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From:	Italian Delegation
To:	Working Party on Company Law Package
N° prev. doc.:	WK 12114/18
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions - Comments and proposals from Italian Delegation

Delegations will find in the Annex comments and proposals from Italian Delegation on the previous Presidency compromise proposal (WK 12114/2018 INIT).

Comments and proposals from Italian
Ministry of Justice on cross-border conversions, mergers and divisions
(WK 12114/2018)

1. Art. 86k par. 2 Protection of creditors – Creditors entitled to apply for adequate safeguards.

Reasoning

Par. 2 does not define creditor who is entitled to apply for adequate safeguards. The first issue concerns the collectability of credit. If the claim has fallen due and the applicable law grants the creditor to apply for payment and also to demand conservative measures on the company's assets, it could seem pointless granting a specific remedy to obtain adequate safeguards. This reflection would lead to restricting the concept only to the creditor who has a claim that has not yet fallen due. Second issue: when should be verified creditor's title to apply for adequate safeguards ? Both issues are settled by article 99 par. 1 of directive 2017/1132/EU, in the matter of domestic mergers. If it is accepted, this amendment should lead to a similar modification of **articles 126b par. 2, 160m par. 2**, regarding cross-border mergers and divisions.

Proposal

2. Member States shall ensure that creditors**, whose claims antedate the publication of the draft terms of conversion and have not fallen due at the time of such publication,** may apply to the appropriate administrative or judicial authority for adequate safeguards within … [any convenient time] of the disclosure referred to in Article 86h.

2. Art. 86k par. 2 & 3 Protection of creditors – Burden of proof and independent expert report

Reasoning

Par. 2 does not define the bundle of facts that creditor has to prove in order to obtain adequate safeguards. Article 99, regarding domestic mergers, entitles creditors to apply for adequate safeguards, "provided that they can credibly demonstrate that due to the merger the satisfaction of their claims is at stake and that no adequate safeguards have been obtained from the company". Such a provision could be easily adapted to cross-border conversion, considering that: 1) the "unduly prejudice" (cf. par. 3) should derive to creditor from conversion to give access to this form of protection; 2) interest at stake is evidently the satisfaction of credits, already existing although not yet fallen due; 3) if company has provided for safeguards and these are deemed adequate by appropriate authority, no more guarantees should be demanded.

Nevertheless, we should consider which kind of prejudice consequent to a cross-border conversion can affect creditors' rights. There are several features which should be taken in account as they can possibly suggest a regulatory arbitrage, that could be detrimental to creditors' rights: minimum capital requirements avoiding company's dissolution; restrictions to directors' liabilities toward creditors; restrictions to the opening of insolvency proceedings; etc.. Secondly, the change of jurisdiction can increase litigation and enforcement costs, as the creditor normally needs to find legal assistance abroad, and can discourage some creditors from bringing their claims (e.g. small claims) before a foreign court. Finally, there could be regulations which affect specifically some creditors: e.g. a different order of graduation of credits in case of insufficient assets or lack of social security provisions in case of insolvency (advance payment of termination indemnity to employees).

We should also distinguish on a case-by-case basis between a legitimate regulatory arbitrage and a "undue" prejudice of creditor's rights, as the same feature (e.g. minimum capital requirements, access to insolvency proceedings) can play different roles, and lead to different assessments, depending on whether a company is flourishing or nearly insolvent, whether the prejudice to satisfaction of credit is a remote danger or a close one.

At the present, in our opinion, the wording of article 86k does not help Member States' authorities and independent experts in assessing whether a undue prejudice to creditors' rights is reasonably unlikely, as it lacks of rules on these two main issues: what does "undue prejudice" mean ? what is the boundary between "undue prejudice" and a legitimate regulatory arbitrage ? Moreover, the expert's task, as envisaged by article 86k par. 3, could be deemed as incomplete or out-of-focus, since the provision focuses on the economic consequences of the cross-border conversion – whether there is a loss of value and credit quality because of conversion – rather than on the causes of this loss of value – whether the change of regulation denies, limits or puts otherwise at stake rights (actions, remedies) granted to the creditor by the previously applicable law, without granting him equivalent rights (actions, remedies). Finally, the wording of article 86k par. 3 ("The creditors of the company shall be presumed not to be prejudiced where …") raises some doubt, from a legal point of view, because in our opinion the creditor has to prove anyway that there is a reasonable likelihood of prejudice, even if the company does not disclose the expert's report, so this report does not bring any shift in the burden of proof.

If it is accepted, this amendment should lead to a similar modification of **articles 126b par. 3, 160m par. 3**, regarding cross-border mergers and divisions

Regarding expert's independence, as the compromise proposal transferred into a recital the reference to Directive 2006/43/EC previously provided for in article 86g (".. Member States should take into account the principles laid down in Articles 22 and 22b of Directive 2006/43/EC .."), the same can be done in this case.

Proposal

2. Member States shall ensure that creditors may apply to the appropriate administrative or judicial authority for adequate safeguards within … [any convenient time] months of the disclosure referred to in Article 86h, **provided that they can credibly demonstrate that the conversion brings undue prejudice to the satisfaction of their claims and that no adequate safeguards have been obtained from the company.**

~~3. The creditors of the company shall be presumed not to be prejudiced where the company discloses together with the draft terms of conversion an independent expert report, which concludes that there is no reasonable likelihood that the rights of creditors would be unduly prejudiced. The independent expert shall be appointed or approved by the competent authority and shall fulfil the requirements laid down in Article 86g(1). In particular, the expert shall take into account whether the creditor's claim against the company or a third party is of at least equivalent value and of a commensurate credit quality as before the conversion and whether it may be brought in the same jurisdiction.~~

3. The company may disclose, together with the draft terms of conversion, an independent expert report, which shall take into account whether the destination Member State law denies, limits or puts otherwise at stake rights or actions previously granted to the creditor, without granting him equivalent rights or actions, and whether this can induce a reasonable loss of credit value and/or credit quality. The independent expert shall be appointed or approved by a public authority, according to national law. If the expert assesses that there is no reasonable likelihood that the creditors' rights would be unduly prejudiced

by the conversion, this assessment shall be deemed by the authority as sufficient proof, unless there is evidence of the contrary.

3. 86k par. 4 Protection of creditors – jurisdiction

Reasoning

In our opinion, there are different techniques for protection of creditors against the risk of an undue prejudice. Par. 2 grants the creditor a special remedy to obtain adequate safeguards. However, this provision is void, if the creditor does not apply within the assigned term or does not conveniently demonstrate that the cross-border conversion will cause an undue prejudice. Although article 86k par. 3, in the current compromise proposal (WK 12114/2018), clearly demands to the expert to verify "whether [claim] may be brought in the same jurisdiction", it is doubtful whether the sole increased costs of litigation abroad would be assessed as an undue prejudice.

Article 86k par. 4 is clearly borrowed from the art. 8 par. 16 of EU Regulation no. 2001/2157 on the European Company. Unlike “adequate safeguards”, protection is a default rule, with no need for the creditor to apply to the appropriate judicial or administrative authority; does not require the creditor to demonstrate that a concrete and appreciable prejudice is deriving from the cross-border conversion; deprives the conversion of one of its effects, i.e. the transfer of the seat (statutory seat or registered office; central administration) for the purposes of jurisdiction, pursuant to EU Regulation no. 2012/1215 (cf. especially articles 4, 63).

The latter remark can raise some perplexity, in the light of the jurisprudence of the European Court of Justice, given that outbound restrictions of general nature, if they are not utterly incompatible with freedom of movement, normally call for a strict judgement of proportionality.

In our opinion, the Directive should find a fair balance between the creditor's interest not to bring his claim before a foreign court and the company's interest in detaching from the departure Member State, in which it no longer has any of the connecting factors that establish, pursuant to article 63 of EU Regulation no. 2012/2015, in which Member State a company (or other legal person) can be sued. A fair balance could consist in the provision of a short term, not exceeding three (or maximum five) years, within which the creditor may sue the company in the courts of the departure Member State, as if the conversion had not took place.

As a consequence of par. 4, even with the time limit envisaged above, the expert (par. 3) should not verify "whether [claim] may be brought in the same jurisdiction".

Proposal

4. The converted company shall be considered in respect of any cause of action arising prior to the conversion in relation to creditors as having its registered office in the departure Member State, **provided that the company is sued within three years after the conversion takes effect. In any case, creditors may also sue the company accordingly to Regulation 2012/1215/EU**.

4. Art. 86m Pre-conversion certificate – securing payments due to public bodies

Comments

Pursuant to article 86m, par. 1, second subparagraph, “such completion of procedures and formalities may include the satisfaction of payments, securing payments or securing non-pecuniary obligations due to public bodies or the compliance with special sectoral requirements”. We understand that it is difficult to give a stringent definition in this field, but in our opinion wording could specify which payments/obligations are “due”, avoiding uncertainty.