Analysis of the company mobility package from the perspective of procedural rules to prevent corporate mobility for the purpose of labour standards avoidance

Briefing paper series on the Company Law Package (COM 2018 241 final)

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What problems is the proposal addressing?

An anti-abuse approach is included in the proposed harmonised rules relating to cross-border conversions and divisions. Artificial arrangements to change jurisdiction, hampering e.g. workers' rights and protection in the departure country, are to be avoided by a procedure introducing indicators of real economic business intentions, activities and presence in the country of destination ('substance requirements') as a yardstick. In this way, the risk is addressed that companies can move their legal seat to another country without changing their 'real' organization. So, clearly the aim is to prevent a gap between legal seat and real business activities at the territories of MS.

What is in the proposed Directive (main provisions)?

The procedural rules (see in particular Articles 86g/86m/86n/160i/160o/160p) require the appointment of an 'independent expert'. The expert has to draw a written report and include therein a description of factual elements necessary, if need be, for the 'competent authority' in the departure state to determine 'whether the intended cross-border conversion/division constitutes an artificial arrangement'. An in-depth assessment is asked for in case 'the authority has serious concerns that the cross-border conversion/division may constitute an artificial arrangement'. In the absence of harmonised rules a case-by-case approach examining each conversion and division is needed.

The factual elements 'characterising the company in the Member State of destination', include at least:

- the intent,
- the sector,
- the investment, the net turnover and profit or loss,
- number of employees,
- the composition of the balance sheet,
- the tax residence, the assets and their location,
- the habitual place of work of the employees and of specific groups of employees,
- the place where social contributions are due
- the commercial risks assumed by the converted company in the Member State of destination and the Member State of departure.

What are major shortcomings and what could be done to fix them?

- *Shortcoming*: The kinds of cross-border corporate mobility addressed in the proposal (conversions, mergers and divisions) are not exhaustive. In other words, not all possible techniques/strategies to establish a presence in another jurisdiction are covered by the proposal and therefore it remains possible to escape the anti-abuse procedure.

- *Solution*: include also an anti-abuse procedure re mergers (which is currently absent!) and address/include other forms of cross-border mobility as well, or explicitly deny (unconditional) legal validity of other modalities to create corporate presence in another EU jurisdiction.

- *Shortcoming*: small-size (-50 employees) and micro-size (-10 employees) companies are exempted from the assessment by an independent expert and therefore the factual elements for in-depth scrutiny will not be provided to the competent authority. This omission makes prevention of artificial arrangements involving small and microcompanies theoretical.
- *Solution*: repair this loophole. Including small and micro companies in the scope of the anti-abuse rules is not disproportionate; according to the Impact Assessment, the majority of conversions will be used by SMEs. A majority of companies in 'high risk sectors' for competition on labour costs such as the temp agency sector, construction, road transport and agriculture, is a SMEs. In these sectors, many artificial arrangements are in use - including 'non-genuine' posting of workers - to avoid high wage levels & social security contributions.

- *Shortcoming*: the ex-ante assessment of possible 'undue' artificial arrangements is a step forward, but follow-up by ex-post detection is currently not included.
- This is problematic, in particular since said arrangements might be difficult to discover or proof in advance. *Solution*: perhaps the proposed European Labour Authority can get the ex-post duty to monitor and enforce? A dissuasive sanction might be to make it explicitly possible to challenge the validity of the cross-border conversion, merger or division, if artificial arrangements are detected within 3 years after the change of jurisdictional identity.

- *Shortcoming*: Crucial parts of the anti-abuse reporting are of confidential nature. Possible misconduct or inactivity of respectively the independent expert and the competent authority in the performance of their duties is therefore difficult to trace and counteract. Such intransparency is irreconcilable with the public interest in tackling artificial arrangements.
- *Solution*: make it possible for stakeholders to review the work of the independent expert/the competent authority and to demand e.g. a revised or alternative report by the expert, or an in-depth assessment by the competent authority. Enhance accountability of the competent authority by increasing the transparancy of its assessment and of its decision criteria to start such an assessment.

- *Shortcoming*: unclear formulation/explanation/guidance of crucial terminology or phrases, such as 'competent authority'; 'artificial arrangement'; 'undue/unduly' in-depth assessment, 'serious concerns' make it difficult to assess the accuracy of the proposed anti-abuse approach.
- *Solution*: clarify crucial terminology in order to guarantee a consistent approach across MS. Also, include criteria/targets for in-depth assessment

- *Possible shortcoming (to be further examined)*: although the list of factual elements that should at minimum be taken into account in the in-depth anti-abuse assessment is not in contradiction with substance requirements in other legal instruments, a stronger alignment/consistency is possible/desirable.
- *Solution*: develop a 'practical policy guide' across legal areas for competent institutions, including the Labour Authority.