

EU Company law “upgraded” Package: making the best of digital solutions and cross-border mobility

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REPORT

BusinessEurope, ACCA and UEAPME, with the support of EY, organised a conference called **EU Company law “upgraded” Package: making the best of digital solutions and cross-border mobility**, in BusinessEurope premises, in Brussels.



After a welcome by **Markus Beyrer**, Director General of BusinessEurope, and Keynote speeches by **Věra Jourová**, EU Commissioner for Justice, Consumers and Gender Equality, and **Jytte Guteland**, MEP, S&D and JURI Committee, the panel discussion, moderated by **Jason Piper**, head of Business law, ACCA welcomed **Salla Saastamoinen**, Director for Civil and Commercial Justice at the European Commission; **Peter Scherrer**, Deputy Secretary

General of ETUC; **Pierre-Henri Conac**, Professor of Commercial and Company Law at the University of Luxembourg; **Luc Hendrickx**, Director Enterprise Policy and External Relations at UEAPME; **Joëlle Simon**, Deputy Director General of MEDEF & Vice-Chair of BusinessEurope Legal Affairs Committee and **Daniela Mattheus**, Partner EY, EMEA & Global Corporate Governance Board Services Leader. Concluding remarks were delivered by Peter Martschini, representing the –at the time of the event still incoming- Austrian Presidency of the Council of the EU and **Pedro Oliveira**, Director of Legal of BusinessEurope closed the conference.



The company law package was long-awaited by businesses of all sizes and most stakeholders. The debate confirmed that the measures are generally seen as rightly addressing important issues for companies and as a good, constructive basis for discussion, providing some adjustments.

The spectrum of opinions is very broad. Businesses representatives stressed the importance of removing the red tape and called for clear and simple procedures. Many asked for an efficient and quick process without physical appearance, as well as safeguards that come with the digitalisation proposal. Practitioners ask for legal certainty, efficiency and transparency. Some called for good protection against fraud, with stronger connection between the register and real activities, while others criticised that fraud is mentioned too often in the proposals, whereas their focus should be on the many honest entrepreneurs. According to some stakeholders, company law should not be a tool to fight tax evasion. For others, the proposal is too business-friendly and does not go far enough in the worker's protection.

Main highlights



Markus Beyrer, Director General, BusinessEurope

- The Company Law Package has been awaited for a long time and it is important to move forward. European companies always had two objectives: to remove red tape and to make sure that companies can exercise the right of free establishment. Even though we have seen substantial progress, companies are still facing a lot of problems.
- We need a change of mind-set when it comes to digitalisation. A lot of company processes are becoming digital and are dematerialising, however administrative procedures are not fully there. It is not yet possible to register a company in every member state without lengthy procedures or without going there physically.
- The package is a good attempt to fill these gaps. BusinessEurope has been advocating for solutions for many years. The EU Company Law Package is therefore timely but also very complex because company law is still very rooted in national legal traditions which will bring challenges going forward. We will need to ensure that procedures for cross-border mergers, divisions and conversions remain simple whilst ensuring effective protection for parties involved. We need to see what is reasonable and strive for trust in digital tools.



Věra Jourová, Commissioner for Justice, Consumers and Gender Equality

- The EU economy needs healthy and thriving companies, which can easily operate in the single market. They play a crucial role in promoting economic growth, creating jobs and attracting investment in the European Union. In principle, the single market offers plenty of opportunities for such companies. However, too often, it is difficult to make use of those opportunities in practice.

- For a long time, we have heard from companies, also through your organisations, that carrying out business operations across borders poses challenges. That moving from one country to another and reorganising a business through a conversion or a division is impossible or complicated. And that EU company law is not in tune with digital developments.
- We have also heard concerns from representatives of employees – including organisations present today – that their rights can be affected during cross-border operations. That without harmonised safeguards, there are no rules to protect their interests or it is not clear which rules to use. And that some companies may even abuse this situation.
- It is in response to these longstanding calls that the Commission has now proposed the Company Law Package with two proposals: the first one on digital tools and processes in company law; and, the second one, on what is known as cross-border operations of companies. A very important objective was to strike the right balance in the Package. On one hand, we need rules to enable companies to make use the freedom of establishment in order to prosper and to create jobs. On the other hand, we need to protect stakeholders, in particular employees. This package is the result of intense analytical work, broad consultation and deep discussions with stakeholders. I would like to thank many of the organisations present here today for your active involvement in our preparatory work. We found your input very valuable.
- We were also influenced by recent jurisprudence of the European Court of Justice, in particular the Polbud case. This judgment – whilst clarifying the freedom of establishment – did not clarify the rules of the game and was an invitation for the legislators to act.
- I believe that the Package, as we put it forward, is a well-balanced one. It will help to make the single market deeper but also fairer. It will enable online solutions to be used in company creation in all EU countries and set a maximum response time. Online facility and once-only principle would also apply to filing of updates and required information. It also stresses that the digital processes must be secure and must not open up the possibility of fraud. We learnt our lesson from the Single Member Company Proposal (SUP), and this is well reflected in the package.
- The new rules will provide a clear and harmonised framework to enable honest entrepreneurs to grow, restructure and to relocate within the single market. At the same time, it will enhance the legal situation of all stakeholders involved in cross-border operations. It will better enable them to enforce their rights. And it will bring efficient safeguards for those who need protection, in particular for employees.
- Ultimately, the rules in the Package will empower national authorities to be efficient watchdogs. We will need to ensure that we filter out abusive or fraudulent purposes and support honest entrepreneurship.
- I am pleased to see that the first reactions on the package have been overall positive. Even if there are doubts on some issues, it is seen as a step in the right direction and Member States and stakeholders are willing to work to improve it.
- I am very happy that both the Council and the European Parliament seem committed to make rapid progress in negotiations on the Package. The Bulgarian Presidency promptly started the negotiations, and I would like to thank them for this. I presented the Package to the Ministers in the Competitiveness Council and the feedback there was positive. And I am informed that the Austrian Presidency would like to advance the negotiations during the second half of this year. Likewise, in the European Parliament the rapporteurs were announced and there were good discussions at a JURI Committee hearing and also earlier at the conference organised by the Socialists & Democrats Group.
- I hope that this overall constructive approach that we have seen so far prevails. I think that we agree on some key principles underpinning the package already. For instance, that we need to ensure that the exercise of freedom of establishment in the

single market goes hand in hand with a strong social dimension. That we need European rules in a number of areas where there are none today, such as cross-border conversions. That we need to make best use of digital solutions. This is a good basis to start.

- I would like to thank BusinessEurope, the Association of Chartered Certified Accountants (ACCA) and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) for facilitating today's exchange of views. We need this kind of occasions that contribute positively to the negotiations process. I wish you an interesting and fruitful discussion. I believe that we should aim to conclude the negotiations on the package before the European elections next May. The new rules should produce results on the ground as soon as possible. And I count on your support.



Jytte Guteland, MEP, S&D JURI Committee

- The European Parliament has several times called for a directive of cross-border transfer of company seats with meaningful workers' participation. Last year the EP has also called on the Commission to come up with rules on cross-border conversions with adequate safeguards for employees, creditors and shareholders in order to create a fairer Single Market.
- The Polbud-ruling from last October, where the European Court of Justice confirmed that companies can enjoy freedom of establishment by only transferring their registered office from one Member State to another without the real seat office and without the need to exercise real economic activity there, clearly showed the need to improve the rules in order to prevent fiscal and social dumping.
- In the light of this, the EP welcomes the two initiatives of the Company law package. The absence of harmonised rules may lead to increased use of letterbox companies for fraud purposes and artificial arrangements of unserious business. Therefore, it is important that the freedom of establishment of the EU law does not open up for further forum shopping for evading taxation, or social or workers' rights and that there are sufficient safeguards, which we will aim for.
- As regards to the proposal for the directive for cross-border conversions, mergers and divisions, it is essential that workers or their representatives are fully involved throughout the procedures. The proposal must be in line with the 8th principle of the Pillar of European Social Rights: notably, they should be informed and consulted in good time on matters relevant to them in the context of companies' cross-border conversions. This has been mentioned by the Commission in the proposal but it also will require teeth and further clarifications during the actual articles.
- The rules must be coherent, compatible and complement the other recent initiatives such as rules on posted workers and the fight against tax evasion.
- Any plan to move a registered office cross-border must respect the highest level of worker's involvement through the right to information, consultation and participation, in order to ensure that employees are fully able to accompany the fundamental changes in the company that they work. Any circumvention of existing rights to workers' participation must be avoided.
- The mobility of companies must go hand in hand with the protection of social and workers' rights as economic sustainability and social sustainability are each other's preconditions. Workers' rights are a cornerstone of sustainable corporate governance and need to be secured within this proposal.

- Regarding the digitalisation of company law, the proposal would enable companies to register, file and update their data in the registers fully online, without the need of physical presence before a business registry or intermediary except where there is a genuine suspicion of fraud. As such, business registers and intermediaries will be required to integrate digital tools into their practices.
- So far, 17 Member States allow the full online registration. The Directive on the use of digital tools and processes in company law makes online establishment of companies obligatory.
- It is crucial that we can assure that this proposal really prevents fraud and abuse while at the same time enables better digital tools for setting up businesses.
- On 21 June, the Committee on Legal Affairs held a public hearing on “Conversions, Divisions and Digitalisation - new EU company law tools”. At the hearing, social partners, academics and other interest groups views were shared. There were some concerns raised that we will need to look further in to, for example the importance of 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. Others mentioned the importance for high European standards for identity checks in order to prevent identity theft.
- However, the creator of a company is not directly obliged to go to an authority or notary but can do the establishment through online tools.
- Several stakeholders, such as notaries and trade unions, have argued that the proposed Directive could reduce the quality and trustworthiness if even legal persons are able to register online. Therefore, the recommendation is to limit the mandatory introduction of the online registration procedure to the registration of companies by natural persons only which I believe is a good idea.
- Some form of ex-post monitoring should also be foreseen and that involvement of notaries and trade unions should be made through the entire lifecycle of companies.
- In the light of the scandals connected to LuxLeaks, Panama and more recently Paradise Papers that have shown that the business model of tax havens are based on the use of non-transparent company shareholdings that set up in order to camouflage real beneficiaries, we all can agree that more legality controls and safeguards are needed, even when improving the digital procedures better.
- Fully online registration of companies without enough legality controls might lead to a very much higher number of letterbox companies is not in the interest of anyone. It is important not to wipe out the “gatekeeper” function of notaries and courts in order to detect fake documents and disqualified directors.
- From the parliament's house, there is a strong cross-border will to work move forward and achieve progress in the legislative procedure with both the directive proposals.



Panel discussion, moderated by **Jason Piper**, head of Business law, ACCA, who stressed:

- The nature of the subject can mean that discussions can become very academic, to the point of getting bogged down in theoretical discussions, while all the while economic

operators will be getting on and doing stuff, whether the legal frameworks have been updated or not.

- And that's a challenge which has become even greater with changes to the available tools for business and the changing and evermore fast-moving environment they operate in so it's more important than ever that alongside the robust theoretical foundations we make sure there's a sound appreciation of the practical implications of the proposal.
- As a professional body with members advising businesses all across the EU on the best economic outcomes for their operations, ACCA is happy to see this package with its blend of practical forward-looking steps alongside many important structural legal protections.
- The key test though will be for the proposals to deliver options for business which are more attractive than any of the "unregulated" alternatives. Businesses of every size are adapting to the opportunities offered by digital technology, and many will eagerly embrace the steps taken for the formation and registration of companies online, while others who might have been more wary will take comfort from a coordinated regime that the benefits are real.
- But it's the scope for mobility and adaptability of the legal forms which is perhaps most important – and in some ways the hardest to predict. It's essential that as well as catering for the millions of established businesses already operating across the EU, the new rules present an attractive option for new businesses opening up to meet new demands in new markets, operating on business models that we couldn't have imagined even just 7 years ago. It's here that the protections for employees, creditors and non-controlling members will be the most important, and I know that's an area which some of our speakers will be keen to focus on.

Salla Saastamoinen, Director, Civil and Commercial Justice, European Commission

- Trying to balance the interests of different stakeholders was the most important task for the European Commission.
- The proposal on the digitalisation will make procedures quicker, cheaper and more efficient. The system requires identity checks – identity of persons who are setting up the company must be checked. If there are doubts, the proposal provides a possibility to ask for physical presence. The proposal is limited to the European citizens.
- As regards to the Cross-border operations proposal, the idea is to create a clear procedure for cross-border mergers, divisions or conversions. This means legal certainty, cost savings and efficiency gains. Cross-border operations will fully be done online – digitalisation is brought into both proposals.
- The European Commission wants to increase transparency and involvement of stakeholders. Companies must prepare draft terms of reference for cross-border operations which will be publically available on the Business Register Interconnection System. Employees and shareholders will be able see them on the system and comment.
- The company must also report to shareholders. However, the Commission is aware that the procedure can be demanding and has foreseen that shareholders can agree to dispense the report.
- There is also a specific report for employees that the company will need to prepare in addition to the draft terms of reference.
- The Commission is proposing a system where the genuinity of company movements would be checked so that there are no artificial arrangements. This will be checked through independent experts and this will be more important for bigger companies – the independent expert report is not foreseen for smaller companies, however authorities will be checking every company. If there is a serious suspicion of an artificial arrangement, in-depth assessment will be performed and if it proves to be an artificial arrangement, cross-border operation can be prohibited.

- It is important to stress that the cross-border proposal is not harmonising the national establishment criteria for companies. It is also not dealing with the first-time establishment, only with the cross-border cases.
- There are also rules to protect shareholders and creditors. Employee participation rights are also addressed in the proposal. If there has been employee participation in the country of the departure, it will continue in the country of the destination. All the existing information and consultation rights under the union law apply throughout the procedure.
- The European economy has changed, we have created fairer single market, introduced more legislation on the workers' rights and proposed new taxation rules - this is the right time for the EU Company Law Package.
- The Commission prepared the proposals taking into account future negotiations and what would be politically feasible and realistic.
- The Proposal on cross-border operation is important politically, however in practice, the digitalisation proposal will have a much bigger impact because it will concern a very big number of companies, including SMEs.
- The task of an independent expert is to bring factual information for public authorities – instead of replacing, give additional public information to social partners.

Peter Scherrer, Deputy Secretary General, ETUC

- A good company law framework on the European level is much needed. We need rules but some provisions in the proposal, especially the one regarding independent experts, will not function in some EU member states. It is well-meant, but it will probably won't work in real life.
- Notaries should be included in the process of registration but they should also be included during the whole lifecycle of a company.
- Transparency must be more connected to the information and consultation rights. Here the European Commission was not ambitious enough. It has proposed some safeguards for existing information and consultation rights but there are no provisions regarding countries where we don't have anything.
- There is a need for more connection for the real economic activities of the company. It is important to focus on the country where the wealth is produced. There is no reason why the state that provides infrastructure and enables the company to be profitable should not get the taxes and why the social security contributions should not be paid there.
- It is dangerous to introduce the exception of the micro- small and medium-sized enterprises. This should be reconsidered in the further process of this proposal.
- As regards to what social partners can to make company mobility more successful for both, businesses and workers, proper social dialogue on the company level is required. The European Commission could have been helpful by introducing provisions which enable both parts to have a procedure of information and consultation. Social partners on the national level should ask for more advanced national rules. It is our duty as social partners to make sure we don't have examples of misuse and don't add to the arguments that Europe is only the place to make money without paying attention to people. Community sense and solidarity should be our priority.

Wolfgang Kowalsky, ETUC, added to Peter Scherrer's comments by saying that the perception that companies are mostly honest is unfair. Diminished tax income is a very big issue.

- Ensuring workers' rights is key. The proposal on workers' involvement should therefore be simplified. The Commission is a "prisoner" of previous EU company law.
- Company mobility is not an issue that affects thousands, rather hundreds of companies a year – we should not start an ideological discussion on something that has a very low impact.

Pierre-Henri Conac, Professor of Commercial and Company Law at the University of Luxembourg

- The two proposals were requested by stakeholders since a long time because Europe is all about the Single Market and the freedom to move. Companies need to be active and develop legitimate business in other countries. The proposals bring order to the existing situation and are a huge step forward in order to increase protections. Such rules to help businesses are important, especially to reduce unemployment in Europe.
- As regards to the digitalisation proposal, it is an important step that needs to be embraced. It is essential to make cross-border activities easier in order to facilitate experts. All the comments from the stakeholders, especially from the notaries, were taken into account in order to ensure legal certainty. This proposal should be adopted because it is full of protections that are very well thought out.
- The right to create companies should not only be limited to natural persons. There is no reason to discriminate legal persons, as recently suggested by notaries. This concern can be easily fixed by having representatives of legal persons and checking their identity.
- The cross-border conversions proposal is well-balanced and the workers' rights are especially well protected. Shareholders' rights are also protected in a balanced way.
- The artificial arrangement element is new. It essentially gives a veto right to Member States that want to prevent companies who wish to move for wrong reasons. This intensity of the process will depend in practice on each Member State. The highest level of protection will probably exist in Germany and Austria.
- However, the system is quite bureaucratic. Therefore, an honest business presumption could be useful.
- This is the most important piece of legislation in the last decade in European Company law for non-listed companies. It will be mostly useful for SMEs, not so much for big companies who can already pay lawyers to enjoy freedom of establishment. The proposal will create competitiveness in Europe and help successful SMEs because we need jobs. Both texts are already a compromise taking into account the views of all stakeholders. Therefore, it should be possible now to promptly move forward.

Luc Hendrickx, Director Enterprise Policy and External Relations, UEAPME

- The Digital proposal will have a great impact on the majority of SMEs. The proposal is timely and the Commission took the time to prepare it very well, which was not an easy task. The consultation process was also done well.
- There are always possibilities for simplification when we talk about digitalisation, but it should never be an end in itself. A balance is needed between simplification and safeguards and the European Commission was successful in this task.
- We need efficient identity checks. UEAPME is therefore insisting in setting high European standards for identity checks – even higher than proposed now. We have to know who exactly is behind a company in order to create an environment of trust.
- As regards to speeding up formation process, it is important to do ex ante control instead of dealing with unintended consequences afterwards. The EC proposal is a positive step in this direction.
- The introduction of the “only once” principle is very welcome by UEAPME as it has been advocating for it since 2005. There are still some member states that are reluctant to introduce this principle.
- We should avoid forum shopping. A genuine link to a member state should be required, in which a company is to be registered.
- The Commission proposals should be adopted as soon as possible, not only to help SMEs but also to be able to show before the European elections that something very positive can be delivered at the European level for majority of SMEs.
- The Commission should be bolder in the future as regards to proposals in digitalisation. There are many digital tools that can be taken into account when preparing these proposals.

- Digitalisation on national level will depend on performance of the systems. In many countries where there is a form of e-governance, at a certain point the systems do not work anymore.
- The whole company law debate should not be seen as attack on honest companies. We have to be conscious in the interest of honest enterprises. Knowing who is behind a company is extremely important.

Joëlle Simon, MEDEF & Vice-Chair of the Legal Affairs Committee, BusinessEurope

- The company law package has been a long-awaited one by businesses. Digitalisation is an irreversible trend and a source of time and money savings for companies. On the positive side, the recognition of one of the fundamental freedoms for companies – the freedom of establishment – is very welcome. On the negative side, there is unfortunately a negative vision of the business world in Europe that underlines these texts.
- We need to focus on honest entrepreneurs, however the proposals ask the member states to check in every operation whether there is an artificial arrangement behind the company's move. That means that if a company fulfils legal criteria to move, it will no longer be enough. This is "a guilty until proven innocent approach" which is in clear contradiction of article 49 of the Treaty and the jurisprudence of the European Court of Justice.
- BusinessEurope is in favour of preventing and sanctioning fraud, however company law is not the best tool to fight tax evasion and letterbox companies.
- Another source of concern is complexity of procedures: 2 or 3 reports and a very large exit right for departing shareholders which will make operations more costly and complex. On the contrary, to facilitate cross-border operations, the process should be straightforward, quick and should offer legal certainty.
- As regards to cross-border mergers, the proposal seems to add on new procedures. There is no harmonisation on the way to protect creditors, which was an important expectation from businesses.
- Despite several studies, including the European Commission ones, regarding the complexity of existing workers related provisions, no simplification has been proposed. On the contrary, the proposal seems to go a step further towards codetermination at very low level in certain cases. Unnecessary complexity and duplication should be avoided in this area which is already covered by other EU rules protecting workers.
- We cannot reduce the economic world to letterbox companies. We hear about that way too much while the reality is very different. Even if a letterbox company is created, that does not mean that a criminal activity lies behind it. We have to focus on abuses but this is not a company law domain. Company law is about facilitating businesses to grow and to go cross-border while taking on board stakeholder interests. Freedom of establishment needs to become a reality, otherwise it will be just an ineffective proposal. It is possible to reach a better balance between business interests and those of stakeholders. We are ready to work in that direction.

Daniela Mattheus, Partner EY, EMEA & Global Corporate Governance Board Services Leader

- The proposals demonstrate the willingness to get the balance right between safeguards and protection, and freedom, especially for SMEs. It is also the right time for it and is indeed a huge step forward.
But to meet the right balance in practice will be a challenge for these proposals. The implementation in the member states needs to be considered. Therefore some points might be worth to bring into the discussion for further consideration:
- The Commission tries to align cross-border transactions in respect to harmonized procedures and safeguards overall. To make the proposal as easy as possible for the member states it could potentially work: first having a general part that applies to all

cross-border transactions and then establishing special rules for mergers, divisions and conversions.

- Considering the overall goal of the proposal to align cross-border harmonize there some differences between conversion and divisions on one hand side and on cross-border mergers on the other hand side which are not self-explaining. Especially when it comes to prevention of violation of rules, which does not apply to mergers, only to conversions and divisions. It is quite easy to form a new cooperation in another country, do a cross-border merger and violate rules. This should be taken into account by the European Commission.
- The proposals introduce quite a lot of leeway for member states. Do we really reach the goal of the proposal if every member state takes advantage of it? It could be useful to provide guidance for member states in terms of implementing the company law act and such leeway as well as in terms of interpretation in the practical handling by the authorities and by the courts.
- Finally, it is also important to provide the right environment where companies are comfortable to step into the digital world to generate the cost efficiency for small and medium sized entities

Concluding remarks



Peter Martschini, -at the time of the event still incoming - Austrian Presidency of the Council of the EU.

He summed up the main points raised by the other speakers:

- Expectations were really high when the European Commission presented the Company Law Package in April 2018. The proposals are very ambitious and even though not everyone is happy with them, many acknowledge that the Commission has worked hard to come up with sound solutions. Most appreciated is the fact that the proposals clearly address all the main issues important for companies.
- The spectrum of opinions is very broad. Many businesses stress the importance of removing the red tape. It is key to find the right balance between rules that enable honest entrepreneurs and safeguards.
- Jytte Guteland told us that the European Parliament and the Council were asking for new rules in order to close the existing loopholes. For many the involvement of workers is crucial. There is also a direct link with sustainability. It is important to protect serious businesses. There is also a clear role for the notaries.
- Salla Sastamoinen said that many have asked for an efficient and quick process without physical appearance, as well as safeguards that come with the digitalisation proposal. Practitioners ask for legal certainty, efficiency and transparency.
- According to ETUC, we have to make sure that we achieve good protection against fraud. Stronger connection is needed between the register and real activities. There should be a better way to use the information rights of employees. Not everyone is in favour of exception for SMEs and many call for broader application of the general rule.
- For Pierre-Henri Conac, the relation between the proposals and reduction of unemployment needs to be addressed in the future.
- Joëlle Simon criticised that fraud is mentioned so often in the proposals as our focus should be on the many honest entrepreneurs. The laws are made for honest entrepreneurs but clear indications in the current text are missing. According to some stakeholders, company law should not be a tool to fight tax evasion. Clear and simple procedures are needed, anything else would be a heaven for auditors and lawyers.
- Peter Martschini concluded saying that overall, the proposals are very good basis for finding the right balance between rights and safeguards. We want to make the best use of digital tools in company law in order to improve the registration process while at the

same time ensuring the quality and reliability of business registers. It is key to enable mobility of companies by establishing clear rules on cross-border mergers, divisions and conversions, as well as removing unnecessary obstacles while providing adequate safeguards for employees, creditors and minority members.

- The Austrian Presidency will work on the proposals in an ambitious way and put all the efforts that are needed in order to move forward.