



**Mergers and divisions:  
Towards cross-border mobility for companies in the EU?**



On May 4<sup>th</sup>, Members of the European Parliament adopted a **non-legislative report** on cross-border mergers and divisions in the Legal affairs committee. This is food for thought for the Commission who plans to publish a legislative proposal this year.

This proposal will revise the [2005 directive on cross-border mergers](#) and may provide rules for cross-border divisions and seat transfers for the first time (although specific rules exist in the [European company](#) and in the [European cooperative society](#) status). **Therein lies the paradox!** Shouldn't rules on cross-border mergers and divisions be the first policies to be adopted in a single market?

Actually, this topic has been on the agenda for a very long time: the 2005 directive was proposed in 2003 after the original 1984 proposal was withdrawn! It is widely acknowledged that the **2005 cross-border mergers directive**, which only applies to limited liability companies, works quite well: cross-border mergers [increased by 173%](#) between 2008 and 2012 thanks to lower operational (no more board meetings for each single entity) and regulatory (reporting and overlapping requirements) costs. However most stakeholders, including Italian social-democrat rapporteur Enrico Gasbarra, welcome its revision in order to improve some provisions: extend its scope to all legal entities, harmonise rules for creditors and for minority shareholders' rights and use more fast-track procedures.

**Yet some issues remain highly controversial.** The first one is the **employees' protection**. Any legislation on mergers must strike a balance between providing high mobility to companies within the EU and ensuring sufficient protection to stakeholders, the most exposed of them being the employees. The [2015 public consultation](#) discloses how divisive this issue is: 41% of respondents supported the modification of employees' protection rules, 28% saw no need for

change and 31% did not express clear views. The [2016 parliamentary study](#) concludes that due to its political sensitivity, this issue should be ignored for the moment and left for a general review of employees' protection regimes in EU law. Instead, the rapporteur considers it should be reviewed now and proposes to apply the European company status' rules, i.e. the information, consultation and co-determination of workers on their companies' decisions.

The other main controversial issue relates to the lack of rules on cross-border divisions and on seat transfers, which may facilitate **legal, social and fiscal dumping**.



So far, to perform **cross-border divisions**, companies have to undergo several operations (e.g. create a subsidiary and transfer assets or have a domestic division and a transfer of seat), which are complex and create legal uncertainty. Yet,

more than 80% of respondents to the [2015 consultation](#) consider cross-border divisions are crucial to simplify the company's structure and to adapt it to changing market conditions and 79% support the integration of rules on divisions in the mergers directive. Moreover, the [2016 parliamentary study](#) recommends that divisions be governed by the same rules than those for mergers unless specific characteristics so require.

Finally, the Parliament [has asked](#) for rules on **seat transfers** at least since 2012. The [2016 parliamentary study](#) even supports a "real cross-border mobility directive" which would include mergers, divisions and conversions of all legal entities. The rapporteur does not go so far but he highlights the need for "ever more stringent standards" of information and participation of workers. Yet, seat transfer was not mentioned in the [2015 Commission's consultation](#) nor in its 2017 [work programme](#) so it may not be part of the revision. Expect the answer in the coming months...

## Brexit: the EU sets the course for the future negotiations

One month after British Prime Minister Theresa May [triggered](#) the [article 50](#) of the Treaty on EU which officially launched the Brexit on March 29<sup>th</sup>, **a special European Council gathering twenty-seven Member States adopted political [guidelines](#) for the upcoming negotiations.**

These guidelines set out a two-phased approach to the negotiations: a first phase to disentangle the UK from the EU (withdrawal agreement) and a second phase to present a general overview of the future EU-UK relationship. The EU's priorities for the first phase are **citizens' rights, borders**, and the thorny issue of the **financial settlement** (i.e. the budgetary liabilities and commitments of the UK towards the EU).

Within this framework, a General Affairs Council should approve on May 22<sup>nd</sup> the European Commission's [recommendation](#) on draft negotiating directives. The latter will allow the Article 50 Taskforce headed by Michel Barnier to conduct the negotiations.

**The negotiations are expected to begin with the British government that will come out of the anticipated legislative elections called for by Theresa May on June 8<sup>th</sup>.**

The negotiations on the second phase about the future EU-

UK relationship will only begin when the European Council deems that "*sufficient progress*" has been made on the first phase. **Meanwhile, transitional agreements could be negotiated.** The European Parliament recommends a similar approach in a [resolution](#) adopted on April 5<sup>th</sup> but it limits the duration of the transitional agreements to three years.

As for now unity among the twenty-seven Member States seems strong, **but divisions may appear when the European Council of December 2017 will assess the negotiations' progress.** The most concerned countries, Poland (800 000 out of the three million Europeans living in the UK are Polish) and Ireland (due to the borders issue), are likely to differentiate themselves.

The Treaty stipulates that a withdrawal agreement must be reached within two years (i.e. at the latest on March 30<sup>th</sup> 2019) and **the Commission expects an agreement proposal to be submitted to the Council by autumn 2018 at the latest.** The withdrawal agreement

should be approved by the European Council (qualified majority) and obtain the consent of the Parliament (simple majority) by February 2019. This is a tight deadline but a limited prolongation of the negotiation period could also be considered. This would require unanimity at the European Council and the UK's agreement.



## EU public consultations\*

Justice	<a href="#">Whistleblowers' protection</a>	29.05.2017
FinTech	<a href="#">A more competitive and innovative European financial sector</a>	15.06.2017
Telecoms	<a href="#">Review of the significant market power guidelines</a>	26.06.2017

\* For an exhaustive list : <http://ec.europa.eu/yourvoice/>

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