

# EU Facilitates Cross-Border Mergers and Online Company Establishment

11 June, 2018

European company law provides a mechanism enabling two companies from different EU states to merge to form a single legal entity. On 25 April 2018, the European Commission published a proposal to extend this regime by making it easier for companies from different states to merge, divide or transfer their registered seat from one EU state to another. The proposed changes would also strengthen safeguards for creditors and exit options for dissenting shareholders.

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The European Commission also published a second proposal which would require all EU states to provide a fully online procedure for registering companies, establishing new branches and filing documents to the business register.

These proposals, if taken forward, will not be implemented into law until after the United Kingdom is scheduled to leave the European Union. This means that, until the post-Brexit relationship between the United Kingdom and European Union is agreed, it is not possible to say whether these proposals will come into effect in the United Kingdom. It is also not possible to say, more generally, whether UK companies will continue to be able to participate in the existing cross-border merger regime at all post-Brexit.

**Cross-border conversions, mergers and divisions within the Single Market.** The European Commission's proposed changes focus on ways to increase cross-border mobility for companies within the Single Market while protecting the interests of stakeholders and safeguarding against fraud and abuse.

## Key features of the proposal

- New, harmonised rules across all EU states governing the transfer of a company's corporate seat from one EU state to another (a "cross-border conversion") and the splitting of a single entity into two or more entities across EU state borders (a "cross-border division").

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- New fast-track rules for “simple” cross-border mergers, while retaining the existing procedures in the Cross-Border Merger Directive where the fast-track rules are not applicable.
  - Safeguards for cross-border conversions and cross-border divisions that are designed to protect shareholders, creditors and employees and to ensure that the new procedures do not provide a means for creating artificial arrangements for the purposes of tax abuse.
  - Additional safeguards for cross-border mergers that are designed to protect shareholders and creditors.

### **Safeguards**

The new safeguards proposed by the European Commission would largely follow the process set out in the existing regime, but with appropriate adaptations to account for any specific risks for abuse. The proposed procedures include:

- a requirement for the company carrying out the cross-border operation to provide employees and shareholders with a management report addressing the impact and implications that the cross-border operation may have on them as stakeholders;
- an independent expert (appointed by the competent authority) who will be responsible for verifying the accuracy of the information submitted by the company and producing an independent expert report. This report will provide the factual basis on which the competent authority will assess the risk of an artificial arrangement being created by the cross-border operation;
- a requirement for final checks to be undertaken by the competent authority of the relevant departure and destination EU states to ensure that the cross-border conversion is lawful, e.g., by confirming that all of the conditions of the cross-border operation have been fulfilled;
- a requirement for entities that are seeking to implement a cross-border operation to make a declaration that they are not aware of any reason why the entities that result from the cross-border operation would not be able to meet their liabilities and that creditors will not be prejudiced; and
- a requirement that shareholders who oppose the cross-border operation be entitled to exit rights. A dissenting shareholder will have the right to dispose of its holding to the company, the other shareholders or a third party (in agreement with the company) for cash compensation, the adequacy of which would be reviewed by an

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independent expert. The proposal does not expand on how “adequate” compensation will be calculated.

**Digitalisation of company law.** The European Commission is also focused on creating a more efficient means for establishing companies and completing the various filings that arise during the company life-cycle. Their proposal requires all EU states to enable the registration of companies, establishment of new branches and filing of documents to the business register to be completed entirely online.

Currently, only 17 EU states permit a company to be established entirely online, including Cyprus, France, Greece, Poland, Portugal and the United Kingdom. All of the other EU states require at least some aspects of the process to be completed in person, creating inefficiencies, unnecessary costs and delays. The main “barrier” to an online process in many jurisdictions is the requirement for a notary to be involved, as is the case in Germany, Spain, Italy and Belgium. According to the European Commission’s press release:

- online registration takes on average half of the time of the traditional paper-based formats and can be up to three times cheaper; and
- online registrations and filings under the proposed new rules would save an estimated €42 – €84 million per year for EU companies.

### **Key features of the proposal**

In addition to providing for the registration of a company and the filing of documents to the business register to be able to be completed entirely online, the proposal would introduce additional improvements:

- the information that is available free of charge on EU business registers will be expanded to include more data such as the legal status of the company, the names of those who can act on its behalf and whether the company has any branches established in other EU states; and
- the implementation of the “once-only” principle whereby the increased ability for national authorities to access and share company information in the digital space will reduce the need for a company to submit the same information or documents multiple times to different authorities in order to meet the requirements set by EU states.

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**Safeguards**

To prevent the proposed digitalisation from increasing opportunities for fraud and abuse, authorities will be able to:

- require the physical presence of the applicants where they have genuine reasons to suspect fraudulent use of identity; and
- rely on each other's information about disqualified directors and refuse the appointment of a director of a company within their own jurisdiction where that person is currently disqualified from acting in another EU state.

**Looking forward.** The proposals will be submitted to the Council of the European Union and the European Parliament for their consideration and final adoption. The details of the proposals will then be published in the form of a draft, and later a finalised, Directive. Once adopted, the new Directive would have to be implemented into the laws of all EU Member States within two years.

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Please do not hesitate to contact us with any questions.

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