COMMENTS ON THE PROPOSAL FOR A DIRECTIVE AMENDING DIRECTIVE (EU) 2017/1132 AS REGARDS CROSS-BORDER CONVERSIONS, MERGERS AND DIVISIONS, COM (2018) 241 final

(in the context of the public hearing on the *"European Company Law Package"*

organized by the European Economic and Social Committee,

the Thessaloniki's Traders Association and the University of Macedonia)

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I. CONTEXT OF THIS DOCUMENT AND METHODOLOGICAL ASPECTS

The researchers participating in the drafting of this document, all of them working at the Universitat Autònoma de Barcelona (Autonomous University of Barcelona, hereafter UAB), are:

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These comments have been elaborated in the frame of the activities of the following research projects or research groups:

- Research project "Brexit y libertad de establecimiento: aspectos societarios, fiscales y de extranjería" (*Brexit and Freedom of Establishment: Aspects relating to Corporate Law, Taxation and Legal Status of Aliens)*; reference DER2017-88910-P, coordinated by professor Carlos Górriz López and funded by the Spanish Ministry of Science, Innovation and Universities.

- Research project "La representación laboral en las empresas dispersas y en red: problemàtica, disfunciones y propuestas de mejora" *(Employee*

Representation in Dispersed and Network Undertakings: Problems, Dysfunctions and Proposals for Improvement); reference DER2017-83189-R.

- Institute of European Studies of the UAB.

The collaboration of different research groups of the UAB has allowed the participation of specialists from different disciplines, namely, private international law, commercial law, tax law and labour law.

This contribution has been elaborated according to the following methodology: the researchers held a meeting on 12 July 2018, in which several aspects of the proposal were discussed. Written comments were submitted by professors Arenas García, Fernández Amor, Solà Monells and Gardeñes Santiago, who at the same time was the coordinator of the drafting of this document. The final document was approved by all members. Dr. Gardeñes Santiago was commissioned with the task of presenting it at the Thessaloniki hearing of 10 September.

The aim of this document is rather modest. It does not intend to analyse in an exhaustive manner the text of the referred proposal, but rather to highlight or comment some of its main features and some selected topics. In addition, this document does not necessarily reflect the individual position of each of the researchers, but rather tries to focus on specific issues that were discussed among them, trying to identify a minimal consensus, if any.

II. GENERAL ASSESSMENT

On the overall, our assessment of the goals of the proposed initiative is positive. Taking into account that the case law of the Court of Justice of the European Union (hereafter, CJEU) has held that the freedom of establishment enshrined in Article 54 TFEU encompasses these operations of cross-border company restructuring (more specifically, existing case law deals with mergers and conversions or transfers of seat), it is convenient to adopt rules of secondary law which are able to provide legal certainty and to harmonize at least the basic aspects of these operations, which are complex from a technical point of view. So far, EU secondary law deals with cross-border mergers (since the 2005 Directive, now codified in Directive 2017/1132). Therefore, the proposal we intend to comment completes and amends existing legislation on cross-border mergers in the EU and, at the same time, intends to regulate for the first time cross-border conversions (or transfers of seat) and cross-border divisions in the EU. In this regulatory context, it is appropriate to take into account, not only the interests of the company itself, but also the protection of other stakeholders, namely, members of the company, employees and creditors, both private and public.

On the other hand, the proposal considers the need to apply successively different national laws (those of the departure Member State and those of the destination Member State), establishes a distribution of functions between the authorities of the different Member States and establishes coordination and communication mechanisms (together with the "twin" Directive proposal, presented also on 25 April 2018, on the use of digital tools and processes in company law).

We will comment on several aspects of the proposal, namely, the avoidance of "artificial arrangements" (section III), and more specifically those aimed at obtaining "undue tax advantages" (section IV), aspects of private international law in relation to the protection of members of the company (section V) and, finally, some comments on the rights of employees (section VI).

III. THE AVOIDANCE OF "ARTIFICIAL ARRANGEMENTS"

The proposal establishes some conditions for the operations. In our view, the most important one is that the operation does not constitute an "artificial arrangement" aimed at obtaining undue tax advantages or at unduly prejudicing the rights of employees, creditors or minority members. For example, as far as cross-border conversions are concerned, Article 86.c (3) states that *"Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members."* An equivalent rule is establihed for divisions in Article 160 d(3) of the proposal.

This condition has been the most discussed one among the members of the group. The main sources of concern were, first, its compatibility with the doctrine of the CJEU, especially with its rulings in Centros (9 March 1999, Case C-212/97) and Polbud (25 October 2017, Case C-106/16), the convenience or not of controlling this condition in an ex ante procedure carried out by the authorities in the Member State of origin of the company, and finally the interpretation of the concept of "artificial arrangement" for unduly prejudicing certain rights.

Several aspects have to be taken into account.

First, the members of the group agree that an ex ante control procedure is not incompatible with EU primary law on the freedom of establishment, as long as it is justified by reasons of general interest. In the field of company law, the CJEU would have admitted this, at least implicitly, in the Centros ruling, when it said that Member States are entitled to take measures aimed at, not only penalising fraud, but also "*preventing*" it (par. 38). Furthermore, taking into account the interests at stake and the utmost importance of the procedural aspects and the need of security in these type of operations, and ex ante control would be justified. Indeed, possible obstacles to the successful completion of the operation should be detected at the earliest possible stage, preferably in the State of origin of the company. Therefore, as a matter of principle, an ex ante control is perfectly compatible with EU primary law. A different issue is whether some of the conditions of the specific ex ante control established in the proposal are convenient or not.

Second, the aim of avoiding “artificial arrangements” has been admitted by the CJEU as a valid reason for Member States to deny tax advantages to companies. This doctrine was clearly established in the Cadbury Schweppes ruling (12 September 2006, Case C-196/04), which also gave indications on how to interpret this concept (see, specially, paragraphs 52 to 56 and 64 to 75). On the contrary, in the same ruling the Court reiterated its previous doctrine, reminding that the fact that the company has no activity in the Member State of incorporation or where it intends to transfer its seat is not a sufficient reason for denying the recognition of its legal personality (Centros) or the possibility of cancelling its registration in the State of origin as a result of a transfer of seat to another Member State (Polbud). In other words, searching a more favourable company law, even if the company does not undertake real activities in the Member State of incorporation, would not be a case of fraud, but a normal exercise of the freedom of establishment. Therefore, the message of the case-law would be that, in order to safeguard Member States’ tax competences, the existence of an “artificial arrangement” would be a valid reason for denying the tax advantage at stake, but not for putting into question the formation (or transformation) of the company itself. In appearance, this judicial doctrine could seem contradictory, but it is not. The clue for understanding this is the scope or range of the “liberal” Centros doctrine: it would be confined to the aspects dealing with company-law provisions on the “formation” or “transformation” of the company itself, but it would not touch other aspects, such as other company law aspects, taxation, employees’ rights or specific regulations on certain business sectors (on this perspective, see, for instance, M. Gardeñes Santiago, “Some Remarks on the Cross-Border Establishment of Companies in the EU”, in D. Anagnostopoulou, I. Papadopoulos and L. Papadopoulou, eds., *The EU at a Crossroads. Challenges and Perspectives*, Newcastle upon Tyne, Cambridge Scholars Publishing, 2016, pages 109-135; a Spanish uptdated of this work: “Observaciones acerca del establecimiento transfronterizo de sociedades en la Unión Europea”, in R. Arenas García and C. Górriz López, coord., *Libertad de establecimiento y Derecho europeo de sociedades. Cuestiones fiscales, mercantiles e internacionales*, Barcelona, Atelier, 2017). Therefore, the novelty of the proposal is that it relies on the doctrine of “artificial arrangements” built in the context of undue tax avoidance (Cadbury Schweppes case) and tries to apply it in the field of company transformations or restructuring.

Third, according to the proposal, it seems that the existence of an artificial arrangement, as a ground for refusing the granting of the certificate in the Member State of origin, should be the object of a systematic analysis, which would include, except in the case of small undertakings, the report of an independent expert. Of course, combatting fraud is a very legitimate goal. However, in our view the conditions laid down in the proposal obliging to check systematically that there is not an “artificial arrangement” in the specific case are perhaps excessive, and they could deter business from exercising their freedom of establishment. In addition, it seems from the proposal that the existence of an artificial arrangement could only be detected in the country of origin, but, once the authorities of that country have awarded the certificate, there would be no possibility of challenging the operation on that ground. For instance, as far as cross-border conversions are concerned, Article 86p (5) says that the pre-conversion certificate shall be accepted by the authorities of the destination Member State as *“conclusive evidence”* of the *“proper completion”* of procedures and formalities under the national law of the departure Member State. As far as divisions are concerned, the same rule is found in Article 160r (5). Although the exact interpretation of these provisions could be controversial (the expression *“proper completion of the procedures and formalities”* includes only procedural aspects or also substantive conditions being assessed in the context of such procedures?), there is the risk that they could be interpreted as precluding the possibility for the Member State of destination of deciding on the existence or not of an artificial arrangement. This might present risks, especially if we take into account that a cross-border conversion or division which would have taken effect in accordance with the procedures established in the proposed Directive could not be declared null and void (Art. 86u; for divisions, Article 160w; these provisions seem to follow the general rule of EU company law limiting the cases in which nullity of a company may be declared; see Article 11 of Directive 2017/1132). Therefore, the safeguards for avoiding such artificial arrangements would be incomplete, because sometimes it may be difficult to discover them ex ante (on the difficulties of such control, S. Álvarez Royo-Villanova, “La propuesta de la Comisión Europea sobre fusiones, escisiones y transformaciones tranfronterizas: un paso adelante y otro atrás”, *Diario La Ley*, nº 9223, of 21 June 2018, p. 4). For this reason, Articles 86p (5) and 160r (5), insofar as they can be interpreted as leaving in the exclusive hands of the authority of the departure Member State the assessment of a possible artificial arrangement, raise doubts, as they could have the negative consequence of making an operation “ironclad”, if the artificial arrangement would not have been detected in the country of origin.

Furthermore, in the proposal the reinforced ex ante control of artificial arrangements is foreseen for conversions and divisions, but, quite surprisingly, not for mergers. Indeed, the proposed modifications of Articles 127 and 128 of Directive 2017/1132 do not include comparable provisions. In fact, in such modifications there are only references to a *“genuine suspicion of fraud”* as a reason for Member States to require the physical presence of a company representative before a competent authority, thus depriving the said company of the right of submitting the necessary information and documents online. It is true, however, that some doubts could raise as to the possibility of an interpretation in the case of mergers that would be “parallel” to the provisions on conversions and divisions. This interpretation could stem from the last sentence of Article 128.1 of Directive 2017/1132, when it says that the competent authority shall “*in particular”* ensure that the merging companies have approved the common draft terms. The use of such an expression would probably allow to envisage that the control of the competent authority could also apply to other aspects, such as the avoidance of artificial arrangements, but this interpretation would not be free of doubts. Therefore, this “asymmetric” regulation could result in the rather easy avoidance of the control mechanism established in the proposal: undertakings wishing to convert could choose the indirect path of creating a new company in the envisaged destination Member State and then merge with it (in this sense, J. Sánchez Santiago, “El control ex-ante de montajes puramente artificiales: ¿Una reacción adecuada frente a Polbud?”, in *Almacén de Derecho*, 15 June 2018, http://almacendederecho.org/).

A similar problem might arise in relation to divisions: the proposal of Directive envisages only those cross-border divisions leading to the creation of a new company [on the definition of “division”, see Article 160 b (3)] but not those in which assets and liabilities are transferred to more than one existing company. According to the Commission, this exclusion would be justified by the complexity of dealing with risks of abuse in a situation where a company being divided transfers assets and liabilities to existing companies in different Member States, and by the fact that in a cross-border context the procedures established would need the involvement of many authorities from different Member States. Therefore, the Commission prefers not to regulate such cross-border divisions by acquisition, at least for the moment, and to wait until experience with the new rules on cross-border divisions has been gained (Explanatory memorandum, p. 16; see the critical assessment of this exclusion by S. Álvarez Royo-Villanova, “La propuesta…”, *cit.*, p. 2-3). Although these reasons are understandable, this exclusion from the scope of the proposed Directive could allow the circumvention of the conditions envisaged for divisions in the proposal. Instead of creating new companies as a consequence of the division, interested parties could first create new companies in different Member States, and then transfer assets and liabilities to them. As this operation would be out of the scope of the proposed Directive, it would be governed by the national laws of Member States.

For these reasons, in order not to make too burdensome the procedure in the country of origin and, at the same time, combat possible cases of abuse or fraud, another possibility would be to include specific provisions for the protection of other stakeholders, such as the proposal does with members, creditors and workers, and, at the same time, to introduce a general anti-abuse clause. An example of this type of general clause would be, for instance, that of article 35 of Directive 2004/38, of 29 April 2014, on the rights of movement and residence of citizens of the Union and their family members. This general clause would allow to take the appropriate measures in cases where an abuse is found and, at the same time, it would not oblige the authorities to undertake a systematic analysis of possible frauds in each and every case, but only when the circumstances of the case so require. In addition, this general anti-abuse clause could be relied upon, not only by the authorities of the country of origin, but also by those of the Member State of destination. This would avoid possible “gaps”, thus providing a more complete protection.

In conclusion, our opinion on this aspect of the proposal would be the following:

- The ex ante control in the country of origin is, in general, an adequate procedural mechanism for controlling the legality of the operation in its first stage.
- However, the proposal should change its orientation as far as the control and avoidance of possible "artificial arrangements" is concerned:
  In the first place, the proposal should keep, or even reinforce, the specific provisions protecting concrete stakeholders (namely, members, creditors and employees) such as, for instance, the exit right with adequate compensation for members disagreeing with the operation.
  In the second place, the systematic control of "artificial arrangements" in the country of origin should change to a more general control of possible fraud or abuse of rights, not necessarily on a systematic manner, but if the circumstances of the case so require. A general anti-abuse clause should be introduced, which could be relied upon, not only by the authorities of the country of origin but also by those of the State of destination. This anti-abuse clause would complete the specific provisions protecting members, workers or creditors, and therefore it would be particularly useful when the interests at stake are not sufficiently protected via the specific provisions foreseen in the proposed Directive.
  Third, as the proposal does not deal with the harmonization of tax law, Members States could still apply their measures aimed at denying undue tax advantages in case of "artificial arrangements", as understood in the Cadbury Schweppes doctrine. However, the aim of avoiding undue tax advantages poses some specific problems, so it will be dealt in more detail in the following section.
- The rules having the capacity of being interpreted as making impossible to challenge the pre-conversion or pre-division certificates in the Member State of destination should be reconsidered. Rather that talking of a "*conclusive evidence"*, Articles 86p (5) and 160r (5) should indicate that pre-conversion or pre-division certificates awarded in the Member State of origin allow to presume that the procedures and also substantive conditions in the Member State of origin have been properly applied, unless the contrary is proved. Therefore, the certificates in question would constitute *prima facie* evidence, and the burden of proving that the conditions in the Member State of origin would not have been properly completed would rest on the person challenging such certificates. The same rule should apply as far as cross-border mergers are concerned, so Article 127.2 of Directive 2017/1132 should be modified in the same sense.
- Last but not least, it would be important to keep or introduce in the proposal appropriate provisions specifying its scope and proper exclusions, in order to identify clearly the harmonized field. In particular, it ought to be outlined that the proposed Directive is to be applied without prejudice of national laws on taxation, social security and criminal law provisions.

IV. THE ISSUE OF UNDUE TAX ADVANTAGES

IV.1. Concept of "undue tax advantages"

The basic objective of the modification proposed is to offer companies the possibility of operating *"(...) in a legal and administrative environment which is both conducive to growth and adapted to face the new economic and social challenges of a globalised and digital world, while pursuing also other legitimate public interests, such as the protection of employees, creditors and minority shareholders and providing authorities whit all necessary safeguards to combat fraud or abuse"* (first paragraph, Explanatory Memorandum). In this sense, it intends to balance two elements, on the one hand, the right of companies to free establishment and, on the other, the protection of certain groups and Member States in order to ensure that the exercise of a freedom of the single market will not be spurious from various points of view (rights of workers, creditors, shareholders and the State)

The proposed Directive affects phenomena that allow the exercise of free establishment such as business conversions, mergers and divisions. To carry out a conversion or a division, the proposal is based on a procedure in which a pre-conversion or pre-division certificate issued by the competent authority has a leading role (Articles 86m and 160o).

The issuance of such a certificate depends, among other elements, on the competent authority considering that there are no *"(...) serious concerns as to the existence of an artificial arrangement aimed at obtaining undue tax advantages (...)*". (Recitals 22 and 52 and Article 86c.3). The question that arises is what does the concept of "undue tax advantages" mean at the EU level? In any case, as it is an indeterminate legal concept, it will depend on the development and precision of the tax legislation of each Member State on taxation of companies, a field in which, although there are initiatives, the EU only has coordination powers.

The differences in the meaning of this concept attributed by different Member States may pose some difficulties to the basic objective of the Directive which is to strike a balance between the right of free establishment of companies and the interest of each Member State not to lose its capacity to collect taxes due to abuses or fraud. A Member State may have an interest in an entity settling in its territory, but this expectation could be frustrated because another Member State concludes that there are undue tax advantages, whereas the latter Member State would not share this conclusion.

IV.2. Proposal

The establishment of a common general framework of business cross-border restructuring has a close link with fiscal aspects. If the degree of coordination achieved in the EU in both fields is different, the correct development of both is impaired. Therefore, further harmonization of direct taxation, and particularly company taxation, would be desirable.

However, as said before, the proposed Directive does not intend to harmonize tax issues. It merely refers to undue tax advantages as a reason for stopping a planned corporate restructuring operation. We could ask ourselves if this approach is really necessary. To safeguard Member States' interest in the proper application of their tax laws, would not it be enough to state clearly that the Directive is to be understood without prejudice to the tax laws of Member States? In addition, it could be further specified that Member States retain their competence for applying their fiscal legislation in case of artificial arrangements aimed at obtaining undue tax advantages, and to deny any possible tax benefits. Member States could also establish that the project of company restructuring should be communicated to the tax authorities. It is possible that the measures mentioned so far would be enough to safeguard the fiscal competence of Member States. However, these measures would not prevent disparities when Member States apply their antifraud measures in the taxation field, which may have an impact on the corporate restructuring operation.

Therefore, even if the proposal does not really deal with a taxation issue, the idea of introducing the concept of "undue tax advantage" as a reason for impeding the corporate operation could be useful insofar as it allows a more uniform interpretation and application of this concept in the context of corporate operations. For this reason, if the notion of "undue tax advantage" would be kept in the proposal, then we propose to work on it at the EU level, in two complementary ways:

A) Including in the definitions that appear in the Directive (art. 86b) a meaning of the concept that can be used by Member States. It is not a question that has not been already worked out if we consider Article 6 of Directive 2016/1164, which reads: "*Undue tax advantage: effect achieved from the use of arrangement or series of arrangements which, having been put into place with the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not put into place for valid commercial reasons once all relevant data and circumstances have been analyzed."*

B) After having fixed the meaning of the concept, but not fully resolving its broad profiles, three possibilities to avoid controversies in its interpretation could be considered:

i) That the determination of the existence of an undue tax advantage is established by the Member State issuing the certificate and that this determination is necessarily accepted by the Member State receiving the entity being restructured. In this sense, Articles 85c (4) and 160d (4) could expressly establish that the national legislation of the departure Member State should govern not only the procedure and formalities, but also the material conditions for the issuance of the certificate, including the absence of an undue fiscal advantage.

ii) Increasing the possibilities of arbitration regulated by Directive 2017/1852, of 10 October 2017, regarding tax dispute resolution mechanisms in the European Union limited to litigation on the interpretation and application of tax conventions on double taxation. This mechanism could be an agile system to solve discrepancies between Member States in the interpretation of the concept of 'undue fiscal advantage'.

iii) That the State issuing the certificate determines the existence of an undue fiscal advantage in a consensual manner with the receiving Member State. For this purpose, it would be possible to establish the necessary collaboration between authorities and the necessary coordination between Member States based on the information exchange mechanisms existing in the EU (Directive 2015/2376 or Directive 2016/881). In case of lack of an agreed solution, some form of dispute resolution mechanism, like the one indicated in ii), could be envisaged.

If the control for preventing undue tax advantages in the frame of the operation of cross-border restructuring is to be kept in the projected Directive, then it would seem rather logical to foresee that, apart from other stakeholders, the projected operation should be communicated to the tax authorities, which should have the opportunity of expressing their view in the frame of the procedure for granting the certificate (and, of course, they would be entitled to apply any relevant provisions of their tax law).

V. THE PROTECITON OF MEMBERS AND RULES OF PRIVATE INTERNATIONAL LAW

In the context of conversions, Article 86j (6) of the proposal establishes that Members States shall ensure that the law of the departure Member State should govern the rights of the shareholders granted in paragraphs 1 to 5 of that Article. Member States must also ensure that the Courts of the departure Member State will have jurisdiction over the claims related with those rights.

These obligations impose on Member States changes in their internal private international law rules. As far as the law applicable to shareholders' rights when a company carries out a cross-border conversion is concerned, there is no conflict with existing European private international law because the law applicable to companies is excluded from the relevant regulations (Rome I and Rome II).

This is not the case for jurisdiction rules, because Brussels I bis Regulation (Regulation 1215/2012) applies to company law issues. In fact, the requirement included in the proposal is coherent with the recent case-law of the CJEU. In its judgment in E.ON Czech Holding AG v. Michael Dědouch, Petr Streitberg, Pavel

Suda, of 7 March 2018 (Case C-560/16), the Court established that the Courts of the company's domicile have exclusive jurisdiction in cases in which the shareholders of a company ask for a reasonable compensation for their shares in the company (an action equivalent to those provided by paragraphs 1 to 5 of Article 86j (6) of the proposal). This approach of the Court of Justice is not problem-free (see R. Arenas García, "From the Exclusive Jurisdiction in Matters Related with the Validity of the Decisions of the Company's Organs to a Special Forum for Internal Disputes within Companies", https://www.academia.edu/36787009/Commentary_on_EUCJ_of_7_March_2018), but in any case it must be considered in the context of the analysis of the proposed Directive.

The proposal imposes an obligation on Member States to extend the jurisdiction of the Courts in cases related with the rights of shareholders when a company with its domicile in a Member State converts into a company ruled by the law of another Member State. The obligation of the Member State could be fulfilled by the introduction in its internal private international law of a rule like this one:

"The Courts of State X [being "X" the State that is implementing the Directive] will have jurisdiction for any action brought by the shareholders of a company formed in accordance with the law of State "X" when the action is based in the rights of shareholders granted in articles Y-X [being "Y-Z" the articles of the national implementing measure that include the rights conferred by paragraphs 1 to 5 of Article 86j of the Proposal].

The reference to "company formed in accordance with the law of State "X" is in accordance with Article 86a of the proposal ("*This Chapter shall apply to the conversion of a limited liability company formed in accordance with the law of a Member State…*").

There is no doubt that this national provision, as it would be a measure for implementing a Directive, would prevail over Regulation 1215/2012 (see Article 67 of the Regulation), but it would still be necessary to articulate properly these national rules with Regulation 1215/2012.

As national and unilateral provisions, these rules would imply that, despite the provisions of Regulation 1215/2012, the Courts of the Member State of incorporation would have jurisdiction for the cases referred above; but, which would be the nature of this ground of jurisdiction? It could not be considered – according to the wording of the proposal- as an exclusive competence. So, in principle, the provisions of Regulation 1215/2012 could apply to confer jurisdiction to the Courts of other Member States. So, the Courts of the defendant's domicile would also have jurisdiction, and also de Courts designated in the statutes of the company, according to Article 25 of the Regulation (judgment of the Court in *Powell Duffryn*, of 10 March 1992, C-214/89). The exclusive grounds of jurisdiction would also apply, but they would lose their exclusive nature as they should be applied together with the national laws implementing the Directive. This could cause some doubts and problems.

First, it is always difficult to apply rules from different instruments. The doubts about the scope of each of the instruments could cause some problems (for example, the doubt about the exclusion or not of Regulation 1215/2012 as a consequence of the implementation of the proposed Directive).

Second, if the grounds of jurisdiction of the Regulation could also be used, what about the cases in which the action would be brought before the Courts of the defendant's domicile and also before the Courts of the Member State of incorporation of the company? In such a case, would the rules on *lis pendens* of the Regulation apply or should it be interpreted that even in this case the Courts of the country of incorporation should assume jurisdiction?

The problem explained so far in the case of cross-border conversions -Article 86j (6)- would appear also in cases of cross-border mergers -art. 126a (7)- and divisions -Art. 160l (6)-.

For these reasons, we think that, instead of leaving to Member States the responsibility of introducing in their legislation new rules on international jurisdiction, it would be more adequate to include in the Directive a provision changing Regulation 1215/2012 in order to modify the exclusive grounds of jurisdiction in company matters (Article 24.2). This would ensure a uniform solution for all Member States. Therefore, the provisions now in the proposal could be included in Regulation 1215/2012 and the modification could also be used to include in the text of the Regulation the doctrine established by the CJEU in the E.ON case of 7 March 2018. As far as the actions foreseen in Articles 86j (6), 126a (7) and 160l (6) are concerned, we think the best solution would be to insert a new rule in article 24.2 of Regulation 1215/2012 that would provide for the exclusive competence of the Courts either of the departure Member State or of the destination Member State, therefore allowing the plaintiff to choose any of them. It would be an "exclusive-alternative" judicial competence similar to that existing today in Article 24.1 for short-term tenancies of immovable property, that would be justified by the fact that in these cases of cross-border restructuring there are two (or sometimes more) successive laws of incorporation of the company.

VI. SOME COMMENTS ON SOME ASPECTS RELATING TO THE RIGHTS OF EMPLOYEES

VI.1. The report of the management or administrative organ to the employees

One of the main instruments incorporated in the proposal for safeguarding the interests of employees concerned by cross-border restructuring operations is the duty imposed on the management or administrative organ to draw up a report explaining the implications of the operation for the employees, and to make it available to them.

The terms are almost identical in all three possibilities of restructuring: Article 86f for conversions, Article 124a for mergers and Article 160h for divisions, except for a specific issue of time limits, which we will comment briefly. In general terms, we think that the duty to produce a report specifically targeted at the employees is a positive measure, because it allows them to be informed of the projected operation before it takes place, thus providing them with the opportunity to take the initiatives they consider appropriate for defending their interests.

There are, however, two aspects that could be improved:

The first one relates to the time given for providing the report to the employees: not less than two months before the date of the general meeting that should decide on the operation, in case of conversions and divisions, and not less than one month in case of mergers. In our view, there are no solid arguments for such a difference, because the three situations are essentially similar. Therefore, it would be advisable that the time awarded would be the same in the three situations.

The second one relates to the objective difference derived from the existence or not of a mechanism for employee representation in the company. According to the proposal, the report should be made available to the representatives of the employees or, where there are no such representatives, to the employees themselves. In our view, it would be convenient to establish two different time-limits: a general one, when such representatives exist (it could be two months, as laid down in the proposal), and a longer one in case there is no employee representation (for instance, three months).

Of course, it ought to be welcome that the proposal establishes the obligation to deliver a report also when there are no organs of labour representation in the company, specially taking into account that the proposed Directive tries to facilitate cross-border restructuring operations for small and medium undertakings, in which very often such organs of structured representation do not exist. However, to have a real possibility of assessing the report and delivering an opinion on it, employees without a mechanism of structured representation in the company will normally need more time that an experienced representation organ, or they may even need external advice to undertake the proper assessment. For this reason, they should be awarded more time.

VI.2. Opinion of the employees on the report by the management or administrative organ

The proposal foresees the possibility for the employees or their representatives of delivering an “opinion” on the management’s report concerning the restructuring operation and its implications for the staff. In our view, this is an essential measure, because employees may have a close or “on the ground” knowledge of the reality of the company which might be very useful both for the general meeting and for the authorities in charge of approving the operation, warning them of the possible risks for the personnel. Therefore, we think that the proposal should regulate this opinion in more stringent terms, for instance establishing a reasonable time-limit for delivering the opinion since the reception of the report or, in case an opinion is not delivered, obliging to explain the reasons impeding it. To sum up, the idea would be to maximize the possibilities of making known and taking into account the perspective of the personnel on the projected operation.

VI.3. Possibility of not approving the operations in case of artificial arrangements aimed at unduly prejudicing employees' rights

As said before (section III), the proposal foresees the possibility of denying the certificate to be delivered by the authorities of the member State of departure when the operation constitutes an artificial arrangement aimed at unduly prejudicing the legal or contractual rights, *inter alia*, of employees. This rule is laid down in Articles 86c (3) and 86m (7).c) as far as conversions are concerned, and in Articles 160d (3) and 160o (7).c) in case of divisions; by contrast, such an ex ante control of artificial arrangements is lacking in the case of mergers.

Even if, as far as employees' rights are concerned, it is difficult to imagine how could they be unduly prejudiced, because there are other Directives aimed at impeding such negative effects on workers' interests (in particular, Directive 2001/23, of 12 March 2001, on the safeguarding of employees' rights in case of transfer of undertakings and businesses), it would be convenient to further clarify this provision by reference to the breach of individual and collective rights foreseen in the legal and collective agreement rules applicable in each case.

VII. SOME COMMENTS ON COMPANY RELATED ISSUES IN THE CONTEXT OF BREXIT

As it is well known, as a consequence of the referendum held in June 2016 the United Kingdom decided to leave the European Union. The UK submitted on 29 March 2017 the notification of its intention to withdraw pursuant to Article 50 of the TFEU. This means that on 30 March 2019 the UK will become a third country. Unless a ratified withdrawal agreement establishes another date, EU law will cease to apply to the UK from 30 March 2019. Although such withdrawal agreement is being negotiated, in view of the current political situation, the Commission envisages two possible scenarios. The first one is that the agreement is ratified before 30 March 2019. In such case, an additional transition period of 21 months will start, and EU law will cease to be applicable to and in the UK on 1 January 2021. The second scenario is absence of agreement or that the agreement is not ratified not later than 30 March 2019. In such a case there would be no transition period and EU law would cease to apply to and in the UK from that date [see the interesting Communication from the Commission

“Preparing for the Withdrawal of the United Kingdom from the European Union on 30 March 2019”, COM (2018) 556 final, of 19 July 2018].

As in many other fields, Brexit will have an impact on company law issues. However, at least in a first stage, company law does not seem to have been a priority for the negotiators (see the much more detailed analysis of R. Arenas García, “Brexit y Derecho de sociedades”, *Anuario Español de Derecho Internacional Privado*, t. XVII, 2017, pp. 155-180). Nevertheless, in the context of its policy of raising public awareness on the consequences of Brexit, the Commission began to publish in late 2017 “notices to stakeholders” in different policy areas. According to the Commission, these notices explain the situation in the sector concerned after 30 March 2019 in the absence of a withdrawal agreement. Therefore, they do not contain any interpretation of possible results of a future withdrawal agreement. One of these notices, adopted on 21 November 2017, under the responsibility of the Directorate-General Justice and Consumers, concerns the “Withdrawal of the United Kingdom and EU Rules on Company Law” (http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=607669).

According to this Notice, subject to any transitional arrangement that may be contained in a withdrawal agreement, by 30 March 2019 EU rules in the field of company law will no longer apply to the UK. As a consequence of this, UK incorporated companies will be third country companies and therefore will not be automatically recognised by the Member States of the EU under Article 54 of the TFEU (paragraph 4, point 1). In other words, the recognition of UK companies in EU member States will no longer depend on EU law, but on the national law of each Member State, or international treaties that might be applicable. Therefore, the judicial doctrine inaugurated in Centros would no longer apply to UK incorporated companies. This might be problematic for companies incorporated in the UK but having their central administration or principal place of business in the EU Member States (“pseudo-foreign corporations”), because such States will no longer be obliged to recognize their legal personality and limited liability, or even their capacity of being a party in judicial proceedings (see, for instance, the situation in the *Überseering* ruling, of 5 November 2002, Case C-208/00). This could happen in those Member States following the “real seat” theory, which obliges companies to incorporate in the country where the main administration or activity are located. Another possible consequence of this situation, in those Member States which do not follow the “real seat“ model, but the incorporation one, is that, although the legal personality of a “pseudo-British” company would in principle be recognized (because countries following the incorporation model do not require that the company incorporates in the country of its real seat), they may ask special or additional requirements for pseudo-foreign corporations, as those that were at stake in the *Inspire Art* ruling, of 30 September 2003 (Case C-167/01; see, R. Arenas García, “Brexit y Derecho de sociedades…”, *cit.*, p. 165). Therefore, “pseudo-British” corporations that have been created in different Member States, and persons contracting with them, should be aware of this and try to anticipate.

The Commission's Notice also outlines other possible consequences: the first one, quite obvious, is that branches in EU Member States of UK incorporated companies will become branches of third country companies, and the rules relevant to branches of third country companies will apply to them (par. 4, point 2). The second one is that, among other aspects, EU rules on cross-border mergers will cease to apply to the UK (par. 4, point 3).Therefore, for a merger between a company incorporated in a EU Member State an a company incorporated in the UK, both the national rules of the EU Member State in question on mergers with third-country companies and those of the UK will have to be taken into account. And this last remark leads us to the Directive proposal we are commenting: as in the case of existing EU rules on cross-border mergers, future rules on cross-border conversions, mergers and divisions will not apply to and in the UK when it becomes a third State. Of course, there is still the possibility that a withdrawal agreement is ratified in due time, and in such case a transition period would start from 30 March 2019, and special arrangements for UK companies in the EU and for EU companies in the UK could be agreed. Apart from the withdrawal agreement intended to deal with the exit conditions, a future agreement on the future relationship between the EU and the UK could also address issues relating to right of establishment and company law. In addition, another element has to be taken into account: for simple time reasons, it is doubtful that the proposed Directive could ever be applied to the UK. At present, the legislative process is in a relatively early stage and, according to its Article 2, once adopted the Directive should be transposed 24 months after its entry into force (according to Article 4 the Directive shall enter into force the twentieth day following that of its publication in the Official Journal). Therefore, it is quite likely that by the time the Directive is applicable the UK will already be a third State. However, as reminded before, we should be attentive to specific arrangements in the possible future agreements between the EU and the UK.