

# Contribution to the European Commission's consultation on EU Company law upgraded: Rules on digital solutions and efficient cross-border operations

2/8/17

## Introduction

### CEC's role as social partner

CEC European Managers is the European cross-industry social partner organization, recognized by the European Commission, representing the interests of around one million managers throughout Europe. Being one of the actors of EU social dialogue, CEC strongly supports the principle that all parts of the industry should be closely associated in the definition of policy orientations and initiatives that concern the life of companies and the way their corporate events are regulated, whenever these can have an impact on employment and the organization of work. This reflection holds even truer when we consider the particular case of our affiliates: managers represent in fact by definition that specific category of employees within a company that need to put in practice the decisions taken by the ownership, and are asked to design the necessary strategies to accompany all changes affecting the structures of companies.

### CEC's general position with regards to employee participation

One of the basic principles inspiring the functioning of social dialogue, and therefore the whole European social model, is the idea that workers must be involved by the upper management in the life of the company they work for, being timely informed and consulted on the main issues that concern the organization of work, the economic prospects of the company and any other event that might have major employment implications. The system regulating the principles of workers' involvement and consultation is based on three "specific" directives that provide for "domestic" cases, for instance companies that are only based in one Member State (Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on transfers of undertakings and Directive 2002/14/EC establishing a general framework for informing and consulting employees) and three other pieces of legislation covering trans-national situations: the Directive on the establishment of European Works Councils (2009/38/EC) and the two Directives "supplementing" the Statutes for a European Company and a European Cooperative Company with regard to the involvement of employees (2001/86/EC and 2003/72/EC).

That latter three directives aim at upholding existing standards of employee participation at the national level, including:

- the right of employees to elect or appoint some of the members of the company's supervisory or administrative organ, or
- the right of employees to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

## CEC's overall assessment of this consultation and the Commission's apparent political goals

The regulatory framework has so far been based on *negotiations* between employees' representatives and the competent organs of the participating companies. Those negotiations follow the „before and after principle. This means that employee rights in force before the change of legal form are not only an important point of reference during negotiations, but also in some instances serve as minimum standards. For a SE this is the case when Article 7 is applicable. Here the “standard rules” come into play after a failure of the negotiations. If all requirements are met, the participation forms that existed prior to the registration of an SE and that covered a significant amount of employees will continue to exist in a SE.

The consultation launched by DG Justice on the “upgrading” of EU company law is touching on a set of significant legal aspects and raises a series of relevant questions concerning the recourse to digital solutions for registration and other formal acts of companies as well as further provisions to foster their trans-national mobility.

We will detail our position in the text of our response. Here, we would preliminarily like to focus on a “horizontal” issue that is particularly striking for us, as social partner organization: **the absence in the text of the consultation of any reference to the employment and labour rights-related implications of EU company law.**

We regret to see that no reference in the text is made to the acquired rights of workers' in terms of information and participation in the adoption of the decisions concerning the undertaking; we believe that any initiative going in the direction of modernizing the current state of EU company law by rationalizing the current provisions on cross-border operations should not overlook the necessity to **restate the safeguard of acquired rights of workers**, including information, consultation and involvement ones.

Given the Commission's apparent intention to significantly facilitate cross-border transnational mobility of companies, CEC is concerned that the existing legal framework with regard to employee participation at the company-level will no longer be able to offer a comprehensive protection of acquired rights and might not even ensure that the existing negotiating model will be applicable in all forms of cross-border mobility.

Therefore, CEC sees a necessity for a general and comprehensive set of rules with minimum standards regulating employees' participation rights for all forms and variants of cross-border mobility of companies within the EU.

## Annex: CEC's answers in the online-questionnaire

### Information about the respondent

You are welcome to answer the questionnaire in any of the 24 official languages of the EU. Please let us know in which language you are replying.

\* You are replying as:

- As an individual in your personal capacity
- In your professional capacity or on behalf of an organisation

\*Respondent's first name:

\*Respondent's last name:

\*Respondent's professional email address:

\*Name of the organisation:

\*Postal address of the organisation:

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1040 Brussels  
Belgium

\*Type of organisation:

- Private enterprise
- Professional consultancy, law firm, self-employed consultant
- Trade, business or professional association
- Non-governmental organisation, platform or network
- Research and academia
- Regional or local authority (public or mixed)
- International or national public authority
- Other

\*Please specify the type of organisation:

- Chamber of commerce
- Business organisation (including investors, shareholders or creditors' organisations)
- Trade Union/employee body or similar
- Representative of professions or crafts
- Other

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

- Yes
- No
- Not applicable

\* Please indicate your ID number:

\*Please indicate in which country your organisation's headquarters is located:

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany

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- Greece
  
- Hungary
  
- Ireland
  
- Italy
  
- Latvia
  
- Lithuania
  
- Luxembourg
  
- Malta
  
- Netherlands
  
- Poland
  
- Portugal
  
- Romania
  
- Slovak Republic
  
- Slovenia
  
- Spain
  
- Sweden
  
- United Kingdom
  
- Other

\* Your contribution:

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Note that, whatever option chosen, your answers may be subject to a request for public access to documents under Regulation (EC) N°1049/2001

- Can be published with your organisation's information** (I consent the publication of all information in my contribution in whole or in part including the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication)
- Can be published provided that your organisation remains anonymous** (I consent to the publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that it is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent the publication.

## 1. Reasons to Act

The new company law initiative would aim to make the best use of digital solutions in companies' interactions with public authorities but also with companies' shareholders, and to provide efficient rules for cross-border mobility of companies which could include mergers, divisions, conversions and uniform conflict-of-law rules for companies. The questions below seek your views on the problems, their seriousness and the need for EU action. A number of problems faced by companies and stakeholders have already been identified in previous public consultations and studies on company law. We now ask that you bring to our attention any recent developments on problems already identified and other problematic areas. Please also provide evidence or examples of any problems that exist and indicate how serious they are. More detailed explanations on what is meant by digitalisation and cross-border mobility rules are provided in sections 2 and 3.

A recent Study on the Law Applicable to Companies<sup>5</sup> found that in many Member States there is considerable legal uncertainty surrounding the law applicable to companies. The main finding is that differences between Member States' conflict-of-law rules lead to significant practical obstacles to corporate mobility in Europe. This limits the possibility of companies of making effective use of the freedom of establishment. In a context where the substantive laws of the Member States have not been fully harmonised, uniform conflict-of-law rules could give companies and Member States' authorities more legal certainty, promote cross-border mobility in the EU and remove obstacles for them stemming from the potential for conflicts of laws. Any such uniform rules could build on the existing case-law of the Court of Justice of the EU in the area of freedom of establishment promoting choice of law. More detailed explanations are provided in section 4.

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5. <https://bookshop.europa.eu/en/study-on-the-law-applicable-to-companies-pbDS0216330/>

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

	to a very large extent	to a large extent	to some extent	not at all	no opinion
a. Digital processes or tools for companies to interact with Member States (registration, filing, publication)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Digital processes or tools for companies to interact with shareholders	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Cross-border mergers	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Cross-border divisions	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Cross-border conversions	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Conflict-of-laws for companies	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Other areas (please explain)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Which areas:

From CEC's perspective, enhancing the cross-border mobility of companies is a legitimate political aim. However, the goal of any reforms in the field of any reforms should not exhaust itself in improving the functioning of the internal market. The protection of acquired participation rights of employee, specifically their representation in supervisory of administrative bodies, should also be properly taken into consideration. At the national level, legal provisions on employees often constitute the "flip" side of company law rules. A corresponding mechanism should also be in place at the European level. This requirement has been met in the past, for example with the two Directives "supplementing" the Statutes for a European Company and a European Cooperative Company with regard to the involvement of employees (2001/86/EC and 2003/72/EC).

CEC's concern is that future new directives that purposefully or inadvertently omit the



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aspect of employee participation could act as an incentive for companies changing their legal form with the sole or main purpose being the reduction of employee participation rights.

Minimum standards (including both procedural rules and a solid core of material rights) that would apply to all existing and future legal forms could therefore serve as “safety net” for employees from countries with formalised participation rights. Needless to say, the prerogative to decide on legal forms for companies and the roles of employees at the national level should remain with the member states.

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

Numerous studies conducted by Eurofound or institutions at the national level such as the Hans-Böckler-Stiftung in Germany have indicated that employee participation in many member states is continuously under pressure, that avoidance strategies have gained importance and that the already existing European legal forms such as the SE play a certain role in this process.

1.2 Which of the issues mentioned below could be addressed as a priority by the EU? (please choose all that apply)

	top priority	priority	low priority	this issue should not been addressed at all	no opinion
a. Rules for the use of digital processes or tools by companies to interact with Member States (registration, filing, publication)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Rules for the use of digital processes or tools by companies to interact with shareholders	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Rules for cross-border mergers	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Rules for cross-border divisions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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- e. Rules for cross-border conversions
- f. Rules on conflict of laws applicable to companies
- g. Other rules related to companies

Please comment:

As indicated above, CEC's expectation is that all proposals for future reforms of European Company Law are automatically accompanied with an assessment of their potential impact on existing forms of employee participation. Accordingly, proposals for the conditions under which these rights can be protected or to what extent they can be disposed of or be modified in negotiation processes should be worked out at an earliest possible stage.

## 2. The use of digital processes or tools throughout the companies' lifecycle

### The use of digital processes or tools for interaction between companies and Member States

There exists only a limited EU legal framework to allow the use of digital processes or tools in company law and no obligation as such on the online registration of companies<sup>6</sup>. For example, at national level, several Member States already allow full online registration of companies, whereas the EU legal framework allowing it cross-border does not exist. This means that in those Member States founders/representatives can register a new limited liability company in the business register in a fully online process, without having to be physically present before an authority for the act of registration or beforehand. In a number of other Member States, fully online registration is still not available and is, in any event, often difficult in cross-border situations. Moreover, not all information or documents from business registers provided electronically are considered authentic, because they do not have the same value as paper documents. Therefore, electronic versions are often not recognised and accepted in the same way as paper copies of documents. In addition, the information is often not easily accessible. The situation is very similar when registering a branch in another Member State and filing or publishing information.

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

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2.1 What are the main issues that could be addressed for the use of digital processes or tools by companies in their interaction with national business registers? (please choose all that apply)

- a. Make it possible to register, file and publish information on companies and branches fully online in a short time
- b. Provide for appropriate safeguards to make the online registration, filing and publication trustworthy
- c. Provide structured online templates and forms, in particular for the registration of companies and their instruments of constitution
- d. Ensure the recognition of documents/information issued by business registers, including the acceptability of electronic copies which should be accepted as 'true copies'
- e. Ensure that companies do not have to provide the same information more than once nationally and, where possible, cross-border
- f. Other issues
- g. No need for EU measures in this area
- h. No opinion

Please comment:

#### Use of online tools for interaction between companies and shareholders

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

2.2 In which areas could companies (listed and non-listed) be encouraged to use digital tools when interacting with their shareholders? (please choose all that apply)

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

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

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

#### Cross-border mergers

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

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

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

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

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

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

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

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3.1 What are the main issues that could be addressed with respect to cross-border mergers? (please choose all that apply)

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

Please comment:

For the reasons already given in the answers to questions 1.1., 1.1.1 and 1.2, CEC thinks that enough consideration should be given to employee participation rights and to the impact a cross-border merger might have on them. Since European laws on employee participation is, for now, mostly procedural, whereas the substantial rights of employees are defined by national legislators (and in accordance with the principle of subsidiarity apply in one member state only), cross-border mergers (as well as cross-border divisions or cross-border conversions) are especially prone to be used for reducing the influence of employees in the supervisory or strategic decision-making bodies of a company.

### Cross-border divisions

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

Due to the fact that many Member States do not have rules on cross-border divisions or when they do, those rules differ, the position of stakeholders (in particular employees, creditors or minority shareholders) is unclear

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and their interests might not be effectively protected. Also it is not always clear for public authorities, including business registers, tax authorities or social security institutions, how to treat such operations.

3.2 What are the main issues that could be addressed for cross-border divisions? (please choose all that apply)

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

Please comment:

The answer given to question 3.1. is likewise applicable to question 3.2

**Cross-border conversions**

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

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

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

13. A specific European legal form of Societas Europaea, SE, for which transfers are allowed in EU law.

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3.3 What are the main issues that could be addressed for cross-border conversions? (please choose all that apply)

- a. Set out only a cross-border conversion procedure (leaving the question of safeguards for different stakeholders and the question of seat of companies to Member States)
- b. Set out a cross-border conversion procedure and provide for uniform safeguards for different stakeholders across all Member States (leaving the question of seat of companies to Member States)
- c. Set out a cross-border conversion procedure with minimum safeguards for different stakeholders (Member States could enact or maintain more protective rules, but leaving the question of seat of companies to Member States)
- d. Cover the question of stakeholders' protection through conflict-of-law rules in cases of cross-border conversions (see also Question 4.7)
- e. Set out a cross-border conversion procedure which lays down specific rules to deal with the seat of companies
- f. No need for EU measures in this area
- g. Other measures
- h. No opinion

Please comment:

The answers given to question 3.1.is likewise applicable to question 3.3

3.3.2 Which specific rules could be laid down to deal with the question of the seat? (please choose all that apply)

- Cross-border conversion should only be allowed when the real seat of a company is transferred from one Member State to another
- Cross-border conversion should be allowed even if only a registered office is transferred from one Member State to another
- Cross-border conversion should be allowed if a company is capable of showing that it has/will have a

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genuine economic link with the Member State to which it transfers its registered office

- Other solutions
- No opinion

Please comment:

As explained in more detail, CEC thinks that the administrative seat and the statutory seat should always be in one and the same country. If a change of seat occurs between member states (as the result of existing or new provisions in the European company law), specific procedural rules or the minimum standards as mentioned in our answer to question 1.1. should apply.

#### 4. Conflict-of-law rules for companies

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

There have been various practical obstacles reported from the countries that have retained an aspect of the real seat theory, for instance problems in identifying the place of the real seat. The case-law of the European Court of Justice has not yet led to a convergence of national conflict-of-law rules applicable to companies. Companies may encounter problems and difficulties such as problems with the boundary between the applicable law and other fields of law, possible application of two or more Member States' company laws or may even be faced with the impossibility to carry-out cross-border conversions

4.1 What problems arise when national conflict-of-law rules for companies differ? (please choose all that apply)

- a. Problems with identifying the place of the "real seat" or the place of incorporation of a company



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- b. Problems related to the divergent or conflicting provisions in different national company laws
- c. Cross-border conversions are made virtually impossible
- d. Problems with the boundary between the applicable company law and other fields of law (for instance insolvency, tort, contract law)
- e. Problems with the application of overriding mandatory rules of domestic law that may interfere with foreign company law
- f. Other
- g. None
- h. No opinion

**Please comment:**

In view of its goal to protect existing forms of employee participation, CEC feels that European company law should continue to guarantee that the statutory seat and the head office of a European company can only be in one (i.e. the same) country. Otherwise avoidance-strategies or "cherry-picking" could be made too easy.

**Connecting Factor**

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

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

The law of the place of incorporation is not applied without exceptions. The laws of all Member States provide that certain provisions of their substantive company law apply to companies that are incorporated

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under the law of another jurisdiction (so-called "overriding mandatory provisions", i.e. provisions which are crucial to safeguard a country's public interest, such as its political, social or economic organisation). This indicates a country's strong desire to retain an appropriate degree of control over foreign companies operating within its territory when public interests are at stake. While this broad consensus should be taken into account in the context of a possible future harmonisation, the jurisprudence of the European Court of Justice, which sets limits to the application of overriding mandatory provisions in order to give effect to the principle of freedom of establishment, must be observed at the same time.

## 4.2 By which law should a company be governed?

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

As stated in its answer to question 4.1, CEC feels that European company law should continue to guarantee that the statutory seat and the head office of a European company can only be in one (i.e. the same) country.

**Matters governed by the lex societatis**

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

Certain matters do not only address the internal affairs of the company. They reflect wider policy goals and choices, as these rules seek to balance the interests of different social players within the society where a company operates. This may for instance concern rules on employee participation. Two options could be

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

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

4.3 What matters could the *lex societatis* cover? (please choose all that apply)

- a. Internal matters
- b. External matters
- c. No opinion

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

- a. Yes
- b. No
- c. No opinion

4.5 Could EU-level conflict-of-law rules for company law have universal application, i.e. should they also apply to companies incorporated in non-EU countries with operations in the EU?

- a. Yes
- b. No
- c. No opinion

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4.6 Should a possible future instrument on conflict-of-laws in cross-border operations of companies specifically address the possibility of a change of the applicable law through a cross-border conversion to another Member State without loss of legal personality?

- a. Yes
- b. No
- c. No opinion

4.7 Should a possible future instrument on conflict-of-laws specify which matters should be covered by the 'old law' and which by the 'new law'?

- Yes
- No
- No opinion

Please comment:

This question is obviously directed at the scenario that a new directive on the transfer of seat is passed. Here, CEC refers to its general assessment in its answer to question 4.1. CEC thinks that also in this case European company law should continue to guarantee that the statutory seat and the head office of a European company can only be in one (i.e. the same) country.

Other comments

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

- Yes
- No
- No opinion