, inter alia two subsidiaries in Ireland. In the view of the national court, the subsidiary in Ireland was incorporated in order not to fall within the application of certain United Kingdom tax provisions on exchange transactions.</p> <p>The United Kingdom tax authorities according to the national legislation on controlled foreign companies (CFCs) claimed the corporation tax on the profits made by subsidiary in the financial year ending 28 December 1996. The decision was appealed by the company who maintained that the legislation on CFCs was contrary to Articles 43 EC, 49 EC and 56 EC.</p> <p>Special Commissioners of Income Tax, London, decided to refer the question to the Court for a preliminary ruling.</p>
<b>Issues</b>	Do Articles 43 EC, 49 EC and 56 EC preclude national tax legislation such as that in issue in the main proceedings, which provides in specified circumstances for the imposition of a charge upon a company resident in that Member State in respect of the profits of a subsidiary company resident in another Member State and subject to a lower level of taxation?
<b>Judgment</b>	<i>Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that controlled company is actually established in the host Member State and carries on genuine economic activities there.</i>

<b>Case Number</b>	C-210/06
<b>Case Name</b>	<b><i>Cartesio</i></b>
<b>Date</b>	16 December 2008
<b>Facts</b>	Cartesio, a limited partnership formed in Hungary, applied for registration for the transfer of its registered seat to Italy, (where it wished to transfer its head office, while maintaining its activity under Hungarian law). The Hungarian Court of Registration refused as this was not permitted under Hungarian domestic legislation. Since Hungarian law did allow the Hungarian company to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law, it was not possible that Cartesio could be still governed by the law of its incorporation

	<p>following the seat transfer.</p> <p>Cartesio started proceedings before the Regional Court of Appeal (Szeged) and claimed that the refusal was contrary to Articles 43 and 48 of the EC Treaty. The Regional Court of Appeal asked the CJEU for a preliminary ruling.</p>
<b>Issues</b>	<p>Do Articles 43 and 48 of the EC Treaty preclude one Member State (in this case, Hungary) from rejecting the application of a company formed under its legislation but wanting to transfer its head office to another Member State?</p> <p>Can a company request the transfer of seat relying directly on Community law?</p> <p>Are national rules or practices which prevent a Hungarian company from transferring its seat to another MS incompatible with Community law?</p>
<b>Judgment</b>	<ol style="list-style-type: none"> <li>1. A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of inter partes proceedings.</li> <li>2. A court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.</li> <li>3. Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.</li> <li>4. As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.</li> </ol>

<b>Case Number</b>	C-378/10
<b>Case Name</b>	VALE Építési kft
<b>Date</b>	12 July 2012
<b>Facts</b>	Vale Costruzioni was a limited liability company governed by Italian law and registered in the Italian commercial register, wanting to dissolve in Italy and reincorporate under the Hungarian law with the name of Vale Építési. In the application, the representative stated that VALE Costruzioni was the predecessor in law to VALE Építési, and wished to have its Italian predecessor (Vale Costruzioni)

	<p>recorded in the register.</p> <p>After denial of the application from the commercial court of first instance, then confirmed by the Regional Court of Appeal of Budapest, the company lodged an appeal before the Supreme Court with reference to Articles 49 and 54 of the TFEU. The Supreme Court asked the CJEU for a preliminary ruling.</p>
<b>Issues</b>	<p>Must Articles 49 and 54 of the TFEU be interpreted as precluding legislation of one Member State to prohibit a company established in another Member State to transfer its seat into another? Could a Member State refuse to register the predecessor of that company which originates in another Member State?</p>
<b>Judgment</b>	<p>1. <i>Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.</i></p> <p>2. <i>Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from</i></p> <ul style="list-style-type: none"> <li><i>– refusing, in relation to cross-border conversions, to record the company which has applied to convert as the ‘predecessor in law’, if such a record is made of the predecessor company in the commercial register for domestic conversions, and</i></li> <li><i>– refusing to take due account, when examining a company’s application for registration, of documents obtained from the authorities of the Member State of origin.</i></li> </ul>

<b>Case Number</b>	C-371/10
<b>Case Name</b>	<i>National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam.</i>
<b>Date</b>	29 November 2011
<b>Facts</b>	<p>National Grid Indus was a limited liability company incorporated under Netherlands law. On 15 December 2000 it decided to transfer its place of effective management to the United Kingdom. After the transfer of its place of effective management the company was deemed to be resident in the United Kingdom. As a consequence of that Inspector of the Rijnmond tax service, Rotterdam office decided that National Grid Indus should be taxed for the unrealised capital gains at the time of the transfer of the company’s place of management.</p> <p>National Grid Indus appealed the decision to the Rechtbank Haarlem (District Court, Haarlem), which upheld the Inspector’s decision. National Grid Indus thereupon appealed to the Gerechtshof Amsterdam which asked the CJEU for a preliminary ruling.</p>
<b>Issues</b>	<p>1. If a Member State imposes on a company incorporated under the law of that Member State which transfers its place of effective management from that Member</p>

	<p>State to another Member State a final settlement tax in respect of that transfer, can that company, in the present state of Community law, rely on Article 43 EC (now Article 49 TFEU) against that Member State?</p> <p>2. If the first question must be answered in the affirmative: is a final settlement tax such as the one at issue, which is applied, without deferment and without the possibility of taking subsequent decreases in value into consideration, to the capital gains relating to the assets of the company which were transferred from the Member State of origin to the host Member State, as assessed at the time of the transfer of the place of management, contrary to Article 43 EC (now Article 49 TFEU), in the sense that such a final settlement tax cannot be justified by the necessity of allocating powers of taxation between the Member States?</p> <p>3. Does the answer to the previous question also depend on the circumstance that the final settlement tax in question relates to a (currency) profit which accrued under the tax jurisdiction of the Netherlands, whereas that profit cannot be reflected in the host Member State under the tax system in force there?’</p>
<b>Judgment</b>	<p><i>1. A company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.</i></p> <p><i>2. Article 49 TFEU must be interpreted as:</i></p> <ul style="list-style-type: none"> <li><i>– not precluding legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company’s assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State; it makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there;</i></li> <li><i>– precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of that transfer.</i></li> </ul>

<b>Case Number</b>	C-106/16
<b>Case Name</b>	<i>Polbud - Wykonawstwo</i>
<b>Date</b>	25 October 2017
<b>Facts</b>	<p>Polbud – Wykonawstwo, a Polish private limited company decided to move its registered office to Luxembourg. It applied for the opening of the winding-up procedure, as required by the Polish Commercial Code after the resolution on moving the register office to another State (in order to be struck off from the business register). Subsequently, it successfully applied to be registered in the Luxembourg business register as a s.p.r.l. company without completing the winding up procedure in Poland. The Polish business register however dismissed the final application to strike off the company from the business register because the company did not prove that the winding up procedure had been completed.</p>



	<p>Polbud – Wykonawstwo appealed to the Sąd Najwyższy (Supreme Court) which asked the CJEU for a preliminary ruling.</p>
<p><b>Issues</b></p>	<p>1. Do Articles 49 and 54 of the Treaty on the functioning of the European Union preclude the application by a Member State, in which a commercial company (public limited company) was initially incorporated, of provisions of national law which make removal from the commercial register conditional on the company being wound up after liquidation has been carried out, if the company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?</p> <p>2. If the answer to that question is in the negative: Can Articles 49 and 54 of the Treaty on the functioning of the European Union be interpreted as meaning that the requirement under national law that proceedings for the liquidation of the company be carried out — including the conclusion of current business, recovery of debts, fulfilment of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of those acts, and indication of the person to whom the books and documents are to be entrusted — which precede the winding-up thereof, which occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection in the form of safeguarding of creditors, minority shareholders, and employees of the migrant company?</p> <p>3. Must Articles 49 and 54 of the Treaty on the functioning of the European Union be interpreted as meaning that restrictions on the freedom of establishment include a situation in which — for the purpose of conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its place of principal establishment, which remains in the State of initial incorporation?</p>
<p><b>Judgment</b></p>	<p><i>1. Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.</i></p> <p><i>2. Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.</i></p>



**ANNEX 7: OVERVIEW OF MEMBER STATES' POSITIONS ON THE QUESTIONS OF SEAT AND CONNECTING FACTORS**

<b>Member State</b>	<b>National approaches in substantive company law requiring only the registered office or both registered office and real seat as conditions for incorporation of companies<sup>288</sup></b>	<b>National laws allowing cross-border transfer of registered office<sup>289</sup></b>	<b>National approaches to conflict of laws<sup>290</sup> - connecting factor</b> (for EU/EEA cases the incorporation theory should apply in line with ECJ case law)
<b>Austria</b>	both registered office and real seat	no	'real seat'
<b>Belgium</b>	both registered office and real seat	yes	'real seat'
<b>Bulgaria</b>	only registered office	no	incorporation theory
<b>Croatia</b>	only registered office	no	incorporation theory
<b>Cyprus</b>	only registered office	yes	incorporation theory
<b>Czech Republic</b>	only registered office	yes	incorporation theory
<b>Denmark</b>	only registered office	yes	leaning towards incorporation theory, but not clear
<b>Estonia</b>	mixed system (only requires registered office in general but some link between the company's activities and its registered office may be necessary depending on the interpretation of EE rules))	no	incorporation theory, but not clear
<b>Finland</b>	only registered office	no	incorporation theory
<b>France</b>	mixed system (traditionally required both registered office and real seat; but now this approach of requiring both seats is mainly applied for the benefit of third parties/in case of fraud; otherwise, the registered	yes	incorporation theory, with some elements of real seat to protect third parties <sup>291</sup>

<sup>288</sup> On the basis of information in the Study on the Law Applicable to Companies, LSE, 2017, the European Added Value Assessment - Directive on the cross-border transfer of a company's registered office 14th Company Law Directive (European Parliament) and additional research.

<sup>289</sup> On the basis of the 2013 Lexidale study on cross-border mergers directive, the 2012 the European Added Value Assessment - Directive on the cross-border transfer of a company's registered office 14th Company Law Directive (European Parliament) and additional research.

<sup>290</sup> Study on the law applicable to companies.

<sup>291</sup> According to FR position taken in meeting of 24 June.

<b>Member State</b>	<b>National approaches in substantive company law requiring only the registered office or both registered office and real seat as conditions for incorporation of companies<sup>288</sup></b>	<b>National laws allowing cross-border transfer of registered office<sup>289</sup></b>	<b>National approaches to conflict of laws<sup>290</sup> - connecting factor</b> (for EU/EEA cases the incorporation theory should apply in line with ECJ case law)
	office is the main connecting factor)		
<b>Germany</b>	mixed system (DE used to require both registered office and real seat but since 2008 DE companies can transfer their real seat and carry out all business abroad while having their registered office in DE)	no	EU/EEA: incorporation theory Non-EU/EEA: real seat
<b>Greece</b>	mixed system (real seat relevant for most companies, e.g. private and public companies; registered office required for the newly introduced IKE-PC company form; EL companies can transfer real seats abroad)	yes	real seat
<b>Hungary</b>	only registered office (previously both registered office and real seat)	no	incorporation theory
<b>Ireland</b>	only registered office	no	incorporation theory
<b>Italy</b>	mixed system (real seat can be located abroad but general meetings normally required at the place of registered office – unless the articles of association provide otherwise)	yes	incorporation theory, but not entirely clear
<b>Latvia</b>	mixed system (in theory both registered office and real seat required but de facto more focus on registered office)	no	real seat, but de facto focus is on registered seat
<b>Lithuania</b>	mixed system (LT company law based on the presumption that the registered office, the real seat, and the main business place coincide but in practice this is not required)	no	incorporation theory
<b>Luxembourg</b>	mixed system (national companies may have real seat outside of LUX; both registered office and real seat are required but the latter usually means that board meetings take place in LUX even if day-to-day management is conducted from abroad)	yes	real seat, but presumption that real seat is at the place of registration
<b>Malta</b>	only registered office	yes	incorporation theory

<b>Member State</b>	<b>National approaches in substantive company law requiring only the registered office or both registered office and real seat as conditions for incorporation of companies<sup>288</sup></b>	<b>National laws allowing cross-border transfer of registered office<sup>289</sup></b>	<b>National approaches to conflict of laws<sup>290</sup> - connecting factor (for EU/EEA cases the incorporation theory should apply in line with ECJ case law)</b>
<b>Netherlands</b>	only registered office	no but deliberations on a national draft law on cross-border conversions are ongoing	incorporation theory
<b>Poland</b>	mixed system (traditionally both registered office and real seat was required; 'seat' of a company is required under substantive company law but without further specification. Legal scholars divided between whether only registered office or both seats are required but the former view has become dominant)	no	incorporation theory <sup>292</sup> , but not entirely clear
<b>Portugal</b>	registered office (no specific connection of PT companies with the domestic territory required; PT companies can transfer their real seat into another Member State)	yes	real seat, but not applied in practice for EU/EEA cases
<b>Romania</b>	registered office (there seems to be no requirement of a link between the company's activities and its registered office)	no	real seat
<b>Slovakia</b>	only registered office	yes	incorporation theory
<b>Slovenia</b>	both registered office and real seat (some commentators argue that private and public companies need to have both the registered office and real seat in SI and others – that the real seat can be located outside of SI)	no	incorporation theory, but not entirely clear
<b>Spain</b>	both registered office and real seat	yes	leaning towards incorporation theory, but not entirely clear
<b>Sweden</b>	only registered office	no	incorporation theory
<b>United Kingdom</b>	only registered office	no	incorporation theory

<sup>292</sup> According to PL government expert in the meeting of 26 June.



## **ANNEX 8: METHODOLOGY OF KEY ASSUMPTIONS FOR CROSS-BORDER DIVISIONS AND CROSS-BORDER CONVERSIONS**

### **8.1 Baseline estimations – Volume methodological assumptions**

#### **8.1.1 Cross-border transfers assumptions**

In order to estimate the annual volume of cross-border transfers in the EU, the following sources of information were gathered and utilized:<sup>293</sup>

- Statistics on annual cross-border transfers between 2010 and 2016 were provided by business registers for 4 Member States (BE, CZ, DK and LT).
- Statistics on annual domestic transfers between 2010 and 2016, provided by business registers in 16 Member States (BE, CY, CZ, DK, EE, FI, IE, HR, HU, IT, LT, MT, NL, RO, SE, UK);
- Statistics on the total number of companies in the EU, collected from Eurostat;
- Two qualitative parameters: the attractiveness of Member States in terms of foreign direct investments and the complexity of the procedures, as estimated by the Study team following collection of Member State Factsheets.

#### **Estimation of domestic transfers for the 28 Member States**

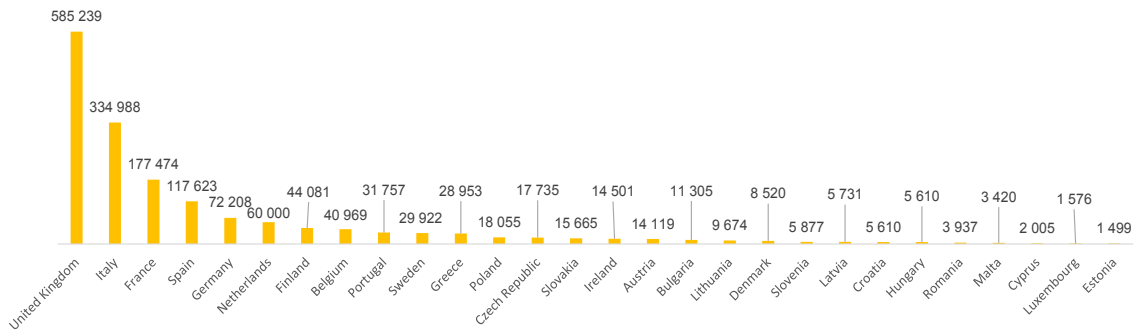
Concerning domestic transfers, business registers of 16 Member States (BE, CY, CZ, DK, EE, FI, IE, HR, HU, IT, LT, MT, NL, RO, SE, UK) were able to provide specific data. In order to estimate the number of national transfers for the Member States for which statistics were not available, it is estimated the average percentage of national transfers per year among the total number of companies in the Member States for which data were available. The obtained percentage was then applied to numbers of companies (available for all member states thanks to Eurostat database) in order to estimate the missing data of national transfers per year.

The graph below shows the number of national transfers estimated for the 28 Member States, on the basis of the two different sources. As illustrated, the estimated number of national transfers varies from one Member State to another.

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<sup>293</sup> EY study on cross-border operations of companies, p. 19.

**Figure 1: Estimated number of domestic transfers in 2016 in the 28 Member States**



Source: Data collected by business registers (BE, CY, CZ, DK, EE, FI, IE, HR, HU, IT, LT, MT, NL, RO, SE, UK) and EY estimations (AT, BG, DE, ES, EL, FR, PL, PT, SK, SI, LV, LU)

### 8.1.2 Cross-border divisions assumptions

Information on cross border divisions was available for only 7 Member States. In order to estimate the annual volume of cross-border divisions in the EU, the following sources of information were gathered and utilised:<sup>294</sup>

- Statistics on annual cross-border divisions between 2010 and 2016, provided by business registers for 7 Member States (BE, CY, CZ, DK, FR, LT, LV, SE);
- Statistics on annual domestic divisions between 2010 and 2016, provided by business registers in 16 Member States (BE, BG, CY, CZ, DK, IE, EE, HU, FI, IT, LT, MT, PL, RO, SE, UK);
- Statistics on the total number of companies in the EU, collected from Eurostat;

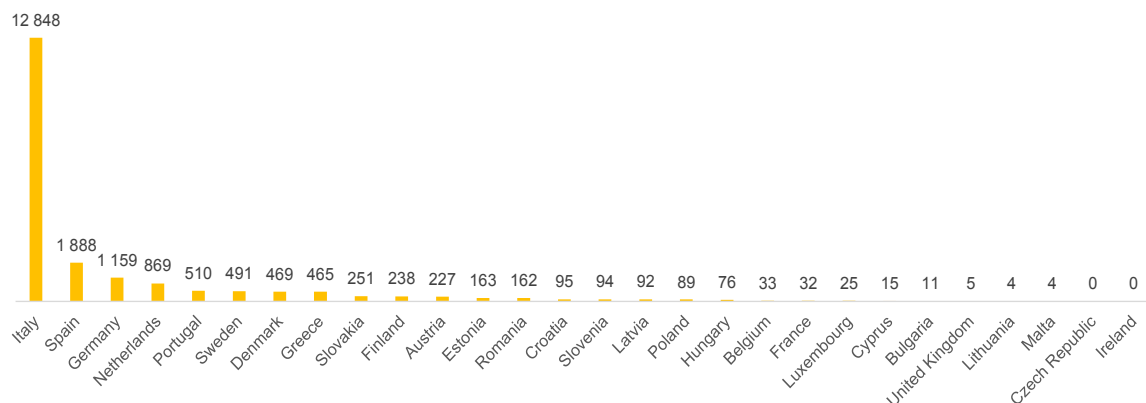
Two qualitative parameters: the attractiveness of Member States in terms of foreign direct investments and the complexity of the procedures, as estimated by the Study team following collection of Member State Factsheets

#### Estimation of domestic divisions for the 28 Member States

Concerning domestic divisions, business registers of 16 Member States (BE, BG, CY, CZ, DK, IE, EE, HU, FI, IT, LT, MT, PL, RO, SE, UK) were able to provide specific data. In order to estimate the number of national divisions for the Member States for which statistics were not available, the EY Study team estimated the average percentage of national divisions per year among the total number of companies in the Member States for which data were available. The obtained percentage was then applied to numbers of companies (available for all member states thanks to Eurostat database) in order to estimate the missing data of national divisions per year.

<sup>294</sup> EY study on cross-border operations of companies, p. 25.

The graph below shows the number of national divisions estimated for the 28 Member States, according to the different sources. As illustrated in the graph below, the estimated number of domestic divisions vary from one Member State to another.



### 8.1.3 Estimation of cross-border divisions and transfers for the 28 Member States

Concerning cross-border transfers, business registers of 4 Member States (BE, CZ, DK, LT) were able to provide specific data. In regards to cross-border divisions, the business registers from 8 Member States provided data (BE, CY, CZ, DK, FR, LT, LV and SE). In order to estimate the number of cross-border transfers and cross-border divisions in the Member States for which statistics were not available, the EY Study team assumed that the number of cross-border transfers was a function of the number of domestic transfers according to the following equation:<sup>295</sup>

$$\text{Number of cross-border transfers} = F * Avg * \text{Number of domestic transfers}$$

$$\text{Number of cross-border divisions} = F * Avg * \text{Number of domestic divisions}$$

- F, is a function of the attractiveness of the Member State and the complexity of the procedure:  
Two qualitative parameters built on a 3 level scale and estimated via interviews with stakeholders in Member States. The attractiveness of the Member State is based on the total number of foreign direct investments –FDI- projects inside the Member State<sup>296</sup>. The complexity of the procedure is linked to the regulatory

<sup>295</sup> EY study on cross-border operations of companies, p. 26.

<sup>296</sup> EY Attractiveness Annual Barometer (<http://www.ey.com/gl/en/issues/business-environment/ey-attractiveness-surveys>)

requirements of each country, it might be linked to data communication requirements, legal formalization (some countries like the UK are demanding to go through the court – not only a notary), dissuasive measurement as a strong right of entry, etc. and was estimated on the basis of the information provided by the 28 EY legal experts when completing the Member States Fiches.

- Avg, the average number of cross border transfers and divisions as a percentage of domestic ones with available data. AVG is equal to 0,04% for transfers and 7% for divisions.
- Number of domestic transfers, calculated previously or given by the business registers of 12 Member States.

The table below shows for each Member State the value of F, the attractiveness ranking (due to foreign direct investment projects and jobs and the EY barometers measuring the attractiveness of Member States) and the resulting percentage in respect to cross-border conversions.

**Table 1 : Complexity of procedures and attractiveness per Member State**

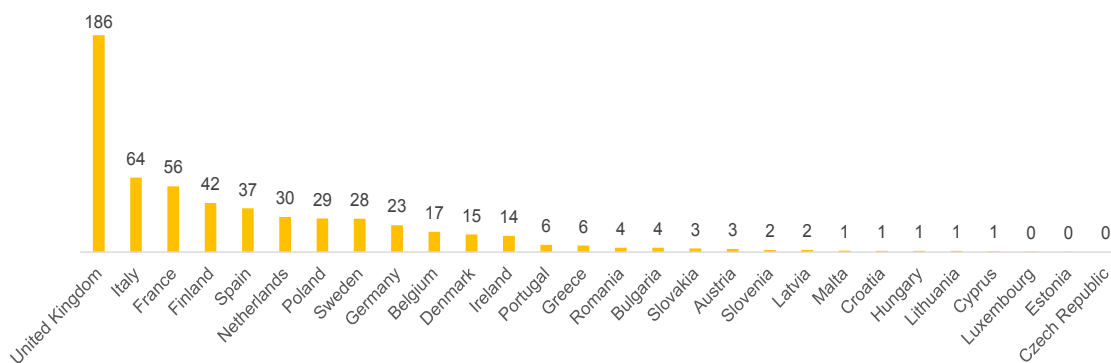
Member State	Process complexity (1 – simple; 3 – complex)	Ranking (EY barometer)	F
Bulgaria	1	>19	0,03%
Germany	3	2	0,03%
Estonia	3	>19	0,00%
Ireland	2	8	0,09%
Greece	2	>19	0,02%
Spain	3	4	0,03%
France	3	3	0,03%
Croatia	2	>19	0,02%
Italy	3	14	0,09%
Cyprus	1	>19	0,03%
Latvia	1	>19	0,03%
Luxembourg	2	>19	0,02%
Hungary	3	12	0,02%
Malta	1	>19	0,03%
Netherlands	3	6	0,05%
Austria	2	>19	0,02%
Poland	2	5	0,16%
Portugal	2	18	0,02%
Romania	2	10	0,09%
Slovenia	1	>19	0,03%
Slovakia	2	17	0,02%



Member State	Process complexity (1 – simple; 3 – complex)	Ranking (EY barometer)	F
Finland	2	9	0,09%
Sweden	2	13	0,09%
United Kingdom	3	1	0,03%

Source: Eurostat, Business registers and EY analysis. Complexity level is based in our appreciation of interviews and ranking is based on EY attractiveness barometer

Thus, it was possible to estimate the number of cross-border transfers in 2016 in all Member States. As it is illustrated in the graph below, the number of cross-border transfers occurring annually varies from one Member State to another, ranging to approximately 186 in the United Kingdom to 0 in Luxembourg, Estonia and Czech Republic. The total number amounts 575<sup>297</sup>.



**Figure 2: Estimation of the number of cross-border transfers per Member State in 2016**

Sources: Data collected by business registers (BE, CZ, DK, LT); data collected from national expert estimation (NL), data collected from Case Studies (HU), EY estimations (AT, BG, CY, DE, EE, EL, ES, HR, FI, FR, IE, IT, LV, LU, MT, PL, PT, RO, SI, SK, SE, UK)

EY's expert consultation agreed that, across the EU, **the range of volume was between 350 – 900 cross-border transfers per year.**

### Estimation of cross-border divisions for the 28 Member States

<sup>297</sup> If we consider the sensitivity of the 2 qualitative parameters of the formula presented above, a range between 350 and 900 should be considered

In respect of cross-border divisions, the table below shows for each Member State the value of F, the attractiveness ranking (thanks to FDI projects and jobs and EY barometers) and the resulting percentage.<sup>298</sup>

**Table 2 : Complexity of procedures and attractiveness per Member State**

Member State	Process complexity (1 – simple; 3 – complex)	Ranking	F
Bulgaria	2	14	3,5%
Germany	3	3	2,6%
Estonia	2	>19	1,0%
Ireland	2	10	3,5%
Greece	2	>19	1,0%
Spain	3	8	1,3%
France	2	5	6,5%
Croatia	2	>19	1,0%
Italy	3	18	0,4%
Latvia	2	>19	1,5%
Luxembourg	2	>19	1,0%
Hungary	2	9	3,0%
Malta	1	>19	2,6%
Netherlands	2	>19	1,0%
Austria	2	12	3,0%
Poland	2	2	6,0%
Portugal	2	>19	1,0%
Romania	2	4	6,0%
Slovenia	2	>19	1,0%
Slovakia	2	11	3,0%
Finland	2	>19	1,0%
United Kingdom	3	>19	0,4%

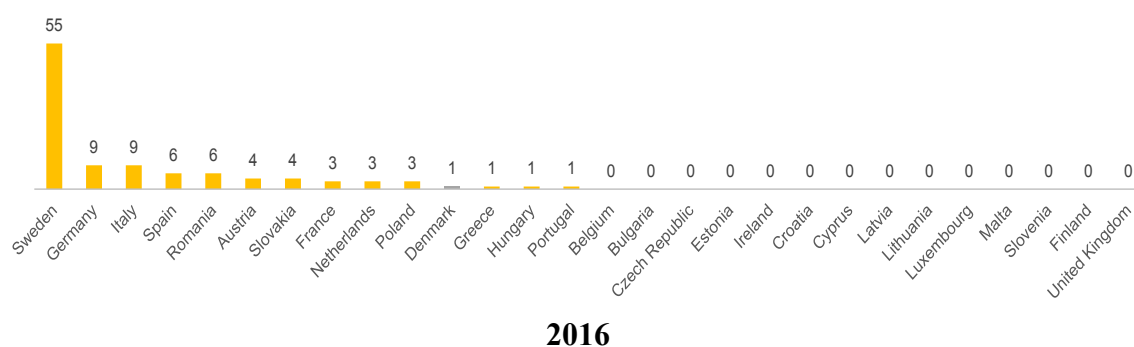
*Source: Eurostat, Business registers and EY analysis*

Thus, it is estimated the number of cross-border divisions in 2016 in all Member States. The figure below summarises the results and shows that the estimated number varies from one Member State to another and ranging between 55 Sweden to 0 in 14 Member States. The total number amounts 106.<sup>299</sup>

<sup>298</sup> EY study on cross-border operations of companies, p. 26.

<sup>299</sup> If we consider the sensitivity of the 2 qualitative parameters of the formula presented above, a range between 106 and 344 cross-border divisions occur annually in the EU. Following discussions with the economic and legal experts, it was estimated that the low range better reflected the reality

**Figure 3: Estimation of the number of cross-border divisions per Member State in**



Sources: Data collected from business registers (BE, CY, CZ, DK, FR, LT, LV, SE), EY estimations (AT, BG, DE, EE, EL, ES, FI, HR, HU, IE, IT, LU, MT, NL, RO, PL, PT, SI, SK, UK)

Following discussions with the experts, it was estimated that across the EU, there are approximately 50 - 200 direct cross-border divisions per annum.

## 8.2 Baseline Estimation – Costs for cross-border divisions and cross-border transfers

According to the information collected from the Member State fiches, the procedure to undertake a cross-border operation is more expensive for companies, as expected, than undertaking a national procedure. Given the complexity of the exercise, it was difficult to obtain a precise idea of costs per operation from the business registers. Indeed, this cost depends on many parameters, with this information unavailable. This cost depends on the type and the size of the company, hosting and home countries, current procedures, registration fees, etc.

The objective of this section is to estimate an average range per Member State of the overall cost of a transfer. This cost has been divided into three main categories:<sup>300 301</sup>

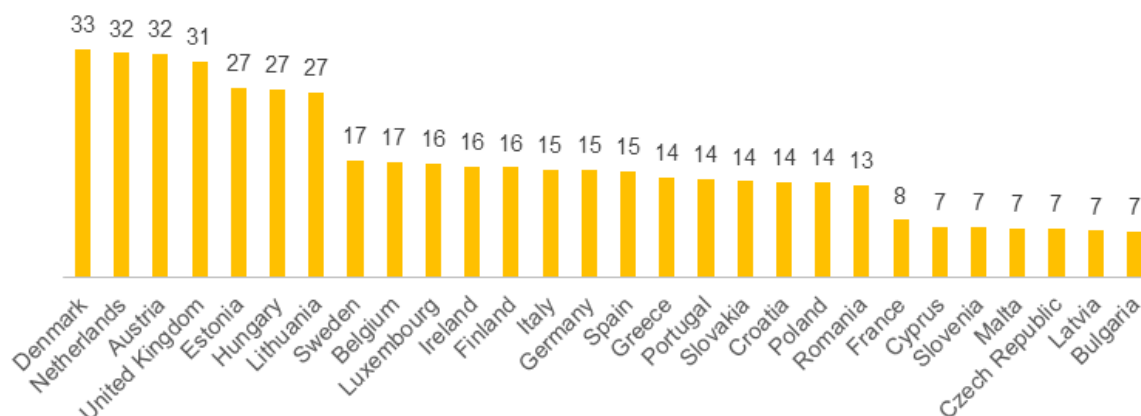
- 60% for **legal advisory costs** (tax advisory costs are excluded – taking into account direct costs of the transfer after the decision took place);
- 5% for **registration costs** within public administrations;
- 35% for **costs related to the execution of the transfer** (production of documents, organization of general meetings, etc.) in man days.

<sup>300</sup> EY study on cross-border operations of companies, pp. 24 and 26.

<sup>301</sup> The assumptions made were validated by the EY's Expert Panel.

In terms of methodology used, a standard cost of legal advisory and registration fees was initially estimated as well as the number of man-days required to complete the transaction. These three terms were then weighted to the complexity of the procedure and to the cost of the man-day applied in each member state (on the basis of the average annual salaries obtained thanks to the Eurostat database).

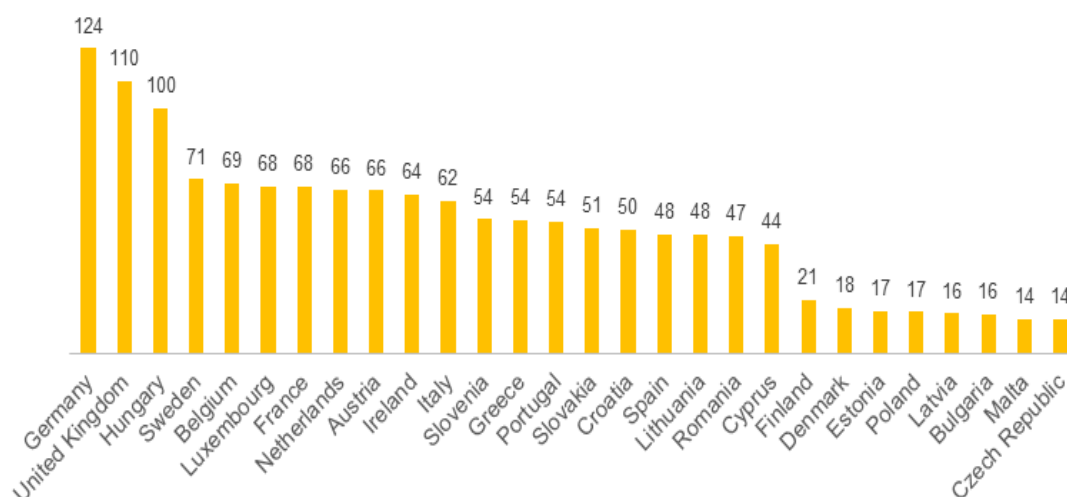
**Figure 4: Estimation of the cost (in k€) of a cross-border transfer of registered office per Member State**



Source: EY estimations

The average cost per unit at EU level is estimated at between **€20,000 and €40,000** depending on the Member States involved and on the companies. Especially, when a procedure requires a validation by the court, cost can significantly increase (like in the United Kingdom).<sup>302</sup>

**Figure 5: Estimation of the cost (in k€) of a cross-border division of registered office per Member State:**



<sup>302</sup> EY study on cross-border operations of companies, p. 24.

Source: EY estimations

*\*Italian estimation is biased because of the large number of companies. The estimated figure does not correspond to reality, so it has been discarded from the total (according to EY's expert panel opinion)*

The average cost per unit within the EU is estimated to be between **€55,000 and €70,000** depending on the Member States and type of company involved. Especially, when a procedure requires a validation by the court, the cost can significantly increase, like in Germany and the United Kingdom).<sup>303</sup>

- Cross-border conversions are estimated to cost between 130% - 180% a national conversion procedure<sup>304</sup>
- Cross-border divisions are estimated to cost between 130% - 200% a national division procedure<sup>305</sup>

These figures are based on comparisons between costs a national and cross-border procedure for Member States that have direct procedures for both of the operations.

### 8.3 Limitations of Estimations

It should be noted that that the baseline volumes for both cross-border divisions and cross-border conversions only concerns *direct* procedures. For divisions this concerns operations through existing cross-border procedures at MS level (CZ, DK and FI), analogous application of the national division procedures (AT, BE, BU, ES, FR, HR, LT, PT and SE) and the CBMD (AT, BE, IT, LT, NL, PT and SE). Similarly, rationale applies for cross - border conversions.

Due to the difficulties in estimating the number of cross-border mergers at EU level and isolating the mergers that used to achieve the result as a cross-border division or cross-border transfer, a significant volume of indirect operations were not taken into account. Therefore, in reality the overall cost savings will be significantly higher given that the costs of an additional merger amount to approximately €80,000 - €100,000.<sup>306</sup>

Similar rationale applies to conversions carried out through an SE transfer where the procedure for the transfer, without accounting for the creation of the SE, amounts to approximately €30,000.<sup>307</sup>

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<sup>303</sup> EY study on cross-border operations of companies, p. 28.

<sup>304</sup> EY study on cross-border operations of companies, p. 102

<sup>305</sup> EY study on cross-border operations of companies, p. 117.

<sup>306</sup> EY study on cross-border operations of companies, p. 56.

<sup>307</sup> EY study on cross-border operations of companies, p. 66.

## 8.4 Estimation of Impacts

The impacts of a new procedure for cross-border conversions were estimated on the basis of assumptions of 3 scenarios:

- Scenario 1: Increase of volume of 20% per year
- Scenario 2: Increase of volume of 30% per year
- Scenario 3: Increase of volume of 40% per year

The assumption of a 30% increase as a mid-scenario is based on the finding that the introduction of procedural rules for cross-border mergers led to an increase of 173% of merger activity over 5 years. The following table provides an overview of the estimated cost savings per year for companies:

Cross-border Conversions Cost Savings							
Year	2016	2017	2018	2019	2020	2021	Total
<i>Scenario 1 (Baseline Volume + 20%) with €12,000 cost reductions</i>							
Operational cost reductions at low volume (350 operations)	€4,200,000	€5,040,000	€6,048,000	€7,257,600	€8,709,120	€10,450,944	€41,705,664
Operational cost reductions at low volume (900 operations)	€10,800,000	€12,960,000	€15,552,000	€18,662,400	€22,394,880	€26,873,856	€107,243,136
<i>Scenario 1 (Baseline Volume + 20%) with €19,000 cost reductions</i>							
Operational cost reductions at low volume (350 operations)	€6,650,000	€7,980,000	€9,576,000	€11,491,200	€13,789,440	€16,547,328	€66,033,968
Operational cost reductions at low volume (900 operations)	€17,100,000	€20,520,000	€24,624,000	€29,548,800	€35,458,560	€42,550,272	€169,801,632
<i>Scenario 2 (Baseline Volume + 30%) with €12,000 cost reductions</i>							
Operational cost reductions at low volume (350 operations)	€4,200,000	€5,460,000	€7,098,000	€9,227,400	€11,995,620	€15,594,306	€53,575,326
Operational cost reductions at low volume (900 operations)	€10,800,000	€14,040,000	€18,252,000	€23,727,600	€30,845,880	€40,099,644	€137,765,124
<i>Scenario 2 (Baseline Volume + 30%) with €19,000 cost reductions</i>							
Operational cost reductions at low volume (350 operations)	€6,650,000	€8,645,000	€11,238,500	€14,610,050	€18,993,065	€24,690,985	€84,827,600
Operational cost reductions at low volume (900 operations)	€17,100,000	€22,230,000	€28,899,000	€37,568,700	€48,839,310	€63,491,103	€218,128,113
<i>Scenario 3 (Baseline Volume + 40%) with €12,000 cost reductions</i>							
Operational cost reductions at low volume (350 operations)	€4,200,000	€5,880,000	€8,232,000	€11,524,800	€16,134,720	€22,588,608	€68,560,128
Operational cost reductions at low volume (900 operations)	€10,800,000	€15,120,000	€21,168,000	€29,635,200	€41,489,280	€58,084,992	€176,297,472

volume (900 operations)							
<b>Scenario 3 (Baseline Volume + 40%) with €19,000 cost reductions</b>							
Operational cost reductions at low volume (350 operations)	€6,650,000	€9,310,000	€13,034,000	€18,247,600	€25,546,640	€35,765,296	€108,553,536
Operational cost reductions at low volume (900 operations)	€17,100,000	€23,940,000	€33,516,000	€46,922,400	€65,691,360	€91,967,904	€279,137,664

The impacts of a new procedure for cross-border divisions were estimated on the basis of assumptions of 3 scenarios:

- Scenario 1: Increase of volume of 10% per year
- Scenario 2: Increase of volume of 20% per year
- Scenario 3: Increase of volume of 30% per year

The following table provides an overview of the estimated cost savings per year for companies:

Cross-border Divisions Cost Savings							
Year	2016	2017	2018	2019	2020	2021	Total
<b>Scenario 1 (Baseline Volume + 10%) with €12,000 cost reductions</b>							
Volume (Low) + 10%	50	55	61	67	73	81	386
Operational cost reductions at low volume (50 operations)	€600,000	€660,000	€726,000	€798,600	€878,460	€966,306	€4,629,366
Operational cost reductions at High volume (200 operations)	€2,400,000	€2,640,000	€2,904,000	€3,194,400	€3,513,840	€3,865,224	€18,517,464
<b>Scenario 1 (Baseline Volume + 10%) with €37,000 cost reductions</b>							
Operational cost reductions at low volume (50 operations)	€1,850,000	€2,035,000	€2,238,500	€2,462,350	€2,708,585	€2,979,444	€14,273,879
Operational cost reductions at High volume (200 operations)	€7,400,000	€8,140,000	€8,954,000	€9,849,400	€10,834,340	€11,917,774	€57,095,514
<b>Scenario 2 (Baseline Volume + 20%) with €12,000 cost reductions</b>							
Operational cost reductions at low volume (50 operations)	€600,000	€720,000	€864,000	€1,036,800	€1,244,160	€1,492,992	€5,957,952
Operational cost reductions at High volume (200 operations)	€2,400,000	€2,880,000	€3,456,000	€4,147,200	€4,976,640	€5,971,968	€23,831,808
<b>Scenario 2 (Baseline Volume + 20%) with €37,000 cost reductions</b>							
Operational cost reductions at low volume (50 operations)	€1,850,000	€2,220,000	€2,664,000	€3,196,800	€3,836,160	€4,603,392	€18,370,352
Operational cost reductions at	€7,400,000	€8,880,000	€10,656,000	€12,787,200	€15,344,640	€18,413,568	€73,481,408

High volume (200 operations)							
<i>Scenario 3 (Baseline Volume + 30%) with €12,000 cost reductions</i>							
Operational cost reductions at low volume (50 operations)	€600,000	€780,000	€1,014,000	€1,318,200	€1,713,660	€2,227,758	€7,653,618
Operational cost reductions at High volume (200 operations)	€2,400,000	€3,120,000	€4,056,000	€5,272,800	€6,854,640	€8,911,032	€30,614,472
<i>Scenario 3 (Baseline Volume + 30%) with €37,000 cost reductions</i>							
Operational cost reductions at low volume (50 operations)	€1,850,000	€2,405,000	€3,126,500	€4,064,450	€5,283,785	€6,868,921	€23,598,656
Operational cost reductions at High volume (200 operations)	€7,400,000	€9,620,000	€12,506,000	€16,257,800	€21,135,140	€27,475,682	€94,394,622



## **ANNEX 9: CALCULATION METHOD FOR POTENTIAL SAVINGS FOR COMPANIES BROUGHT ABOUT BY THE USE OF DIGITAL TOOLS AND PROCESSES THROUGHOUT A COMPANY'S LIFECYCLE**

This annex presents the data and methods used for calculating the potential savings that companies could make thanks to rules on:

A) Online registration: Despite the limitations of the available data and the assumptions used for these calculations, the results clearly indicate that the more companies would chose to register online as a legal entity, the more the registration costs would decrease compared to the costs for paper-based registration.

B) Elimination of multiple submission of company information by implementing the 'once-only' principle. Here also despite limitations of available data it is clear that any situations in company law rules where companies would be required to submit certain information only once would contribute to savings both for companies and public administrations.

### **A) Online registration**

#### **1. Data sample and assumptions**

Two sets of data have been used for these calculations:

- Costs of company registration in 13 Member States<sup>308</sup> both for online registration and paper-based registration of a company. For some of these Member States the registration costs were available as a range comprising the minimum and the maximum cost for each procedure (online vs paper-based). Where the original cost was in a currency other than Euro, the equivalent in Euro was considered.
- Eurostat data concerning birth of new limited liability companies in the same 13 Member States for the year 2014 (this being the latest data available).

Concerning the cost of company registration, this was calculated as the sum of all fees incurred by companies in order to complete the company registration, including, where

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<sup>308</sup> Based on Annex to Everis study

applicable, fees for registration with the business register, notarial fees and fees for publication in the national gazette.

For 2 Member States the cost for online registration is "not applicable" (as the procedure is not available), however a cost has been calculated based on the average in the other 11 Member States. For this reason all other calculations consider two samples: one of 11 Member States and one of 13 Member States.

Even though these samples consists of just less than half of the Member States, they are considered as representative given the total number of new companies registered in these countries: the 11MS sample represents 65.78% of the total population of new companies, while the 13MS sample represents 71.26%.

## 2. Scenarios

Even for the Member States which allow both online and paper-based registration of companies there is very little data available about the number of company registrations completed online. It is therefore even more difficult to make projections about the number of companies that would register online should they have the option to do so. For this reason three scenarios are being considered:

- *Scenario 1: Low exposure to online registration procedure.* Should Member States allow companies to register online, it is estimated that 25% of new companies would chose this method of registration. The other 75% would still register using the paper-based method.
- *Scenario 2: Medium exposure to online registration procedure:* Same as above, but 50% of new companies would register online and the other 50% would use the paper-based method.
- *Scenario 3: High exposure to online registration procedure:* In this case it is estimated that 75% of new would register online and only 25% would use the paper-based method.

## 3. Calculations

All calculations are comparing cost of online registration vs cost of paper-based registration.

For each of the 3 scenarios above and for the two samples (11MS and 13MS), the total cost of company registration was calculated as an **average cost** of registration, i.e. the average between the lowest and highest cost of registration

### **Scenario 1: Low exposure to online registration procedure**

- Online registration, per MS: average Cost of registration x Number of new companies x 0.25
- Paper-based, per MS: average Cost of registration x Number of new companies x 0.75

Then the total (online + paper-based) was calculated for 11MS and 13 MS.

### Scenario 2: Medium exposure to online registration procedure

→ Online registration, per MS: average Cost of registration x Number of new companies x 0.5

→ Paper-based, per MS: average Cost of registration x Number of new companies x 0.5

Then the total (online + paper-based) was calculated for 11MS and 13 MS.

### Scenario 3: High exposure to online registration procedure

→ Online registration, per MS: average Cost of registration x Number of new companies x 0.75

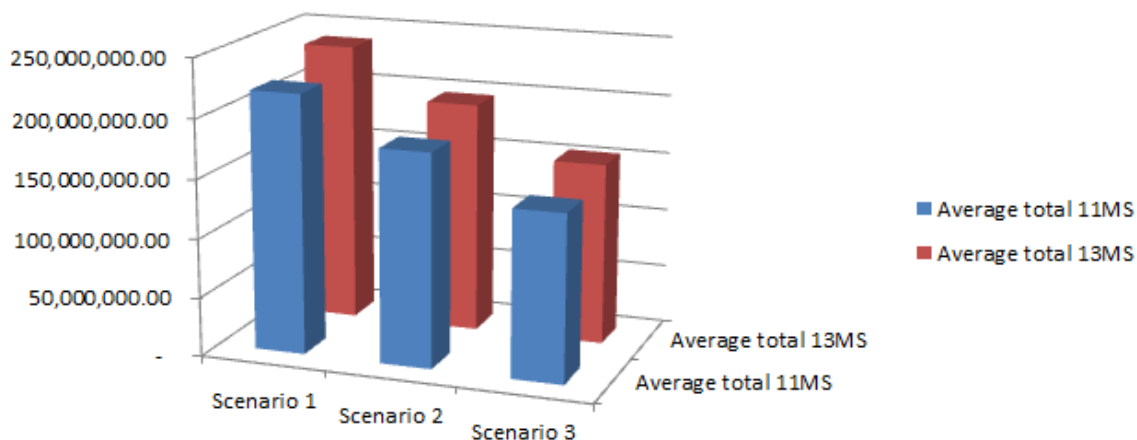
→ Paper-based, per MS: average Cost of registration x Number of new companies x 0.25

Then the total (online + paper-based) was calculated for 11MS and 13 MS.

The summary table clearly indicates that **the more companies would register online, the more the cost of registration would decrease**. This is true for the two samples and for all scenarios:

Scenario	Average total 11MS	Average total 13MS
Scenario 1	€ 219,876,126.53	€ 238,185,013.15
Scenario 2	€ 180,576,788.28	€ 196,112,517.79
Scenario 3	€ 141,277,450.03	€ 154,040,022.43

The graph below also illustrates this savings for the two samples:



#### 4. Data for calculations

The following table presents that data used for the calculations:

Country	Online		Paper-based		Online	Paper-based	New companies
	Low	High	Low	High	Average		
Belgium	€ 2,031.91	€ 2,114.41	€ 2,255.97	€ 2,338.47	€ 2,073.16	€ 2,297.22	16,232
Cyprus	€ 415.00	€ 515.00	€ 395.00	€ 495.00	€ 465.00	€ 445.00	1,836
Czech Republic	€ 185.02	€ 185.02	€ 478.29	€ 667.25	€ 185.02	€ 572.77	18,236
Denmark	€ 90.06	€ 90.06	€ 90.06	€ 90.06	€ 90.06	€ 90.06	11,991
Estonia	€ 390.75	€ 390.75	€ 390.75	€ 390.75	€ 390.75	€ 390.75	7,423
Finland	€ 415.00	€ 415.00	€ 480.00	€ 480.00	€ 415.00	€ 480.00	10,106
France	€ 46.99	€ 206.20	€ 46.99	€ 206.20	€ 126.60	€ 126.60	141,970
Germany	N/A	N/A	€ 255.00	€ 820.00	-	€ 537.50	30,101
Greece	€ 10.00	€ 70.00	N/A	N/A	€ 40.00	-	-
Hungary	N/A	N/A	€ 176.89	€ 337.70	-	€ 257.30	19,055
Poland	€ 23.08	€ 23.08	€ 369.25	€ 8,255.89	€ 23.08	€ 4,312.57	26,052
Portugal	€ 220.00	€ 360.00	€ 360.00	€ 360.00	€ 290.00	€ 360.00	27,793
Spain	€ 133.52	€ 133.52	€ 203.52	€ 253.52	€ 133.52	€ 228.52	72,406
UK	€ 64.69	€ 88.07	€ 139.77	€ 209.91	€ 76.38	€ 174.84	256,910

#### B) Multiple submission of company information / Once-only principle

Section 5.1.2.2 of this impact assessment provides an analysis of the impact that the possible options for addressing the issue of multiple submission of company information to more than one public authority. In this context, it is mentioned that while exact savings of these measures are difficult to estimate, the new rules would partly contribute to the overall savings that the implementation of the once-only principle at EU level can bring. It has been estimated that such overall savings could result in annual net savings of as much as €5 billion per year. The following provides details on how this figure has been calculated in the 2012 study on eGovernment and reduction of administrative burden<sup>309</sup>.

#### Estimation for 3 countries

The Cost benefit analysis (CBA) was based on the evidence gathered for the three so-called “champion” countries which were selected for an in depth cost-benefit analysis (CBA). The three "countries of excellence" were Denmark, the Netherlands and the United Kingdom and they were selected based on the following criteria:

<sup>309</sup> Based on [Final Report: Study on eGovernment and the Reduction of Administrative Burden \(SMART 2012/0061\)](#), p. VI.

- The presence of effective and efficient electronic procedures and general eGovernment;
- Standards and advancement, in order to ensure the significance of the selected cases;
- The centrality of the “once only” principle in national policies and strategies data availability and the presence of information and reports on initiatives, policies and strategies concerning the “once only” principle and other ABR initiatives;
- Replicability and reliability potentials in order for other countries to easily transfer and scale best practice initiatives and solutions;
- The extent and amount of measurements of administrative burden reduction and “once only” principle initiatives, for instance standard cost models, KPI’s and business case approaches;
- The extent and amount of measurements are further indicating both best practice outcomes/effects and early indications of replicability potentials;
- The advancement of the countries’ data infrastructure, in particular common base registries and other significant databases;
- Multilevel cooperation and cross government cooperation on the national, regional and local levels of “once only” principle initiatives and solutions.

The CBA assessed the costs and benefits of relevant initiatives of the “once only” principle and digital by default programmes in these countries. The collection of necessary data for the cost-benefit analysis also covered interviews with stakeholders in the selected countries.

The analysis showed that in DK in the timeline 2012- 2020 the Basic Data Programme has brought potential total savings that are expected to reach EUR100 million annually in 2020. For UK the potential savings fall inside a range of EUR 2,0 and EUR 2,1 billion of savings per year.

### **Extension of the results to EU28**

The projection of the results gathered for 3 countries was extended to EU28 based on two main hypotheses:

Hypothesis 1: all countries start from the same level of development in the implementation of each programme. Countries having an enhanced level eGovernment (evaluated through the UN e-Government Development Index UN-EGDI) are nonetheless expected to experience reduced costs and hence higher net benefits;

Hypothesis 2: all countries are expected to adopt the same planning/implementation strategy used by the three “best practices”.

In addition, three variables were used to rescale the CBA results:

- The population as a proxy for the size of countries;
- The UN-EGDI as a proxy for the level of progress in the adoption of e-technologies;
- The average cost per hour of a Public Official, derived from the Cross-Border Services Study.

The three variables considered were normalized with respect to the level observed in the “best practice” countries to rescale potential costs and benefits for their respective programmes.

## Results for EU28

According to the study:

- The extension of the Danish approach to implement the “once only” principle is likely to generate an annual net saving at the EU 28 level, amounting to around EUR 5 billion per year by 2017.
- The potential impact of the UK Digital Government Strategy at EU level is around EUR 10 billion of annual savings.
- The implementation of the “once only” principle based on the Dutch RNI approach is expected to produce net benefits amounting to around EUR 550 million at EU level in a time horizon of 15 years.

It should be noted that a 2017 study which specifically looked into the possible policy options at EU level for the implementation of the once-only principle<sup>310</sup> was not able to make any new cost estimates and referred back to the figures presented above. The authors of the study acknowledge the shortage of data in making precise estimates:

*At the present time, there are not enough data to allow precise estimates of the impacts of cross-border OOP implementation on businesses and individuals. While there is some evidence of cost savings to public administrations, there is a shortage of data on required investment costs; levels of engagement and maturity vary greatly across Member States and, where implemented, OOP cannot clearly be separated from the services and other activities to which it applies. Nevertheless, some EU Member States have already embraced OOP for one or more of the following reasons:*

*1- Reducing the administrative burden on citizens and businesses;*

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<sup>310</sup> Study by Jonathan Cave, Maarten Botterman (GNKS Consult BV), Simona Cavallini, and Margherita Volpe (FORMIT): [EU-wide digital Once-Only Principle for citizens and businesses - Policy options and their impacts](#) (2017)

*2- More efficient (lower-cost, more effective) government administration;*

*3- Fraud prevention.*

## ANNEX 10: EMPLOYEE PARTICIPATION AT BOARD LEVEL

Board-level employee representation means that employees are granted the right to be represented through their elected representatives in the board of directors or the supervisory board of the company with decision making power. Some Member States provide for an employee participation system in national legislation, some not. The issue of the employee participation is important for cross-border operations in cases in which employees already had the rights to be represented at the board before the cross-border operation was carried out.

There are various forms of employee participation in Member States, ranging from little influence on the board to an equal representation of employee representatives and shareholders in the board. However, in most cases, where the national legislation provides for such system, employee representatives are in minority in companies' boards and therefore their influence is not decisive.

Companies can have different management and supervisory structures, either a monistic ("single-tier") or a dualistic ("two-tier"). The corporate management structure in force in the company has an impact on how the employee participation is organised. In the first case, the company consists of one board which exercises both supervisory and management functions<sup>311</sup> and employee representatives sit on that board. In the dualistic model the company has a management board in charge of running of the company and a supervisory board responsible for monitoring<sup>312</sup>, and employee representatives sit on a supervisory board. In both cases, employees are involved in decision-making processes of the company. There are also several legislations that allow a free choice between these two models.<sup>313</sup>

In 17 out of 28 Member States, plus Norway, employee participation is required in limited liability companies whereas the system is as follows<sup>314</sup>:

Country (including EEA)	Scope	Company's board structure	Number of employees in the board
<b>Austria</b>	<ul style="list-style-type: none"> <li>• Ltd. &gt; 300 employees</li> <li>• Plc</li> </ul>	Dualistic	1/3 of the Supervisory Board (SVB)
<b>Belgium</b>	-	Monistic	-
<b>Bulgaria</b>	-	Monistic and dualistic	-
<b>Cyprus</b>	-	Monistic	-

<sup>311</sup> As for instance in the UK, Belgium, Ireland, Spain, Sweden and Greece.

<sup>312</sup> As for instance in Germany, Austria, Slovakia and Poland.

<sup>313</sup> As for instance in Denmark, Finland, France, Italy and Luxembourg. The choice between the two systems is also allowed for European Companies (SE).

<sup>314</sup> Conchon, Kluge, Stollt, Worker board-level participation in the 31 European Economic Area countries, ETUI (August 2015 update) available at <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/TABLE-Worker-board-level-participation-in-the-31-European-Economic-Area-countries>. The table comprises information on board-level representation in the 28 EU Member States and Norway in 2015.



<b>Country (including EEA)</b>	<b>Scope</b>	<b>Company's board structure</b>	<b>Number of employees in the board</b>
<b>Czech Republic</b>	State-owned Plcs	Monistic and dualistic (only private sector companies can choose the monistic structure)	1/3 of SVB
<b>Croatia</b>	<ul style="list-style-type: none"> <li>• Ltd. &gt; 200 employees</li> <li>• Plc</li> </ul>	Monistic and dualistic (only Plc can choose the monistic structure)	1 representative
<b>Denmark</b>	<ul style="list-style-type: none"> <li>• Ltd. &amp; Plc &gt; 35 employees</li> </ul>	Monistic and dualistic	1/3 of board with a min. of 2 members (min. 3 members on the board of the parent company of a group which falls within the scope of the regulation)
<b>Estonia</b>	-	Dualistic	-
<b>Finland</b>	<ul style="list-style-type: none"> <li>• Ltd. &amp; Plc &gt; 150 employees</li> </ul>	Monistic and dualistic	1/5 (max. 4 members) or based on agreement, employer decide on which board they will sit
<b>France</b>	<ul style="list-style-type: none"> <li>• State-owned Plc</li> <li>• Private sector Plc (voluntary)</li> <li>• Private sector Plc (compulsory) &gt; 500 employees in France or &gt; 5.000 employees worldwide.</li> </ul>	Monistic and Dualistic	<200 empl. 2 members, up to 1/3 >200 empl.: 1/3 of the board In subsidiaries: 200-1,000 empl.: 3 members >1,000 empl.: 1/3 of the board
<b>Germany</b>	<ul style="list-style-type: none"> <li>• Ltd. &amp; Plc &gt;500 employees to 2000 employees</li> <li>• Plc &amp; Ltd &gt; 2000 employees</li> <li>• companies in the iron, coal and steel industry &gt; 1000 employees</li> </ul>	Dualistic	1/3 or 1/2 of SVB, at least one being an executive manager
<b>Greece</b>	State-owned Ltd. and state-owned Plc	Monistic	1 representative
<b>Hungary</b>	<ul style="list-style-type: none"> <li>• Ltd. &gt; 200 employees</li> <li>• Plc &gt; 200 employees</li> </ul>	Monistic and dualistic (only Plc can choose the monistic structure)	1/3 of SVB or based on agreement
<b>Ireland</b>	state-owned commercial companies and state agencies	Monistic	1/3 of the board
<b>Italy</b>	-	Monistic and dualistic	-
<b>Latvia</b>	-	Dualistic	-
<b>Lithuania</b>	-	Monistic and dualistic	-

<b>Country (including EEA)</b>	<b>Scope</b>	<b>Company's board structure</b>	<b>Number of employees in the board</b>
<b>Luxembourg</b>	Plc > 1.000 employees <ul style="list-style-type: none"> <li>state-owned companies</li> </ul>	Monistic and dualistic	up to 1/3 of the board
<b>Malta</b>	-	Monistic	-
<b>Netherlands</b>	<ul style="list-style-type: none"> <li>Ltd. &gt; 100 employees</li> <li>Plc. &gt; 100 employees</li> </ul>	Monistic and Dualistic	1/3 of SVB (dualistic) or 1/3 of the non-executive directors' seats (monistic)
<b>Poland</b>	commercialised and privatised companies	Dualistic	2/5 in commercialised and min 2-4 representatives in privatised companies
<b>Portugal</b>	<ul style="list-style-type: none"> <li>State-owned Ltd.</li> <li>State-owned Plc</li> </ul>	Monistic and dualistic	Based on the articles of association
<b>Romania</b>	-	Monistic and dualistic	-
<b>Slovakia</b>	<ul style="list-style-type: none"> <li>State-owned Ltd. and state-owned Plc</li> <li>Plc &gt; 50 employees (or &lt;50 employees if provided for by the articles of association)</li> </ul>	Dualistic	1/3 up to 1/2 of SVB (if provided by the articles of association) or 1/2 (for state-owned companies)
<b>Slovenia</b>	Plc & Ltd > 50 employees	Monistic and dualistic (only Plc can choose the monistic structure)	1/3 up to 1/2 (defined by the articles of association) (dualistic) 1/4 with minimum 1 representative (defined by the articles of association) (monistic)
<b>Spain</b>	<ul style="list-style-type: none"> <li>state-owned companies &gt;1000 employees</li> <li>state-owned companies in the metal sector &gt; 500 employees</li> </ul>	Monistic	2-3 representatives
<b>Sweden</b>	<ul style="list-style-type: none"> <li>Ltd. &gt; 25 employees</li> <li>Plc &gt; 25 employees</li> </ul>	Monistic	2 to 3 representatives (max. 1/2) (<1,000 employees: 2 members >1,000 employees + operating in several industries: 3 members)
<b>United Kingdom</b>	-	Monistic	-

As indicated in the table, the systems of employee participation on board level vary significantly among Member States. Especially the thresholds for the system to apply and the power of employee representatives are different between MS.

## ANNEX 11: THE SME TEST – SUMMARY OF RESULTS

<b>(1) Preliminary assessment of businesses likely to be affected</b>
<p>The simpler and faster registration and filing procedures through digital tools will reduce costs and administrative burdens for companies. Harmonised rules will enable companies to conduct cross-border operations faster and at lower costs, in particular lower costs of legal assistance and will limit the risks for companies caused by legal uncertainty. This will help businesses to adjust and reorganise their structures to their changing needs that will help them to be more competitive in the Single Market. (See annex 3)</p>
<b>(2) Consultation with SMEs representatives</b>
<p>Consultation with SMEs took place throughout the following processes:</p> <ul style="list-style-type: none"><li>• Public consultation which ran from 10 May 2017 to 6 August 2017 (See Annex 2). Responses were received from 25 business groups, including those representing SMEs.</li><li>• The public consultation was presented to the SBA Follow-up Meeting with Stakeholders on 14.6.2017</li><li>• Regular bilateral meetings with business groups.</li><li>• Individual complaints and submissions received from SMEs concerning the regulatory environment.</li></ul> <p>SMEs and Business Groups were broadly supportive of proposals contained in Company Law initiative, particularly in regards to proposals on digitalisation and cross-border conversions.</p>
<b>(3) Measurement of the impact on SMEs</b>
<p>There was no specific analysis of the distribution of the potential costs and benefits of the policy options over the businesses' size. SMEs, and especially small and micro-enterprises, would be particularly positively impacted by these proposed measures, as they are the ones with the greatest need for new cross-border operations rules. They cannot afford expensive, indirect or sequential cross-border operations. The same applies to the proposed measures to improve the use of digital tools, which are mostly needed by smaller companies to cut costs and stay competitive.</p>
<b>(4) Assess alternative options and mitigating measures</b>

In section 6.2 on overall impacts, it is concluded that the selected options are highly likely to have a very positive economic impact on business stakeholders in general, including SMEs. However, in relation to the proposed new procedure for cross-border conversions and divisions, the requirement of mandatory independent expert report under Option 1 of section 5.2.1 could represent a disproportionate burden for smaller businesses. Therefore, it could be considered to derogate from this requirement for small and micro companies where the burden would be most harshly felt.