

ETUC position paper ETUC demands in view of the upcoming company law package

Adopted at the Executive Committee on 13-14 December 2017

Key messages :

- **Free movement of companies in the Single Market is often more a risk than an opportunity. The absence of convergence in an enlarged Union on key social and fiscal issues leaves room for abuse and circumvention.**
- **The upcoming Company Law package can only add value to workers if it puts in place effective limits against letterbox-type practices and against circumvention of workers' involvement/participation.**
- **Any instrument further facilitating company mobility without introducing effective safeguards against regime shopping is unacceptable. The ETUC must firmly oppose the company law package as a whole, if the Commission does not propose the single or 'real seat' principle connecting the place of registered office to the place of economic activities.**
- **The Company Law package also needs to take into consideration that company mobility - even if it is restricted to cases of genuine economic reasons - has a substantial impact on workers' rights and employment. Meaningful standards for workers' involvement/participation are therefore necessary. The negative consequences of the current "laissez-faire" approach are extremely serious. Letterbox arrangements will merely increase workers' alienation from the single market. The Commission must guarantee that the Single Market and its economic freedoms become a tool to serve all Europeans, and specifically the working people who generate the wealth of our European Union.**

Introduction

President Juncker announced in its 2017 speech on the State of the Union an "EU Company Law Package making the best of digital solutions and providing efficient rules for cross-border operations whilst respecting national social and labour law prerogatives"¹. The shift in the narrative is noticeable. For the first time, the Commission seems to be willing to put EU company law and respect for social standards on the same footing.

The Company Law package will be composed of a proposal for a Directive on cross-border divisions, a targeted revision of the cross-border merger Directive, and a proposal for a Directive facilitating the use of digital tools for the registration of companies. Two additional instruments may also be part of the package: a proposal for a Directive on cross-border conversions (formerly referred to as the '14th company law Directive on transfer of registered seats'), and a proposal for a Regulation on conflict of laws rules for companies.

¹ State of the Union 2017, Letter of intent to President Anotnio Tajani and to Prime Minister Jüri Ratas
https://ec.europa.eu/commission/sites/beta-political/files/letter-of-intent-2017_en.pdf

In the recent Polbud judgment², the Court of Justice of the European Union ('the CJEU') confirmed that companies moving in the Single Market with the aim of enjoying more favourable legislation does not in itself constitute abuse. As a result, a Member State is not allowed to impede companies from moving their registered office elsewhere in the European Union – even if such transfer would have for consequence the creation of a letterbox structure.

In its response to a 2012 consultation on the future of company law, the ETUC had already underlined the responsibility of the EU legislator to regulate company mobility with a view to prevent regime competition³. Following the Polbud ruling, the need for appropriate legislative action is now even more important.

This ETUC position lays out demands in view of the upcoming company law package. Two main areas of action are required: an EU harmonisation of the criteria connecting the registered office to the place of economic activities, and meaningful rules on workers' involvement.

Section I - What plans for a cross-border conversion Directive?

The EU must put an end to regime competition

The choice of registration place is an important step in the life of a business as it determines the main national regime applicable to the company. In the absence of EU harmonisation in this area, the CJEU considers that companies should be able to register in any EU Member State, with no consideration as to where their business activities are effectively situated.

This "laissez-faire" approach is exploited by unscrupulous companies who put in place wholly artificial arrangements in order to minimise or violate the legal obligations that are attached to the place of registration. This is leading to unfair competition on fiscal and social standards, and sometimes to extreme exploitation of workers.

In a 2016 report, the ETUC has evidenced that in Germany, workers in the meat industry sector can be paid as low as EUR 700 a month, with foremen putting in place mafia-type practices at the workplace. In the Dutch road transport sector, truck drivers drive 8 weeks in a row, without being allowed to leave their trucks. In the European construction industry, employers' social security payments are withheld⁴.

Letterbox-type structures are also used to evade national law on participation rights. At present, almost 100 companies whose size would otherwise make them subject to codetermination are evading German codetermination laws by resorting to a foreign form of association. This affects more than 300,000 employees and the trend is on the up⁵.

Finally, in the absence of a European taxation framework, companies are able to use letterbox-type arrangements to evade the most "cumbersome" corporate tax.

² Polbud C-106/16 of 25 October 2017

³ The future of European Company Law, ETUC Resolution of 6-7 March 2012 : <https://www.etuc.org/documents/future-european-company-law-towards-sustainable-governance#.WiUyiEqnGUk>

⁴ Letterbox-type practices: avoiding taxes and exploiting workers across the EU (2016)

<https://www.etuc.org/press/letterbox-type-practices-avoiding-taxes-and-exploiting-workers-across-eu#.WiUy2kqnGUk>

⁵ Der deutschen Mitbestimmung entzogen : Unternehmen mit ausländischer Rechtsform nehmen zu, Hans Böckler Stiftung report 8 (February 2015)

Fair taxation where profits are generated should be tackled with the implementation of the Common Consolidated Corporate Tax Base⁶, its improvement and public country-by-country reporting by multinational companies. As corporate tax is linked to the place of the registration seat, company law therefore has a key role to play to ensure fair taxation of multinationals.

The European Commission must set the principle that EU economic freedoms cannot be abused by companies to establish wholly artificial arrangements. It must be specified in EU law that a company is not allowed to locate or relocate its registered office in a Member State where it has no genuine economic activity (i.e. no employees, no premises, no profit etc.), especially if such as relocation would adversely impact on labour and fiscal standards as well as existing arrangements for workers' participation. The ETUC demands a single or 'real seat' approach along the lines of the model laid down in the European company statute, which the ETUC always supported⁷.

Section II - Cross-border mergers, cross-border divisions and digitalisation of company registrations

Any instrument further facilitating company mobility without introducing effective safeguards against regime shopping will be unacceptable. The ETUC will firmly oppose the company law package as a whole, if the Commission does not propose meaningful connecting criteria as highlighted under section I and III.

The ETUC will also reject any proposal for a conflict of law Regulation if such instrument legitimises the incorporation theory (i.e. that companies should be subject to the law of the registered office).

The ETUC opposes Commission's plans for a cross-border Directive on divisions. Whilst business needs for such a Directive have not been established, the ETUC fears that facilitating the division of companies into smaller structures will have an adverse impact on existing employees' representation structures.

Concerning digitalisations of company registrations, the ETUC acknowledges the added value of having a single interconnected register for all companies across the EU. Such a single source of information will help in terms of transparency and monitoring of companies' activities. At the same time, however, the ETUC is concerned that exclusively digital registrations of companies will accentuate the problem of fraud and/or outdated or incomplete information. The ETUC therefore calls on the Commission to deeply reflect on enforcement issues before facilitating on-line registration of companies. A simple interconnection of national company registers without ensuring common quality standards can only be a first step. Online registration of companies without minimum standards of verification is insufficient; a participation of notaries would be very much welcome to ensure quality work.

⁶ ETUC position on the Common Consolidated Corporate Tax Base (ETUC Resolution 14-15 December 2017) <https://www.etuc.org/documents/etuc-position-common-consolidated-corporate-tax-base-ccctb#.Wi-q60qnGUk>

⁷ „The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.“ (Article 7).

Section III - Meaningful workers' involvement / participation

The ETUC demands an efficient protection of existing national provisions on information, consultation and board-level representation linked to the above-mentioned European approach to extend information, consultation and board-level representation rights to all European companies undergoing a transformation on the basis of European legislation. The escalator⁸ approach would protect most national systems and put an end to the circumvention of national provisions through the use of European company law as it is the case right now. The escalator contains a dynamic clause which prevents the switching to a European company (or the use of European company law instruments) just before reaching nationally established thresholds. The escalator approach anchors the negotiation principle 'in the shadow of the law' and of strong rights. The outcome of negotiations can be quite different from one case to the other, but should not impede on national trade union rights in accordance with national provisions and/or practices. The ETUC claims that companies when using European company law instruments must apply safeguards for information, consultation and board-level representation rights, as laid down in ETUC position on the new EU framework. Moreover, a general obligation to have a European Works Councils would strengthen the European, transnational dimension of information and consultation which is necessary in cases of trans-border company mobility.

The European Pillar of Social Rights (EPSR) as well as the Social Summit in Gothenburg both failed to address the issue of workers participation. This must be corrected during the implementation of the action programme for the EPSR. Employees must be able to anticipate and accompany fundamental changes. Any plan to move a registered office cross-border must therefore timely trigger the highest level of workers' involvement. The transfer of the registered office under a new jurisdiction will have an impact on the procedures for information, consultation and participation at the level of the board. Where the company moves its registered office to a Member State where the standards are less protective than in the Member State of departure, the risks of dilution of workers' protection are very real.

The following must therefore be included in the Commission's proposal:

- a) The negotiation procedure must apply with some adaptations to cross-border conversion, ensuring that negotiations in the shadow of the escalator approach take place on the design and functioning of a new transnational information and consultation body, as well participation rights.
- b) The existing structures of employees' representation must continue to operate during the negotiations and until the new agreement for the involvement of the employees comes into force on transnational level.
- c) Successive cross-border conversions must be prohibited.

⁸ ETUC position paper - Orientation for a new EU framework on information, consultation and board-level representation rights. Adopted at the extraordinary ETUC Executive Committee on 13 April 2016 in The Hague and the ETUC Executive Committee on 9 June 2016 in Brussels