DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committees on commercial law and attorney-notaries

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

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Die Aktiengesellschaft
GmbH-Rundschau
NZG Neue Zeitschrift für Gesellschaftsrecht
WM Wertpapiermitteilungen
ZIP Zeitschrift für Wirtschaftsrecht
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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 65.000 German lawyers. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession.

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

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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[5] 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)			◉		
b. Digital processes or tools for companies to interact with shareholders			◉		
c. Cross-border mergers			◉		
d. Cross-border divisions			◉		
e. Cross-border conversions			◉		
f. Conflict-of-laws for companies			◉		
g. Other areas (please explain)					◉

Which areas:

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The question is to what extent the divergences in legislation regarding the
mentioned complexes constitute “obstacles to the proper functioning of the
single market”. If such high standards are applied, the answer has to be: “Not
at all”, as the single market works smoothly without the approximation of the
laws of the Member States or a comprehensive legal framework in the mentioned
complexes. Cross-border mergers, divisions, and transfers of registered offices
are also possible on the basis of the current law, although partly auxiliary
legal arrangements and the acceptance of intricateness are necessary. Whenever
the DAV answered “to a certain extent”, this is intended to give expression to
the fact that procedural simplifications are possible and perhaps also
desirable. However, from the perspective of the DAV, there is no urgent
requirement for regulation.
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1.1.1 What evidence, including practical examples, could you provide to demonstrate the existence of the problem and its size?

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)			◉		
b. Rules for the use of digital processes or tools by companies to interact with shareholders			◉		
c. Rules for cross-border mergers			◉		
d. Rules for cross-border divisions			◉		
e. Rules for cross-border conversions			◉		
f. Rules on conflict of laws applicable to companies			◉		
g. Other rules related to companies				◉	

Please comment:

The DAV considers a referral of the thematic complexes listed in points a-e to the EU as “less important”. If the aim of the question is to name one of the topics with which the EU could engage before the others, this should be the regulations for cross-border mergers, as this is the practically most important cross-border restructuring measure.
In the proposed answer on point a, the “Registration, Submissions of Documents, Publication” are mentioned as topics for regulation. Our classification as “less important” refers only to the application of digital techniques or instruments for the submission of documents and publications, whereas the online-registration of companies is a topic the EU should not address at all, but should entrust to the Member States.

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[6] .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.

6. i.e registration of an entity in the business register

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)*

- [x] a. Make it possible to register, file and publish information on companies and branches fully online in a short time
- [x] 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

- [x] 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:

In the above checked proposed answer on point a, two topics are combined with each other, namely the facilitation of a complete online-registration as well as the facilitation of the online submission and publication of information. Our cross for answer a refers only to the facilitation of the online submission and publication of information. There is no need to regulate a complete online-registration at the EU level, this matter can be left to the Member States. See above fig. 1.2 point a.

2.1.1 What kind of safeguards would be needed? *(please choose all that apply)*

- [x] Harmonised safeguards to verify the identity (including recognition of electronic IDs, application of the eIDAS Regulation and possible video-conferences)
- [x] Possibility for an exceptional face-to-face verification of identity in case there is a genuine suspicion of fraud
- [x] Harmonised safeguards for the electronic verification of the legality of information or documents (for example, pre-defined structured templates)
- [ ] Other safeguards
- [ ] 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)*

- [x] a. Communication between companies and shareholders on general meetings
- [x] b. Participation and voting in general meetings
- [x] 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

Please comment:

To point b:
Today, it is not uncommon for publicly traded companies that shareholders have the possibility to follow the General Meeting on the internet, and it is common practice in Germany that shareholders can issue their voting instructions to a representative up to the beginning of voting. In addition, companies may provide in the statute or through authorization of the Executive Board that shareholders may participate in the General Meeting without the need to be present at the venue and without a proxy, and that they may exercise their voting rights, wholly or partly, by means of electronic communication. This stems from the respective regulations in the shareholder rights directive. The legislation in the Member States should therefore no longer hinder the facilitation of online participation. There is no need for further action. Online participation must not mean, for example, that shareholders have necessarily the right to ask questions electronically, which then have to be answered in the General Meeting, as this could easily go beyond the scope of every General Meeting.

To point d:
Resolutions without physical meetings unavoidably have to manage without a debate on the matter of the resolution. Therefore, they are only appropriate if none of the shareholders objects to such regulations. Thus, such regulations are de facto not feasible for quoted companies. Conversely, for non-quoted companies it could simplify matters to facilitate a resolution without a physical meeting, as long as no shareholder objects to it.

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[7], 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[8] and for having the creditor protection period start before the cross-border merger becomes effective ('ex-ante')[9].

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[10].

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7. 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.↩

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

- [x] a. Provide cross-border safeguards for creditors
- [ ] b. Provide for specific cross-border safeguards for public authorities (other than for creditors)
- [x] c. Provide for cross-border safeguards for minority shareholders
- [x] 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:

To point d:
It should definitely be provided for the possibility to omit a joint merger report. In addition, it would be desirable from view of practice to allow EU-wide for an economic reference of the merger to a date of merger lying in the past and to provide for the possibility to abstain from the issuance of new shares with the approval of all shareholders.

3.1.1 What kind of safeguards could be provided? *(please choose all that apply)*

- [x] Safeguards for the procedural aspects of protection (deadlines)
- [x] Safeguards for the material aspects of protection (creditors' rights)
- [x] Safeguards for the definition of creditors that would require protection (for example safeguards only covering creditors who could demonstrate that their claims would be endangered according to an independent expert report or following a court proceeding)
- [ ] Other solutions
- [ ] No opinion

Please comment:

3.1.3 What kind of safeguards could be provided?

- [x] Safeguards for opposing a merger (for example, an exit right)
- [x] Safeguards for opposing a share exchange (for example, a possibility of extra compensation)
- [ ] Other solution
- [ ] No opinion

Please comment:

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 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)
- [x] 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

3.2.1 For which stakeholders or interest groups could safeguards be provided? *(please choose all that apply)*

- [x] Creditors
- [ ] Employees, including employee participation in the boards of companies
- [x] Minority shareholders
- [ ] Public authorities (special rules other than for other creditors)
- [ ] Other stakeholders
- [ ] No opinion

Please explain what type of safegaurds should be provided:

For creditors and minority shareholders, the common safety measures such as provisions of security for claims potentially at risk, provisions for compensation of minority shareholders and protective provisions for shareholders with special rights come into question. The DAV does not consider regulations concerning the protection of workers through codetermination in the managerial bodies of the companies to be appropriate; in this respect information and consultation obligations are sufficient.

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[11] 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[12]. 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)[13] 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 Europea, SE, for which transfers are allowed in EU law.

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)
- [x] 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
- [x] g. Other measures
- [ ] h. No opinion

Please comment:

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The questionnaire does not clarify expressly whether the cross-border
transformation is a simple transfer of registered offices, in which case the
identity and legal form of the company remain unaffected (e.g. a transfer of
registered offices of an AG incorporated under German law to France while
maintaining the legal form of the German AG) or a cross-border change of legal
form, i.e. a transfer of registered offices with a change of the legal form
while the identity of the company is preserved (e.g. a transfer of registered
offices of a German AG to France while changing into a French legal form);
perhaps both alternatives are considered. This question should be put first in
a listing of the main topics since it depends on the answer to that question,
which requirements the transformation process and the necessary legal
safeguards must fulfill.
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3.3.1 For which stakeholders or interest groups could safeguards be provided and which kind of safeguards? *(please choose all that apply)*

	Safeguards that make it possible to block the conversion by each Member State concerned	Safeguards for information and consultation of employees before the conversion	Safeguards to protect existing rights (e.g. financial guarantee for outstanding claims, exit rights for minority shareholders, special negotiating body to conduct negotiations on employee participation rights)	Safeguards provided by conflict-of-law rules (i.e. application of the overriding mandatory provisions of the forum or of another Member State with which the company is closely connected)	Other safeguards	No opinion
Creditors	☐	☐	☑	☐	☐	☐
Employees, including employee participation in the boards of companies	☐	☑	☐	☐	☐	☐

Minority shareholders	☐	☐	☑	☐	☐	☐
Public authorities (special rules other than for other creditors)	☐	☐	☐	☐	☐	☐
Other stakeholders	☐	☐	☐	☐	☐	☐
No opinion	☐	☐	☐	☐	☐	☐

Please comment:

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
- [x] b. Problems related to the divergent or conflicting provisions in different national company laws
- [ ] c. Cross-border conversions are made virtually impossible
- [x]

d. Problems with the boundary between the applicable company law and other fields of law (for instance insolvency, tort, contract law)

- [x] e. Problems with the application of overriding mandatory rules of domestic law that may interfere with foreign company law
- [x] f. Other
- [ ] g. None
- [ ] h. No opinion

Please comment:

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To point f:
Different conflict-of-law rules may lead to different decisions in the same
case in different Member States, which endangers the aim of the conflict-of-law
rules to obtain consistency in the decisions.
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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 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

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 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)*

- [x] a. Internal matters
- [x] b. External matters
- [ ] c. No opinion

4.3.1 Please specify which internal matters should be covered by the *lex societatis*:

- [x] The rights and obligations among the members of the company
- [x] The functioning and organisation of the company
- [x] The liability of directors towards the members of the company and the company itself
- [ ] Other internal matters *(please specify in the free-text box below)*

Please comment:

4.3.2 Please specify which external matters should be covered by the *lex societatis*:

- [x] The existence of the company as a legal entity
- [x] The general capacity of the company
- [x] The separation between the members´ and the company´s property
- [x] Other external matters *(please specify in the free-text box below)*

Please comment:

As an inseparable part of the regulations on the separation of the assets of the shareholders and the assets of the company, the regulations under company law concerning the creditor protection due to provisions for raising and maintaining capital must be subject to the lex societatis, possibly even beyond that other regulations on the protection of creditors, such as the publicity rules.

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

Please specify which areas should be excluded (e.g. employee participation rights):

Employee participation rights

Universal or intra-EU application

Conflict-of-law rules usually have universal application. For instance, when determining the law applicable to contracts or torts, it is irrelevant whether the law of a Member State or a non-Member State is designated as applicable. Therefore, one option is to provide for universal application also of a future instrument on company law. There are, however, also EU conflict-of-law rules without universal application, for example, in insolvency proceedings.

Including companies established under the law of a non-EU country in the scope of a future instrument on the law applicable to companies could have far-reaching implications, for instance, for the protection of shareholders, other stakeholders and society at large. Therefore, taking into account such specificities of company law, excluding companies incorporated in third countries from the scope of a future EU instrument could also be considered. A more limited scope of application of this kind would correspond to the scope and impact of the current case-law of the Court of Justice which, in the absence of EU conflict-of-law rules, is based on the freedom of establishment and therefore addresses only intra-EU cases.

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

Please comment further:

```
For companies with registered seat in third countries and administrative
headquarters in the EU uniform conflict-of-law rules regarding the treatment
under company law could be desirable for the sake of consistency in the
decisions. The administrative headquarters should be considered as the
connecting factor.
```

Change of applicable law

In accordance with the case-law of the European Court of Justice, the possibility for a company established in one Member State to convert to a company governed by the national law of another Member State, i.e. to change the applicable law while keeping its legal personality, without prior winding-up or liquidation, is guaranteed by the freedom of establishment in certain circumstances. Specifically, a Member State which enables companies established under its national law to convert, cannot exclude or unduly inhibit, in a general manner, companies initially governed by the law of another Member State from converting to companies governed by its own national law and thus exercising mobility. However, the company that wishes to change its applicable law must satisfy the requirements applicable to national companies for incorporation in the new host Member State (e.g. registration, effective residence requirements, minimum capital, disclosure, internal structure or number of members). The Court has clarified that in this regard the principles of equivalence and effectiveness apply.

The old home Member State's law could continue to govern the rules on the protection of minority shareholders and creditors of the company.

However, not all Member States' laws explicitly allow the cross-border relocation of the statutory seat of companies or have rules on its effects on the applicable law.

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

Please explain further:

```
This is about the form-changing transfer of registered offices. It is an
application of cross-border transformation. Provided that harmonized EU-
regulations on cross-border transformations are established, the form-changing
transfer of registered offices should be included. Resultant legal issues
should, if necessary, be rather regulated in the framework of a separate
instrument concerning cross-border transformations, not only conflict-of-law
rules.
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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:

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See first figure 4.6. If a separate instrument concerning cross-border
transformations is waived, the form-changing transfer of registered offices
shall further on be exercised in accordance with the principles resulting from
the Court of Justice's case law. In that case it could be useful to clarify the
regulatory competences of the country of departure and the country of
destination by conflict-of-law rules.
```

Other comments

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

- [ ] Yes
- [x] No
- [ ] No opinion

Please comment further:

Please upload your file:

Thank you very much for your contribution!

Background Documents

Specific Privacy Statement-bg.docx (/eusurvey/files/70e168cb-259d-4202-9a6c-9008b842008e)

Specific Privacy Statement-cs.docx (/eusurvey/files/c5df0167-11fb-40bb-8a2d-29211665a6a8)

Specific Privacy Statement-da.doc (/eusurvey/files/ea6f4e7a-c058-4f60-88f2-e2fb8fdf4e33)

Specific Privacy Statement-de.docx (/eusurvey/files/81ef0b61-2def-4fe7-9207-80fa0ffc307a)

Specific Privacy Statement-el.docx (/eusurvey/files/f378c606-328a-4a9c-b95a-2f9d1b62d3ee)

Specific Privacy Statement-es.docx (/eusurvey/files/02fb719c-2a87-4acb-b402-64af7f22eb83)

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Specific Privacy Statement-sv.docx (/eusurvey/files/ee2472c3-8727-4fa2-aa82-e2dffe3af02c)

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