BDI
Bundesverband der
Deutschen Industrie e.V.

Deutsches Aktieninstitut

Ms Salla Saastamoinen
Director Civil and Commercial Justice
European Commission, DG JUST
Rue Montoyer 59
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Belgium

4 August 2017

On the consultation:
"EU Company law upgraded: Rules on digital solutions and efficient cross-border operations"

Dear Ms Saastamoinen,

the Federation of German Industries (BDI) and Deutsches Aktieninstitut welcome the initiative of the European Commission to upgrade the European Company Law.

Both aspects - the digitalization of company law and initiatives that enable a more comprehensive cross border mobility for European companies in the European Single Market - are important for business. The Commission should especially envisage to seek legal certainty for companies in cross-border conversions which should include a consolidation of the respective jurisprudence of the European Court of Justice. Measures need to be shaped in a reasonable and practical approach that concentrates on the aim of the initiative to deepen the single market, to promote the use of digital technologies and in particular, to ensure that companies can effectively exercise the freedom of establishment while providing effective safeguards for creditors, minority shareholders and employees.

Enclosed you will find more detailed comments on the topics raised by the consultation.

We would appreciate to stay in contact regarding the forthcoming initiatives resulting from the consultation.

Yours Sincerely

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<u>Comments on the consultation:</u> "EU Company law upgraded: Rules on digital solutions and efficient cross-border operations"

I. Digitalisation of company law and corporate governance

BDI and Deutsches Aktieninstitut favor the use of digital tools for companies to interact with Member States as well as with its shareholders. Digitalisation of company law and corporate governance contributes to facilitate effectively cross border activities of companies be it concerning its engagement with shareholders or the interaction with Member States authorities.

In the context of digitalisation of company law and corporate governance, we would like to raise awareness for the following issues:

1) We deem it important to promote digital tools primarily via non-legislative acts, especially between companies and their shareholders. Hence, companies should be encouraged to use digital tools foremost on a voluntary basis. In particular, video conferences (e.g. of Board meetings) as well as online shared workspaces for the preparation of meetings could be promoted.

   In the fields of electronic invitation and voting of shareholders at general meetings, voluntary solutions are already often in place. For registered shares e.g. in the German market, up to 25%-50% of communication with shareholders is dealt efficiently by digital means.

   However, due to the fact that shareholders from abroad are mainly registered not directly, but through complex chains of intermediaries, those shareholders cannot be reached directly in a digitalized way by the issuer. This problem has been addressed in the recently reviewed Shareholder Rights Directive (EU) 2017/828 that provides a solution for this aspect. When implementing the directive and in case of further measures regarding the relationship between companies and their shareholders the following should be taken into account. In order to remedy obstacles, the following measures would be helpful: (1) Facilitation of the direct entry of cross-border shareholdings (owner, not nominee) in the share register for registered shares and (2) inclusion of electronic shareholder address in the share register for digital direct communication. For bearer shares e.g. in the German market the situation is very different, i.e. the shareholder is not known to the issuer and any communication has to go through the custodian banks.

   Nevertheless, physical meetings with shareholders especially within the annual meeting are still a central element of the Corporate Governance of companies that should not be mandatorily replaced via digital means. Some companies prefer also traditional ways of communication, which should not be precluded. Last, costs related to digitalisation should not be underestimated, which is why a gradual approach for implementation should be applied.

2) Areas of promotion of digitalisation to facilitate cross border mobility can be seen in the use of digital tools for notification, documentation and registration. The promotion of measures for the interaction of companies with Member States in a digital form is a very important element of the initiative, provided that barriers to the free establishment of companies will be reduced. The prerequisites are, however, the protection of the creditor's rights and interests and preserving the integrity of the business registers. Companies very much rely on the information of the public registry that they consult to better assess potential business partners. Therefore, it should be ensured that the necessary information, identity of the founder and authentication of documents are upheld. The safeguards already been agreed among Member States in the Council General Approach on the Single Member Company from May 2015 seem to be a good starting point.

3) Given the potential sensitivity of personal as well as business information provided via digital channels, special attention should be paid on fostering cybersecurity and protection of personal data. Therefore, safeguards to ensure trustworthiness of digital operations will need to be established or effectively enforced.

II. Cross-border mergers:

With regard to cross border mergers, the EU Commission should envisage to further extend simplified cross-border merger procedures. In this context, we would like to stress that drafting a management report when there are in fact no employees and the shareholders waive the requirement is an unnecessary expense.

More generally, we agree with the study on the application of the cross-border mergers directive that there are circumstances where meeting the requirements of the directive is timely and costly (for instance, the waiting period for the creditor protection is unnecessary if there are no extra-group creditors involved in a cross-border merger).

We would appreciate if those areas were addressed in upcoming Commission initiative.

III. Cross-border division:

The lack of a European set of rules for cross-border divisions is a serious obstacle for companies wishing to exercise their right on cross border mobility. The introduction of a respective procedure is an expression of the freedom of establishment, according to Art.49.54 TFEU. It would promote the mobility of companies within the single market. This proposal would simplify the current complex procedures of national divisions and subsequent cross-border mergers, thereby reducing procedural steps and costs, and simplifying transactions.

The provisions of the Merger Directive could serve as a model and inspiration for a future set of rules. This applies in particular to the system of employee participation provided for and practiced under this directive. An orientation to the rules on employee participation in SE Directive (EC) No 2001/86 / EC is complicated and should be avoided.

IV. Cross border conversions:

Within the European Union, cross border conversions of companies are cumbersome. Despite the jurisprudence of the European Court of Justice having set out main principles on cross border conversions, in practice companies still face in many cases obstacles when converting to another country. Those obstacles foremost occur in either companies being forced to dissolve or losing its legal personality in the Member State they intend to leave or by the lack of recognition of its legal personality in the host Member State. Consolidating the jurisprudence of the European Court of Justice would finally create legal certainty and allow for the exercise of the fundamental EU freedom of establishment.

BDI and Deutsches Aktieninstitut consider measures to promote this cross border mobility of companies to be absolutely necessary and partly more than overdue. The mobility of corporations is an essence of the increasingly harmonized single market and direct expression of freedom of establishment, Art. 49, 54 TFEU. If there are no clear, uniform European rules on this issue, there is a risk that companies will be left with the diversity and complexity of national regulations, which autonomously determine the conditions under which companies can move or cannot move.

The minimum criteria would be:

1) Cross-border conversion should be allowed even if only the registered office is transferred from one Member State to another.
2) The cross-border transfer of seats should be tax-neutral.
3) The legal personality of the company concerned should be maintained.
4) The rights of shareholders (creditors, employees, minority shareholders) should not be impaired and protected by special safeguards.
5) Companies in dissolution, liquidation, insolvency or other similar pending proceedings should not be allowed to move their registered offices across borders.
6) Employees' co-determination rights should not be affected by the transfer.

V. Conflict of law-rules for companies

Companies represented by BDI and Deutsches Aktieninstitut share the ongoing experience that indeed there are often conflicting laws in the different Member States they are operating in. Additional options to enhance mobility of companies are therefore generally welcome. At the same time, we doubt whether a satisfactory solution could be reached on European level on the various dimensions the issue entails. This relates in particular to the real seat theory vs. the incorporation seat theory.

In any case, any measures should be handled carefully regarding corporations from non-EU-countries in order to prevent a “race to the bottom”. If not, there is the danger that corporations are founded according to the law of any desired country, which might e.g. not foresee any creditor protection, nor compliance responsibility of the management.

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The Federation of German Industries is the umbrella organisation of German industry and industry-related service providers. It speaks on behalf of 36 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees (www.bdi.eu).

Deutsches Aktieninstitut represents the entire German economy interested in the capital markets. Its about 200 members are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut keeps offices in Frankfurt am Main, Brussels and Berlin (www.dai.de).
