



CNUE Feedback on the draft implementing regulation regarding the disclosure and exchange of information between EU countries' business registers on cross-border conversions, mergers and divisions of companies

We welcome the opportunity granted by the Commission to provide our feedback on the draft implementing regulation laying down rules for the application of Directive (EU) 2017/1132 of the European Parliament and of the Council as regards technical specifications and procedures for the system of interconnection of registers and repealing Commission Implementing Regulation (EU) 2020/2244.

We would like to focus our feedback on two topics, namely:

- (a) the transmission of pre-operation certificates; and
- (b) the legal value of pre-operation certificates exchanged through the system of interconnection of registers.

The transmission of pre-operation certificates

With regard to the transmission of pre-operation certificates, the CNUE would like to focus on paragraphs 6.1.2. 6.2.2. and 6.3.2. of the Annex to the implementing regulation which are worded as follows:

- a) “[f]or each transmission of the pre-[operation] certificate ..., the register of the [departure/merging company/company being divided] Member State shall, following the issuance of the certificate ..., send to the register of [the destination/the company resulting from the merger/each recipient company] Member State the following data ...”;
- b) “[f]or the purposes of making the pre-[operation] certificate available through BRIS ... the register of the [departure/merging company/company being divided] Member State shall transmit the following data ...”.

In our view the proposal does not fully reflect the wording of Articles 86n, 127a and 160n of Directive (EU) 2019/2121 which are worded as follows:

“Member States shall ensure that the pre-[operation] certificate is shared with the authorities referred to in Article ... through the system of interconnection of registers.

Member States shall also ensure that the pre-[operation] certificate is available through the system of interconnection of registers”.

More specifically, with regard to paragraphs 6.1.2., 6.2.2., and 6.3.2., lett. (a), of the draft implementing regulation, we would like to highlight that the addressees of the “sharing” of the pre-operation certificates are the competent authorities (i.e. the court, the notary or any other competent



authority designated by each Member State) and not the business registers, which could be only a medium of transmission.

In that sense, where the notary is designated as the competent authority, it will be necessary to require that the business register of the destination/the company resulting from the merger/each recipient company shares the pre-operation certificate with the competent authority.

Moreover, where the authority responsible for controlling the legality of cross-border operations is not designated ex-ante, as is the case where notaries are designated in this role by national law, we believe that it would be sufficient and appropriate to require the business registers of the destination/the company resulting from the merger/each recipient company Member State to make the pre-operation certificate available to all persons who may be called upon to carry out the control of the legality of the cross-border operation, i.e. in the case of notaries, to all notaries.

Finally, we would also like to highlight that Directive (EU) 2019/2121 requires that access to pre-operation certificates be free of charge for authorities carrying out the control of the legality of cross-border operations, whereas the draft implementing regulation – to our understanding – does not expressly refer to this circumstance. We believe that it would be appropriate to mention this need also in the implementing regulation.

The legal value of the pre-operation certificates exchanged through the system of interconnection of registers

A second topic that the CNUE would like to raise in the context of this consultation concerns the legal value that can be recognised for documents that are exchanged through the BRIS.

The CNUE believes that there is nothing in the text of Directive (EU) 2019/2121, nor in the text of the draft implementing regulation, that exempts competent national authorities from the need to receive legalised or apostilled pre-operation certificates, unless otherwise provided for in national law or international conventions.

In fact, neither Directive (EU) 2019/2121 nor the draft implementing regulation include a provision comparable, for example, to Article 74 of Regulation (EU) No 650/2012, which states that “[n]o legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.”

In more general terms, although exemptions from legalisations and apostilles are increasingly common in EU law, we cannot find a general exemption from these formalities that is applicable in the context of cross-border operations.

Therefore, in practical terms, in many cases the authorities responsible for controlling the legality of cross-border operations will still need to rely – at least – on apostilled documents.

In the light of the existing legal framework, and in order to avoid dangerous misunderstandings for competent authorities, we believe that the implementing regulation should clarify to end-users that the exchange of pre-operation certificates through the BRIS has no implication on the need to



receive certified and apostilled pre-operation certificates, where these are required by the law of the authority carrying out the control of the legality of cross-border operations.

Brussels, 19 April 2021

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