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Cross-border mergers and divisions**European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI))**

(2018/C 331/04)

The European Parliament,

- having regard to Articles 49, 54 and 153 of the Treaty on the Functioning of the European Union (TFEU),
- having regard to the sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies ⁽¹⁾,
- having regard to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies ⁽²⁾,
- having regard to Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) ⁽³⁾,
- having regard to Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees ⁽⁴⁾,
- having regard to 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 ⁽⁵⁾,
- having regard to the Commission communication of 12 December 2012 entitled ‘Action Plan: European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies’ (COM(2012)0740),
- having regard to its resolution of 14 June 2012 on the future of European company law ⁽⁶⁾,
- having regard to its resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company ⁽⁷⁾,
- having regard to the Commission communication of 25 October 2016 entitled ‘Building a fair, competitive and stable corporate tax system for the EU’ (COM(2016)0682),

⁽¹⁾ OJ L 378, 31.12.1982, p. 47.

⁽²⁾ OJ L 310, 25.11.2005, p. 1.

⁽³⁾ OJ L 294, 10.11.2001, p. 1.

⁽⁴⁾ OJ L 294, 10.11.2001, p. 22.

⁽⁵⁾ OJ L 80, 23.3.2002, p. 29.

⁽⁶⁾ OJ C 332 E, 15.11.2013, p. 78.

⁽⁷⁾ OJ C 87 E, 1.4.2010, p. 5.

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- having regard to the judgments of the Court of Justice of the European Union (CJEU) on freedom of establishment, in particular in the cases *SEVIC Systems AG* ⁽¹⁾, *Cadbury Schweppes plc & Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* ⁽²⁾, *CARTESIO Oktató és Szolgáltató bt.* ⁽³⁾, *VALE Építési kft.* ⁽⁴⁾, *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group* ⁽⁵⁾, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* ⁽⁶⁾, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* ⁽⁷⁾, *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ⁽⁸⁾, and *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* ⁽⁹⁾,
 - having regard to the Commission feedback statement of October 2015 containing a summary of responses to the public consultation on cross-border mergers and divisions conducted between 8 September 2014 and 2 February 2015 ⁽¹⁰⁾,
 - having regard to the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs Study of June 2016 entitled 'Cross-border mergers and divisions, transfers of seat: is there a need to legislate?' ⁽¹¹⁾,
 - having regard to the European Parliamentary Research Service study of December 2016 entitled 'Ex-post analysis of the EU framework in the area of Cross-border mergers and divisions' ⁽¹²⁾,
 - having regard to the Commission's 'Work Programme 2017 — Delivering a Europe that protects, empowers and defends', and Chapter II, Point 4 thereof (COM(2016)0710),
 - having regard to Rule 52 of its Rules of Procedure, as well as Article 1(1)(e) of, and Annex 3 to the decision of the Conference of Presidents of 12 December 2002 on the procedure for granting authorisation to draw up own-initiative reports,
 - having regard to the report of the Committee on Legal Affairs (A8-0190/2017),
- A. having regard to the significant effect on European competitiveness of a comprehensive reform of company law and the obstacles to full implementation of the Directive on cross-border mergers;
- B. whereas to date there is no European Union law on cross-border divisions of undertakings; whereas the current situation entails manifest procedural, administrative and financial difficulties for the businesses concerned, as well as the risk of abuses and dumping;
- C. whereas Parliament has strongly and continuously called for the introduction of a European law on cross-border transfers of the registered office or head office of undertakings; whereas the majority of stakeholders are broadly supportive of Parliament's requests;

⁽¹⁾ Case C-411/03, *SEVIC Systems AG*, 13.12.2005, ECLI:EU:C:2005:762.

⁽²⁾ Case C-196/04, *Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, 12.9.2006, ECLI:EU:C:2006:544.

⁽³⁾ Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.*, 16.12.2008, ECLI:EU:C:2008:723.

⁽⁴⁾ Case C-378/10, *VALE Építési kft.*, 12.7.2012, ECLI:EU:C:2012:440.

⁽⁵⁾ Case C-483/14, *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group*, 7.4.2016, ECLI:EU:C:2016:205.

⁽⁶⁾ Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.*, 30.9.2003, ECLI:EU:C:2003:512.

⁽⁷⁾ Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, 5.11.2002, ECLI:EU:C:2002:632.

⁽⁸⁾ Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, 9.3.1999, ECLI:EU:C:1999:126.

⁽⁹⁾ Case C81/87, *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, 27.09.1988, ECLI:EU:C:1988:456.

⁽¹⁰⁾ http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/docs/summary-of-responses_en.pdf

⁽¹¹⁾ PE 556.960, [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)

⁽¹²⁾ PE 593.796.

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- D. whereas for the sake of improving companies' mobility within the EU, it is important that there is a common legal framework on companies' mergers, divisions and transfers operations;
- E. whereas not all Member States in which cross-border mergers and divisions or transfers of registered office or head office have occurred have rules which assign workers' rights to be consulted and informed and to engage in co-determination;
- F. whereas the transfer of a registered office should not circumvent legal, social and fiscal requirements laid down in the law of the European Union and of the Member States of origin but should rather have the aim of establishing a uniform legal framework which ensures the maximum transparency and simplification of procedures and which fights tax fraud;
- G. whereas the relevant EU *acquis* provides for a wide range of information, consultation and participation rights for workers; whereas Directive 2009/38/EC ⁽¹⁾ and Directive 2005/56/EC guarantee cross-border workers' participation and lay down the principle of pre-existing rights; whereas it is considered that those workers' rights should also be protected in case of transfer of seat;
- H. whereas all new initiatives in European company law should be based on an in-depth evaluation and assessment of existing forms of company law, the relevant judgments of the CJEU on the cross-border mobility of companies, and on impact assessments reflecting the interests of all stakeholders, including shareholders, creditors, investors and workers, ensuring the principles of subsidiarity and proportionality;

Horizontal issues

1. Draws attention to the importance of establishing a framework which regulates comprehensively the mobility of undertakings at European level in order to simplify the procedures and requirements applicable to transfers, divisions and mergers and to prevent abuses and fictitious transfers for the purposes of social or fiscal dumping;
2. Calls on the Commission to devote attention to the results of the public consultation conducted between 8 September 2014 and 2 February 2015 on the possible revision of Directive 2005/56/EC and the possible introduction of a legislative framework regulating cross-border divisions; recalls that the results of the consultation indicated that there was a certain consensus on the priorities for legislation on cross-border mergers and divisions in the objectives of boosting internal market and fostering workers' rights;
3. Considers it important that future legislative proposals on the mobility of undertakings should include provisions concerning maximum harmonisation — particularly regarding procedural standards, the rights of corporate governance players, and smaller players in particular, and the extension of applicability to all entities defined as companies or firms as referred to in Article 54 TFEU followed by other sectoral rules, such as rules on workers' rights;
4. Is of the opinion that new rules on mergers, divisions and transfers of seats should facilitate the mobility of companies within the Union, taking account of their business needs for restructuring in order to better use the opportunities of the internal market, and to facilitate undertakings' freedom of organisation, with due respect for workers' representation rights; draws attention, in this respect, to the importance of removing obstacles arising from conflicts of laws in order to determine the applicable national law; considers that the protection of labour rights could be addressed through various EU legal acts, in particular through a proposal for a directive on minimum standards for workers and on employees' participation in European forms of company law and in supervisory boards created under European law;

⁽¹⁾ 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 (OJ L 122, 16.5.2009, p. 28).

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Cross-border mergers

5. Stresses the positive effectiveness of Directive 2005/56/EC on cross-border mergers of limited liability companies, which has served to facilitate cross-border mergers between limited liability companies in the European Union — as shown by the official figures which attest to a significant increase in the number of cross-border mergers in recent years — and to reduce the associated costs and administrative procedures;

6. Considers it necessary to revise Directive 2005/56/EC in order to improve its implementation and to take into account recent developments in both the case law of the CJEU on freedom of establishment of companies and in European company law; considers that the future legislative proposal amending Directive 2005/56/EC should contain a fresh set of rules covering divisions of companies and should set out guidelines for further legislation on the mobility of companies;

7. Calls on the Commission to take into account the results of the consultation of October 2015, which show in particular that there is a need for maximum harmonisation of the criteria governing the impact of mergers on various stakeholders in businesses;

8. Considers it a priority that a more advanced set of rules be laid down for a series of actors and categories of corporate governance, and that those rules be reproduced for future common models on cross-border divisions and registered office or head office transfers; considers it essential to simplify cross-border merger procedures by means of a clearer definition of standards for the legal documentation — starting with the issues of shareholders' information and the collection of merger documents — and new digitisation practices, provided that the basic procedural standards and requirements set out in Directive 2005/56/EC (including the issuance of a pre-merger certificate and the scrutiny of legality in accordance with Articles 10 and 11 thereof) are maintained and that matters of public interest, such as legal certainty and the reliability of commercial registers are preserved;

9. Expects that the provisions concerning workers' rights will be framed in such a way as to prevent certain undertakings using the Directive on cross-border mergers with the sole aim of transferring their registered office or head office for abusive fiscal, social or legal reasons; stresses the importance of avoiding ambiguities in the application of national penalties for failure to respect legislation on workers' rights;

10. Considers it important to make improvements to certain essential aspects:

- the management of assets and liabilities;
- the method of valuing assets;
- the rules on creditors' protection;
- the date on which the period of creditors' protection begins and the duration of that period, in accordance with the principle of assignment of responsibility to the general meeting;
- the communication of company information, through the Member States' interconnected and standardised registers;
- the rights of minority shareholders;
- the establishment of minimum standards of information, consultation and co-determination of workers;
- certain specific exemptions from procedural requirements;

11. Attaches great importance to the protection of certain minority shareholders' rights, such as the right of inquiry into a merger, the right to compensation for a shareholder who relinquishes his holding on account of opposition to a merger, and the right to contest the fairness of the exchange ratio;

12. Supports the possibility of establishing expedited cross-border procedures in the event of consensus among all the shareholders, the absence of workers or the insignificance of any impact on creditors;

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Cross-border divisions

13. Recalls that Directive 82/891/EEC only regulates divisions of undertakings within a Member State; notes that, although specific cases involving divisions of undertakings between different Member States are rarer, as stated in the Commission's 2015 consultation, the figures on domestic divisions show a real need to establish a special EU framework for cross-border divisions; stresses that any new directive should not be used as a formal instrument for divisions in an undertaking for the purpose of forum shopping to avoid legal obligations under national law;

14. Calls on the Commission to consider the significant economic impact which would ensue from legislation governing cross-border divisions, such as the simplification of the organisational structure, better capacity for adjustment, and new opportunities on the internal market;

15. Notes the lengthy and complex procedures required for cross-border divisions at present, which are generally implemented in two stages: an initial domestic division and a subsequent cross-border merger; believes that introducing harmonised standards at EU level in the field of cross-border divisions would lead to a simplification of operations and a reduction of the costs and duration of the procedures;

16. Draws attention to the importance of removing obstacles arising from conflicts of laws in order to determine the applicable national law;

17. Recalls that in some Member States there is no ad hoc national legislation on how to perform cross-border divisions;

18. Considers that a future legislative initiative on cross-border divisions should draw on the principles and requirements listed in the context of the Directive on cross-border mergers:

- procedural questions and issues of simplification, including all the main company division methods that are currently practised (split-ups, spin-offs, hive-downs);
- the rights of creditors and minority shareholders, reasserting the principles of safeguarding and efficiency;
- compliance with the standards on participation and representation by, and safeguarding of, workers, with the aim of enhancing workers' protection, in particular protection against social dumping;
- accounting issues;
- assets and liabilities;
- the harmonisation of rules and procedures, for example: rights attached to shares, requirements regarding registration and communication between business registers, date of completion of the transaction, minimum content of the terms of division, majority rules and a body with the power to monitor the regularity and legality of the transaction;

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19. Instructs its President to forward this resolution to the Council, the Commission and the European Economic and Social Committee.
