

DIGITALIZATION: BALANCE AND PROTECTION – STATE-OF-THE-ART

Tina Jakupak*
Željka Bregeš**

ABSTRACT

This paper provides an overview of the state-of-the-art in this digitalization era in the field of company law. In this paper, the authors present a summary of the (amending) directive of the European Union that is essential for the future digitalization improvement: Directive (EU) 2019/1151 on digital tools and processes in company law. In next year (or in some circumstances two) it is necessary to transpose this (amending) directive into national systems of Member States, but at the same time, it is necessary to maintain national legal traditions.

Digitalization and globalization are the two most frequently used words in our surroundings in the last decade. In that perspective, authors analyze amendments of the directive as regards the use of digital tools and processes in company law. It is essential to interconnect central, commercial, and companies registers of Member States. Authors investigate on-line solutions of a company's lifecycle in the Member States, with the accent on Croatia, as well as access to company information. The focus of this paper is on the rules on online formation of companies, on online registration of branches.

The authors also present a summary of the Directive (EU) 2019/2121 on cross-border operations. The freedom of establishment has an important role and companies can exercise this freedom through the new rules on cross-border operations. Authors take an insight into amendments of European Union Directive as regards cross-border conversions, mergers, and divisions. Directive continues to introduce the right to establishment and discusses the harmonization of EU law in the national law of Member States.

* Tina Jakupak, Commercial Court in Zagreb, Zagreb, Croatia; tina.jakupak@tszg.pravosudje.hr.

** Željka Bregeš, Commercial Court in Zagreb, Zagreb, Croatia; zeljka.breges@tszg.pravosudje.hr.

This paper summarizes the state-of-the-art in this subject area and discusses future development directions. The authors conclude this paper with essential information about the benefits, constraints, and challenges associated with digitalization.

KEYWORDS: *EU company law; digitalization; cross-border mergers; directives amendments*

1. INTRODUCTION

When authors start to research for this paper, the first question to be asked was: what are digital tools? A commonly known definition of digital tools is that digital tools are programs, websites, or online resources that can make tasks easier to complete. A lot of these can be accessed in web browsers without needing to be downloaded, and you can access them both at home and work.¹ Why are they so important? That was the second question that we asked ourselves. Digital tools have advantages and, of course, disadvantages. Digital tools are, or should be, important for making processes more efficient and effective. Also, it is important to be secure and consistent. Maybe the last one is the most important advantage - a data structure that ensures we are capturing information consistently across all contributors. With digital tools all data are centralized. And thirdly, what is digitalization? Digitalization is the process of converting paper files into electronic files. And much more.

As institutions across EU support entrepreneurs and founders, national public authorities, regional public authorities, business organizations, notaries, trade unions, private businesses, national business registers, legal academics, and other stakeholders across a broader range of geographies with a broader set of needs, the case for digital solutions only grows.

There are around 24 million companies in the EU,² out of which approximately 80% are limited liability companies. Around 98-99% of limited liability companies are SMEs.³ Every year around 2,5 million new companies are created and a slightly smaller number of companies cease to exist.⁴ High growth

¹ <https://engage.dhsc.gov.uk/digitalpassport/tools/> visited on October 24th, 2020

² The study 'Assessment and quantification of drivers, problems and impacts related to cross-border transfers of registered offices and cross-border divisions of companies' EY 2017 refers to 24,4 million in 2016. It makes an estimation based on Eurostat data of 2014.

³ EY study on cross-border operations of companies

⁴ According to Eurostat data, there were 2,586,418 new companies in EU28 in 2014, while 2,307,036 companies ceased to exist. In 2013, the number of new companies in EU28 was 2,487,921, with 2,329,272 companies ceasing to exist.

enterprises⁵ play an important role in contributing to economic growth and the creation of jobs.

EU company law rules cover issues such as the formation, capital and disclosure requirements, and operations (mergers, divisions) of companies.⁶ ⁷ EU company law rules also address corporate governance issues, focusing on relationships between a company's management, supervisory board, shareholders, and other stakeholders.

A large part of EU company law was until now codified in a single Directive 2017/1132⁸ relating to certain aspects of company law.

European Company Law from mid-2021 should be different as regards digital tools. Directive (EU) 2019/1151,⁹ which was adopted by the European Parliament on 20 June 2019 and entered into force on 31 July 2019, is the first of two directives in the company law package. The Directive aims to promote the use of digital tools and processes in the context of company law. The Member States need to transpose the Directive into their national legislation by 1 August 2021 (or, in case of particular difficulties, 1 August 2022). The Directive (EU) 2019/2121¹⁰ lays down new rules on cross-border conversions and

⁵ This refers to an enterprise with average annualised growth in number of employees greater than 10 % per year over a three-year period and having at least 10 employees in the beginning of the growth.

⁶ https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en - visited on October 24th, 2020

⁷ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law OJ L 169, 30.6.2017, p. 46–127; Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.7.2019, p. 80–104; Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1–44 ; Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies, OJ L 258, 1.10.2009, p. 20–25; Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21; Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1–9

⁸ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017.

⁹ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law OJ L 186, 11.7.2019, p. 80–104

¹⁰ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

divisions and amends the rules on cross-border mergers. Member States need to transpose this Directive by January 2023. This new set of rules will enable companies to use digital tools in company law procedures and to restructure and move cross-border while providing strong safeguards against fraud and to protect stakeholders. These new Directives revise and complement Directive 2017/1132.¹¹ The purpose of EU rules in this area is to:¹² enable businesses to be set up and to carry out operations anywhere in the EU, provide protection for shareholders and other parties with a particular interest in companies, such as employees and creditors, make business more efficient, competitive and sustainable in the long term and encourage businesses based in different EU countries to cooperate with each other. The areas covered are:¹³

1. Use of digital tools and processes throughout a company's lifecycle: Companies use a number of digital tools and processes in order to comply with requirements stemming from company law, such as registering a company as a legal entity, filing documents to the business register or applying for publication in the national gazette. This also encompasses digital access to company-related information by third parties. The use of digital tools in interactions between companies and their shareholders is not part of this impact assessment.
2. Cross-border mergers: A cross-border merger takes place when two or more companies from different Member states join into one surviving entity by transferring to it all their assets and liabilities.
3. Cross-border divisions: A division involves a transfer of all or some assets and liabilities from a dividing company to existing or new company/companies in another Member states.¹⁴

¹¹ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017.

¹² https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en visited on October 24th, 2020

¹³ Commission staff working document impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and 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, SWD/2018/141 final - 2018/0113 (COD)

¹⁴ Divisions can be carried out in different ways, e.g. a dividing company can be wound up and transfer its assets and liabilities to more than one existing or newly formed company whose shares are allocated to the shareholders of the dividing company (so-called 'split up'). Alternatively, the dividing company can continue to exist and it can transfer some of its assets to other (new or existing) companies (so-called 'spin-off') or companies to which assets are transferred can become its subsidiaries (so-called 'hive-down'). The shares can be allocated

4. Cross-border conversions: A conversion means an operation whereby a company formed and registered in accordance with the law of a Member State converts into a company formed and registered in accordance with the law of another Member State while retaining its legal personality and without being wound up or going into liquidation. Unlike cross-border mergers and divisions, which involve more entities across Member states, a cross-border conversion concerns just one company.
5. Conflict of laws rules: In situations with cross-border elements, conflict of laws rules determine which of possibly two or more national laws apply to the internal functioning of a company.

Increasing demand for improved institutional capacity to deliver digital government services, among others before mentioned, produced this paper.

2. THE DIGITAL TOOLS DIRECTIVE

2.1. THE PROPOSAL OF THE DIRECTIVE ON DIGITAL TOOLS

When it comes to company law in the EU, the Commission aimed to use digital tools and processes in company law. The Commission aimed to provide for a fully online procedure for registering companies. In 2018, according to the Commission information, only 17 Member States provided for a fully online procedure for registering companies. This costs companies time and money. The Commission also noticed that other aspects of communication with company registers are also not fully digitalized.¹⁵

The need for action was because the Commission noticed that national rules on the use of digital tools (e.g. for registration and filing to the business register) either differ from country to country or do not exist and current EU legislation provides for only very limited use of such tools.¹⁶ In particular, there were no provisions on registering companies online. This inability to use

to shareholders of the dividing company in proportion or disproportionately to their existing shareholdings, J. Schmidt, cross-border mergers and divisions, transfers of seat: Is there a need to legislate? Study for the EP JURI Committee, 2016p. 27.

¹⁵ Analysis of the proposed Directive on “the use of digital tools and processes in company law” Briefing paper series on the Company Law Package Sig Vitols, WZB and ETUI (svitols@etui.org) This version: 14 May 2018- file:///G:/User/Downloads/GOODCORP%20BP%207%20-%20Digitalization%20of%20company%20law.pdf visited on October 24th, 2020

¹⁶ European Commission, Proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law - including annex, COM(2018) 239, 25 April 2018

relevant digital tools is a barrier to companies exercising their right to freedom of establishment.¹⁷

Member states provide e-government services at variable degrees: some are very advanced and provide easy-to-use, fully online solutions,¹⁸ while others are more timid in their efforts and do not offer at all online solutions for critical steps in a company's lifecycle such as the registration of the company as a legal entity.¹⁹

Currently, the EU company law includes certain elements of digitalization such as the obligation for Member states to make available online information about limited liability companies registered in central, commercial, or companies registers.²⁰ However, these requirements are limited and lack precision, leading to a very diverse implementation at the national level.

The objective of the Proposal was to develop the Single Market, deepening it and making it fairer and more predictable, by increasing the responsible use by companies of the opportunities the Single Market offers.²¹ The initiative was expected to stimulate jobs, growth, and investment, with a particularly positive impact on SMEs. It is also expected to support the creation of the digital single market by improving the use of digital technologies throughout a company's life-cycle. It is expected to provide more legal certainty for companies and lead to cost reductions while offering effective protection for employees, creditors, minority shareholders, and third parties. Overall, it is expected to provide a balanced framework where the use of the freedom of establishment enshrined in the EU Treaty goes hand in hand with protecting national social and labor

¹⁷ On freedom of establishment and related freedom of capital movements as fundamental freedoms aiming at enforcement of cross-border investments, see Horak, H.; Dumančić, K.; Poljanec, K., *European Market Law: Textbook*, Vol. I, Zagreb, University of Zagreb, Faculty of Economics and Business, Zagreb, 2015, pp. 101-107 and pp. 120-141, [<http://web.efzg.hr/dok/KID//European%20Market%20Law%20online.pdf>]

¹⁸ A number of business registers already have in place advanced online tools and solutions, for example Denmark, Estonia, Latvia.

¹⁹ Commission staff working document impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and 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, SWD/2018/141 final - 2018/0113 (COD)

²⁰ Proposal for a Directive of the European parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law COM/2018/239 final - 2018/0113 (COD) – includin Annex

²¹ *Ibid.*

law prerogatives. The initiative has complemented other EU initiatives such as the Single Digital Gateway.²²

The new provisions on online registration of companies and branches would require Member states to lay down rules concerning e.g. non-discriminatory conditions for acceptability of electronic documents or data originating from another Member states or for the control of the legal capacity of the founding member/representative of the company and his/her identity.²³ The new provisions would also require Member states to make available national online templates for the constitution of a company.

Main provisions of the Proposal were: that all Member states must provide for the fully on-line registration on certain types - without any face-to-face meetings;²⁴ all Member States must recognize e-IDAS compliant electronic identification of EU citizens issued in other Member States; all Member States must provide online templates for the registration of certain types of companies;²⁵ all Member States must register companies within five working days of the relevant submission.

On 25 April 2018, the Commission presented a package of proposals concerning the reform of EU company law.²⁶ The package comprised two directives, both amending Directive (EU) 2017/1132. One of the proposals amends it concerning the use of digital tools and processes in company law, and the other - with regard to cross-border conversions, mergers, and divisions of companies. This follows the Commission's Digital Single Market Strategy (from May 2015), in which it promised to put forward simpler and less burdensome rules for companies, including providing for making digital solutions available in particular in relation to the registration of companies. The Commission

²² Regulation (EU) 2018/1724 establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, OJ L 295, 21.11.2018, p. 1–38 - The single digital gateway facilitates online access to the information, administrative procedures and assistance services that citizens and businesses need to get active in another EU country - https://ec.europa.eu/growth/single-market/single-digital-gateway_en visited on 13th November, 2020

²³ European Commission, Proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law - including annex, COM(2018) 239, 25 April 2018

²⁴ Listed in Annex IIA

²⁵ Listed in Annex IIA

²⁶ <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-digital-technologies-in-company-law> visited on November 2nd, 2020

claimed that the new rules on digital registration of companies will generate savings for companies of between €42 and €84 million per year.

The Proposal concerning the digitalization of company law requires the Member States to ensure that the registration of companies may be carried out fully online without the necessity for the applicants, or their representatives, to appear in person before any competent authority or before any other person or body dealing with the application for registration.²⁷ Furthermore, Member States may not make the online registration of a company conditional on obtaining any license or authorization before the company is registered, unless where it is indispensable for the proper control of certain activities laid down in national law.

On 28 May 2018, it was decided that within Parliament, the proposal shall be dealt with by the JURI Committee.²⁸ On 28 May 2018, the Commission presented the proposal to the Council. On 26 July 2018, Tadeusz Zwiefka, the JURI rapporteur, presented his draft report, to which amendments have already been tabled. The main changes suggested by the rapporteur included: a more detailed definition of the notion of “registration”;²⁹ a new rule whereby the Member States may require the physical presence of the applicant (to register a company) only exceptionally and only on a case by case basis; a requirement that Member States make a possibility for applicants to make pay-

²⁷ <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-digital-technologies-in-company-law>

²⁸ <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-digital-technologies-in-company-law>

²⁹ Online registration of companies: Members said that the registration procedures shall also include the:

- procedures to verify the appointment of directors and that take into account the disqualification of directors by competent authorities of other Member States;
- procedures to verify the legality of the object of the company in so far as such checks are provided under national law;
- procedure to verify the legality of the name of the company in so far as such checks are provided under national law;
- procedures to verify the legality of the instruments of constitution, including verifying the correct use of templates;
- procedures to provide for the role of a notary or any other person or body mandated by the Member State to submit an application for registration;
- circumstances in which online registration may be excluded where the share capital of company is to be paid by way of contributions in kind

Source: Committee report tabled for plenary, 1st reading/single reading; <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1564471&t=e&l=en>

ments online; a new rule whereby the Member States may lay down rules to provide safeguards as regards the reliability and trustworthiness of documents and information to be filed online. On 4 December 2018, the JURI committee adopted the report and tabled it for the plenary. On 6 December 2018, the JURI decided to open inter-institutional negotiation. A provisional agreement between Parliament and Council was reached and confirmed in JURI at the meeting of 4 March 2019. The text has been adopted at the plenary sitting on 18 April 2019. On 11 June 2019, a statement by Germany was produced lifting previous concerns on the availability free of charge of company information. The Council of the European Union adopted the amending directive on 13 June 2019 with all Member States voting in favor. The final act was signed on 20 June 2019. The directive was published in the Official Journal of the EU on 11 July 2019, and entered into force on the twentieth day after publication. Member States will have two years from the entry into force to transpose the directive.

The Proposal grounds were in The EU e-Government Action Plan³⁰ which specifically recognized the importance of improving the use of digital tools when complying with company law-related requirements. The EU e-Government Action Plan³¹ identified three policy priorities: modernizing public administrations using key digital enablers (for example technical building blocks such as CEF DSIs like eID, eSignature, eDelivery, etc.); enabling mobility of citizens and businesses by cross-border interoperability; facilitating digital interaction between administrations and citizens/businesses for high-quality public services.³²

2.2. THE DIRECTIVE ON DIGITAL TOOLS

In today's world technology is a part of everyone's life. Companies use digital tools in their business every day more and more. Companies also need to interact with public authorities, but this is not always possible through electronic means. At least until now or, shall we say until mid-2021.

European company law directive on digital tools is the next step towards the digitalization and modernization of company law in European member states. The emphasis is on the obligation for the Member States to enable the online

³⁰ Communication EU eGovernment Action Plan 2016-2020 - Accelerating the digital transformation of government-COM(2016)179 EU

³¹ The e-Government Action Plans have been political instruments to advance the modernization of public administrations across the European Union

³² <https://ec.europa.eu/digital-single-market/en/node/81744> visited on October 24th, 2020

formation of at least certain types of companies, without the founder having to leave his or her room and computer display, by 1 August 2021 at the latest (or by 1 August 2022 in some cases³³).

The Directive requires the Member States to enact rules and build or adapt systems that would allow companies to register online. This means the end of the mandatory visit to the notary. Does it really mean? The role of notaries as such should not be impacted. But it may be that in some Member States the way in which notarial services are provided would need to be adapted in line with the preferred options and legislation already in force (e.g. the e-IDAS Regulation).³⁴

Directive (EU) 2017/1132 of the European Parliament and the Council³⁵ lays down *inter alia* rules on disclosure and the interconnection of central, commercial, and companies registers of Member States.³⁶ The use of digital tools and processes to more easily, rapidly and time- and cost-effectively initiate economic activity by setting up a company or by opening a branch of that company in another Member State, and to provide comprehensive and accessible information on companies, is one of the prerequisites for the effective functioning, modernization and administrative streamlining of a competitive internal market and for ensuring the competitiveness and trustworthiness of companies. Ensuring that a legal and administrative environment equal to the new social and economic challenges of globalization and digitalization exists is essential, on the one hand, in order to provide the necessary safeguards against abuse and fraud and, on the other, in order to pursue objectives such as the promotion of economic growth, creation of jobs and attracting investment to the Union, all of which would bring economic and social benefits to society as a whole.

There are currently significant differences between the Member States when it comes to the availability of online tools enabling entrepreneurs and companies to communicate with authorities on matters of company law. E-Government services vary between the Member States.³⁷ Regarding access to company in-

³³ Article 2 (Transposition) of Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.7.2019, p. 80–104

³⁴ European Commission, Proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law - including annex, COM(2018) 239, 25 April 2018

³⁵ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017.

³⁶ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law OJ L 186, 11.7.2019, p. 80–104

³⁷ *Ibid.*

formation, EU law stipulates that a minimum set of data always has to be provided free of charge. However, the scope of such information remains limited. Access to such information varies, with more information being made available free of charge in some Member States than in others, thus causing an imbalance in the European Union.

The goal of Directive 2019/1151 is the modernization and digitalization of company law. The Directive promotes digital tools and processes and involves three main things: to enable online filing and accessing of company information, to enable the online formation of certain types of companies, and to enable online registration of branches.

When we talk about online filing and accessing of company documents and information then we talk about 27 Member states. There are significant differences between them when it comes to the availability of company information that they make available through an electronic register. It differs in the number of documents and the content and information hold in the electronic register but also the fees charged for accessing these documents. The Directive imposes certain minimum requirements to achieve a certain degree of uniformity between the Member States. The Directive stipulates: that it must be possible for the documents and information disclosed by companies to be filed online with the register and which of these documents and which information should be made available free of charge.

The Directive also provides for interconnection between the Member states registers, building on the existing system of interconnected registers (BRIS).³⁸

When it comes to the online formation of companies' procedures should be put in such a way to enable the formation of companies and registration of branches to be completed fully online. The company may be established and registered by one or more persons, whether natural persons or legal persons such as companies or partnerships. Member states have an obligation to ensure that the origin and integrity of the documents filed online may be verified electronically.³⁹

³⁸ The system of interconnection of business registers was created with Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p. 1–9. This directive is now part of the codified Directive (EU) 2017/1132 relating to certain aspects of company law. More about BRIS see Bregeš, Jakupak: DIGITALIZATION OF BUSINESS REGISTER, *InterEULawEast* : journal for the international and european law, economics and market integrations, Vol. 4 No. 2, 2017., p. 91-99

³⁹ Article 13j of the directive (EU) 2019/1151

In order to facilitate the formation of companies and the registration of branches and to reduce the costs, time, and administrative burdens associated with those processes, in particular by SMEs as defined in Commission Recommendation 2003/361/EC, procedures should be put in place to enable the formation of companies and registration of branches to be completed fully online.⁴⁰ This Directive should not oblige companies to use such procedures. Member States should, however, be able to decide to make some or all online procedures mandatory. The current costs and burdens associated with formation and registration procedures derive not only from administrative fees charged for forming a company or registering a branch but also from other requirements that make the overall process longer to complete, in particular when the physical presence of the applicant is required. In addition, information on such procedures should be made available online and free of charge.

The online filing and accessing of company documents and information are important steps towards the digitalization of company law. Enabling the formation of companies, registration of branches and filing of documents and information to be done fully online would allow companies to use digital tools in their contacts with competent authorities of Member States.⁴¹

This Directive should only oblige the Member States to enable the online formation of companies, registration of branches, and online filing of documents and information by applicants who are Union citizens, through the recognition of their electronic identification means.⁴² Member States should remain free to decide which person or persons are to be considered under national law as applicants concerning online procedures, provided that that does not limit the scope and the objective of this Directive.

To facilitate online procedures for companies, Member States' registers should ensure that the rules on fees applicable to the online procedures provided for in this Directive are transparent and applied in a non-discriminatory manner.⁴³

The Directive specifies that it should be possible to form companies fully online. However, Member States should be allowed to limit online formation to certain types of limited liability companies, as specified in the Directive, due to the complexity of the formation of other types of companies in na-

⁴⁰ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law OJ L 186, 11.7.2019, p. 80–104

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

tional law.⁴⁴ In any event, Member States should lay down detailed rules for online formation. It should be possible to carry out online formation with the submission of documents or information in electronic form, without prejudice to Member States' material and procedural requirements, including those relating to legal procedures for drawing up instruments of the constitution, and to the authenticity, accuracy, reliability, trustworthiness and appropriate legal form of documents or information that are submitted. However, those material and procedural requirements should not make online procedures, in particular those for the online formation of a company and online registration of a branch, impossible. Where obtaining electronic copies of documents satisfying the requirements of Member States is not technically possible, by way of exception, the documents in paper form could be required.

Promptitude is a priority. The online formation before any authorities or any persons or bodies mandated under national law to deal with any aspect of online procedures should be fast.⁴⁵ In order to ensure the timely online formation of a company or online registration of a branch, Member States should not make that formation or registration conditional on obtaining any license or authorization before that formation or registration can be completed unless national law so provides for the purpose to ensure that there is proper oversight of certain activities.

The Directive requires the Member States to ensure that the formation of at least the types of companies included in a non-exhaustive list in the Annex may be carried out entirely online without the need for the founders to appear in person before any authority, person or body. For the Croatian types of companies, the „društvo s ograničenom odgovornošću, jednostavno društvo s ograničenom odgovornošću“ was included in this list. In other words: Croatia must make it possible for the founder, at least of a „d.o.o. and j.d.o.o.“, to complete the entire formation process at his/her own computer screen. In Germany, for example, online registration is mandatory for „Gesellschaft mit beschränkter Haftung (GmbH)“, but „Aktiengesellschaft (AG)“ and „Kommanditgesellschaft auf Aktie (KGaA)“ may be exempt. The reason for this idea is the concern that physical presence requirements often discourage founders of start-ups from setting up a company in another Member state. This is not the first time that the EU, which gives great importance to the freedom of establishment and the freedom to provide services, is trying to introduce the online formation of companies.⁴⁶

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ A similar possibility of online formation was planned for the *Societas Unius Personae*

The Directive requires the Member States to ensure that the registration in a Member State of a branch of a company that is governed by the law of another Member State may be fully carried out online without the need for the founders to appear in person before any authority. The reason is the same as for the online formation of companies: the aim is to reduce the costs, time and administrative burdens associated with the registration.

We come to important the question: what about the notaries? According to the Directive, the physical presence of the founder before any authority, person, or body can only be required in certain cases where this is justified by reasons of public interest. This is the case, for example, when there are reasons to suspect identity falsification or non-compliance with the rules on legal capacity and on the founders' authority to represent a company.⁴⁷ These reasons of public interest must be assessed on a case-by-case basis. The obligation to visit a notary or any other body, may therefore not be required systematically. Moreover, even where there are considered to be reasons of public interest, the verification of identity or legal capacity will not necessarily entail appearance in person, but may also be carried out by videoconference or similar means.

The fact that a physical visit to the notary will be limited to exceptional cases should not be diminished from the fact that the notary can still have an important role. The Directive offers the legislator the flexibility to some extent to involve notaries in the online system for the formation of companies, registration of branches, and filing of documents and information. In the digital era, the role of notaries will have to undergo significant changes, in particular in a fully online system for the formation of companies.

Once the Directive will be transposed into national law, it should be possible to establish a company cost-effectively through online procedures and within a maximum of 5 working days. The directive also aims to ensure that certain company information will be available in principle free of charge. Founders should be provided with sufficiently detailed information, forms, and digital tools to enable them to carry out the company registration procedure independently, and the information should be offered in an official language of the EU which is widely understood by as many cross-border users as possible. The same should apply to procedures for modifying company information on the register; submitting documents throughout the life cycle of the company; and establishing and registering branches.

It may be difficult for Member states to verify the existence of and representative powers of a legal person – particularly if that legal person was established

⁴⁷ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law OJ L 186, 11.7.2019, p. 80–104

outside the EU. In Croatia, a foreign legal person who wants to establish a „d.o.o.“ company must prove its power of representation with an extract from the company register of its registered seat, accompanied by an ‘Apostille’.⁴⁸ In that case, the European legislator has to come up with a solution to this challenge because this authentication procedures do not exist in electronic form.

The Directive allows Member states online registration for companies where the share capital of the company is paid in the cash and in the way of other contributions. It remains to be seen how many Member states will have a solution for the online procedure for a contribution (non-cash) establishment because this procedure is much more complicated.

Also, a legal framework is defined for the Member States to request information on disqualified directors from other Member states. In order to ensure that all persons interacting with companies are protected, Member States should be able to prevent fraudulent or other abusive behavior by refusing the appointment of a person as a director of a company, considering not only the former conduct of that person in their own territory but, where so provided under national law, also information provided by the other Member States.⁴⁹ Member States should, therefore, be allowed to request information from the other Member States. The reply could either consist of information on a disqualification in force or other information that is relevant for disqualification in the Member State that received the request. Such requests for information should be possible by employing the system of interconnection of registers. In that regard, Member States should be free to choose how to best collect this information, such as by gathering the relevant information from any registers or other places where it is stored under their national law or by creating dedicated registers or dedicated sections in business registers. Where further information, such as on the period and grounds of disqualification, is needed, Member States should be allowed to provide it through all available systems of exchange of information, following national law. However, this Directive should not create an obligation to request such information in every case. Moreover, being allowed to consider information on disqualification in another Member State should not oblige the Member States to recognize disqualifications in force in the other Member States.⁵⁰

⁴⁸ The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, 1961.

⁴⁹ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law OJ L 186, 11.7.2019, p. 80–104

⁵⁰ DRAFT: COMMISSION IMPLEMENTING REGULATION (EU) .../... laying down rules for the application of Directive (EU) 2017/1132 of the European Parliament and of the

What does the term ‘disqualification’ cover in the exchange of information on disqualified directors? The provisions of Directive 2019/1151 require that Member States exchange information on whether a given person is disqualified or is recorded in any of their registers that contain information relevant for disqualification of directors. Any further exchange is covered by national law. Also, the Directive does not harmonize the concept of disqualification as the authors of this paper noticed. In Croatia there is no register of disqualified directors – does it mean that we will have it in the future? Who will keep the data? The provision stipulates that competent authorities should know whether the given person is recorded in any of the registers relevant for disqualification of directors in the other Member States utilizing the system of interconnection of business registers.⁵¹ The registers, the authorities or persons or bodies mandated under national law to deal with any aspect of online procedures should not store such personal data longer than is necessary to assess the eligibility of the person to be appointed as a director.

The Directive stipulates the “Once only” principle – companies only have to submit a specific document one time to one authority. Applying the once-only principle entails that companies are not asked to submit the same information to public authorities more than once.⁵² For example, companies should not have to submit the same information both to the national register and to the national gazette. Instead, the register should provide the information already submitted directly to the national gazette. Similarly, where a company is formed in one Member State and wants to register a branch in another Member State, it should be possible for the company to make use of the documents or information previously submitted to a register. Furthermore, where a company is formed in one Member State but has a branch in another Member State, it should be possible for the company to submit certain changes to their company information only to the register where the company is registered, without the need to submit the same information to the register where the branch is registered. Instead, information such as a change of company name or change of registered office of the company should be exchanged electronically, between the register where the company is registered and the register where the branch is registered using the system of interconnection of registers.

Council as regards technical specifications and procedures for the system of interconnection of registers and repealing Commission Implementing Regulation (EU) 2015/884 and Annex - <https://op.europa.eu/en/publication-detail/-/publication/f60392a2-d70c-11ea-adf7-01aa75ed71a1/language-en> visited on 20th November, 2020

⁵¹ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.7.2019, p. 80–104-see Article 13i.

⁵² Ibid.

The extension of the interconnection of European registers is also stipulated in the Directive. Disclosure in the register: in each Member State, a file shall be opened in a central, commercial, or companies register for each of the companies registered therein.⁵³ The Member States shall ensure that companies have a European unique identifier⁵⁴ allowing them to be unequivocally identified in communications between registers through the system of interconnection of registers established under Article 22.⁵⁵ That unique identifier shall comprise, at least, elements making it possible to identify the Member State of the register, the domestic register of origin, and the company number in that register and, where appropriate, features to avoid identification errors.

2.3. DIGITAL TOOLS IN CROATIA

E-justice reforms, as e-establishment (or e-registration) of a company is, do not occur, or at least it shouldn't, in an institutional and technological vacuum. The unique institutional and e-government technological ecosystem of each country must be considered when e-justice reforms are planned, designed, and implemented.⁵⁶

When it comes to Croatia there are three ways to establish a company: in person, by information system START, and information system called HITRO.HR.⁵⁷

There are two types of companies that may be established in Croatia: a company based on capital and a company based on a partnership. Through Start

⁵³ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.7.2019, p. 80–104-see article 16.

⁵⁴ EUID

⁵⁵ Commission Implementing Regulation (EU) 2015/884 of 8 June 2015 establishing technical specifications and procedures required for the system of interconnection of registers established by Directive 2009/101/EC of the European Parliament and of the Council (OJ L 144, 10.6.2015, p. 1) and Annex

⁵⁶ <http://pubdocs.worldbank.org/en/165711456838073531/WDR16-BP-Estonian-eGov-ecosystem-Vassil.pdf> visited on 2nd November, 2020

⁵⁷ In the period from 1.1.2019. to 31.12. 2019. in Republic of Croatia there were: 6957 entities established through HITRO.HR; 18 through e-establishment (START) system and 8475 entities were established 'in person'.

¹ⁿ the period from 1.1.2020. to 1.11. 2020. in Republic of Croatia there were: 5974 entities established through HITRO.HR; 694 through e-establishment (START) system and 3405 entities were established 'in person'; Source: Ministry of justice and administration of Republic of Croatia

system and HITRO.HR system you can establish only company based on capital. And not all types but just „društvo s ograničenom odgovornošću“ and „jednostavno društvo s ograničenom odgovornošću“.

HITRO.HR is a portal intended for quick communication between business subjects and the state administration.⁵⁸ It allows entrepreneurs to carry out online certain procedures for registering particular types of companies. The entry into force of the Regulation on the method of entry in the court register⁵⁹ through e-Company services enables the electronic establishment of limited liability companies with share capital in cash from any Notary or HITRO.HR office in the Republic of Croatia to any of Commercial courts 24 hours a day 7 days a week. Notary public compiles minutes of establishment, the application for registration of the company into the court registry, and a statement regarding the absence of debts. The documents must be signed and certified by Public Notary who fills in an electronic application through eCompany service (if the Notary Public uses one). After that, all necessary documents can be submitted to HITRO.HR through eCompany service or can be brought personally. In the case of company establishment through HITRO.HR service all founders and other persons whose signatures are to be verified must be present. For foreign nationals who don't speak Croatian, there must be a court interpreter for the language present. Registration documentation sealed by the Public notary can be submitted to the HITRO.HR. HITRO.HR can deliver documents for court registration and the Croatian Bureau of Statistics for you. You can make the payment of court fees and the initial capital at HITRO.HR. At the HITRO.HR counter you receive an RPS Form which you have to fill out in order to obtain Registration by sector from Croatian Bureau of Statistics. There are no costs of entering into the Register of Business Entities. Once the registration is approved HITRO.HR staff contacts the founder in order to take over the incorporation documents.

HITRO.HR is upgraded through the e-Company service (on-line registration of a limited liability company).⁶⁰ The e-Company is implemented in collaboration with the Ministry of Justice, Central State office of e-Croatia, Commercial courts, Croatian Chamber of Public Notaries, and Financial agency. It is based on the Instruction on the Conditions and Manner of Establishing Electronic Communication with the Court Registry⁶¹ and its Changes. By e-Company service, all Court registers became available from any HITRO.

⁵⁸ <https://www.hitro.hr/en/about-us> visited on 2nd November, 2020

⁵⁹ Official gazette no. 22/12

⁶⁰ <https://www.hitro.hr/en/e-company> visited on 2nd November, 2020

⁶¹ Official gazette no. 40/07, 62/08, 107/08, 20/09

HR office or Public Notary office within Croatia enabling clients to have their company registered within 24 hours.

Advantages of using e-Company service: the procedure is shortened to 24 hours; registration is enabled from any HITRO.HR or Public Notary office to any Court registry in Croatia, access to the Court registry through a protected system, secure, reliable technology solution, use of Advanced digital signature for authentication and encryption purpose, process control and automatization speeds up the procedure and eliminates mistakes, documents received by the system are automatically saved into the Court's digital case file, tracking of the cases in the system enables transparency. A quality system is developed that can be further developed.

The public notary can perform company registration by himself without the mediation of HITRO.HR.⁶²

The Ministry of Justice has developed the second service - the electronic service e-establishment, which is integrated into the information system for starting a business START, through which it is possible to remotely establish the most common forms of company. This created the conditions for electronic access to the court register and the commercial court via the Internet with the use of the National Identification and Authentication System.

In December 2019 the e-registration (e-establishment) of companies was introduced. It is available through the E-Citizen system and without the requirement of visiting a public notary. Croatian citizens can start a business online, i.e. start a private limited company (d.o.o.), a simple private limited company (j.d.o.o.), and a craft (sole proprietorship) with information system START.⁶³ START is an information system providing services as a one-stop-shop. A simplified service provides background connection of the former procedures

⁶² Economy Profile of Croatia Doing Business 2020 Indicators (in order of appearance in the document) Starting a business Procedures, time, cost and paid-in minimum capital to start a limited liability company (<https://www.doingbusiness.org/content/dam/doingBusiness/country/c/croatia/HRV.pdf>)

²⁰²⁰ Croatia made starting a business easier by abolishing the requirements to reserve the company name and obtain director signatures for company registration, and by reducing the paid-in minimum capital requirement.

²⁰¹⁷ Starting a Business: Croatia made starting a business more difficult by increasing notary fees.

²⁰¹⁵ Starting a Business: Croatia made starting a business easier by reducing notary fees.

²⁰¹¹ Croatia eased business start-up by allowing limited liability companies to file their registration application with the court registries electronically through the notary public.

²⁰⁰⁸ Croatia made starting a business easier by enhancing the services of the one-stop shop

⁶³ <http://psc.hr/en/establishment/>

into a single procedure and is available 24/7. The financial cost of starting a private limited company (d.o.o.) is significantly lower. There are no more costs of public notaries, proxies, seals, and tax stamps. The court fee is 50% lower if it is paid electronically. For starting a private limited company (d.o.o.) 1/4 of the initial capital may be paid at the beginning in the amount of 5.000,00 HRK, while the rest (up to 20.000,00 HRK) needs to be paid in full within a year after the company has been registered. There is no separate fee for using the system and no fees to the banks or institutions for a variety of approvals that are required in other systems. The business will start within a few days only. The founders may be dislocated and everyone may fill out the e-forms from their own address and city. Croatian citizens need to possess an e-ID and activated personal user box within the e-Citizens system. The authority responsible for the START system is the Ministry of the Economy and Sustainable Development.

Since START is available so far only for Croatian citizens, all others (EU/EEA + foreigners) need to register business via HITRO.HR service and notary. Before registration by HITRO.HR or commercial court authentication in any public notary office is still required.

Advantages of establishing company on line are: all necessary actions are performed without physically going to the commercial court, the Tax Administration or the Central Bureau of Statistics; no more booking a company name; the participation of a notary public in the procedure is not required; no signature deposit; all submissions are submitted electronically; signing documents with an electronic ID card; payment of share capital by bank cards via the Internet (a deposit is made to a special account managed by the Ministry of Justice); payment of court fees by bank cards via the Internet; the application for registration is automatically submitted through the system to the competent court; the commercial court issues a Decision on establishment on the form of an electronic document; in addition to the Court Decision, the party also receives a Certificate from the Tax Administration on the OIB and a Notice on the classification of the business entity in the register of the Central Bureau of Statistics; if it is necessary to supplement or correct the application, the commercial court submits a conclusion via the e-establishment system and the applicant returns the corrected application to the court for reconsideration through the same channel; the service is available 24 hours 7 days a week via the Internet; lower establishment costs - court fees for electronic services are reduced by 50%, and in certain situations (d.o.o. with several founders) the possibility of initial payment of only 1/4 share capital; after the business account of the company is opened, the paid-in share capital is automatically transferred to the company.

From mid-April 2020, business entities and citizens have been enabled to obtain an official excerpt from the court register electronically, to facilitate business.⁶⁴

From 14th April 2020. until 8th May 2020, 1031 e-excerpts were issued via the court register website, while in the same period notaries issued 4959 excerpts.⁶⁵

3. CROSS BORDER DIRECTIVE – MERGERS, DIVISIONS, AND CONVERSIONS

3.1. THE PROPOSAL OF THE DIRECTIVE ON CROSS-BORDER OPERATIONS

In the absence of a reliable EU legal framework for cross-border divisions and conversions, and as a result of inefficiencies in the current EU rules for cross-border mergers, companies have difficulty in accessing markets in the other Member States and often need to find expensive alternatives to direct procedures.⁶⁶ This can deter them, particularly if they are SMEs, from doing cross-border business. Relevant stakeholders (employees, creditors, minority shareholders, and other third parties) are faced with uncertainty as to their rights and protections in cross-border situations. The divergent national conflict-of-law rules contribute to this situation.

For the last 30 years, cross-border mobility of companies is an issue that has been obtaining attention in the EU.⁶⁷ From the wording of articles 49 and 54 of the Treaty on the Functioning of the European Union,⁶⁸ it should be understood that companies should benefit from freedom of establishment. But in practice, the scope of freedom of establishment is not so understandable.

⁶⁴ [https://pravosudje.gov.hr/vijesti/e-izvadak-iz-sudskog-registra/21811-Web page of Ministry of justice and administration](https://pravosudje.gov.hr/vijesti/e-izvadak-iz-sudskog-registra/21811-Web%20page%20of%20Ministry%20of%20justice%20and%20administration)– visited on November 2nd, 2020

⁶⁵ Ministry of justice and administration

⁶⁶ 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- COM/2018/241 final - 2018/0114 (COD)

⁶⁷ Judgment ECLI:EU:C:1988:456 – C-81/87 The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc

⁶⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, Official Journal C 326 , 26/10/2012 P. 0001 - 0390

Because of that, harmonized rules for cross-border conversions are supported by all stakeholders, in particular all those who replied to the 2017 public consultation.⁶⁹ Cross-border divisions are supported by the Member States, businesses, notaries, but not by trade unions. The need to revise the Cross-border Mergers Directive is acknowledged by all respondents, except notaries, although respondents consider it a lower priority. Concerning conflict-of-laws, the Member States and businesses that replied to the 2017 consultation support the proposed measures, while trade unions and notaries do not see the need for EU action.

New rules on cross-border divisions and conversions are expected to save between €12 000 and €37 000 per operation for divisions and €12 000 and €19 000 per operation for conversions, although the exact cost reductions will depend on the final procedural rules adopted and on the related compliance costs.⁷⁰ A positive social impact is expected to result from the protection of rights related to employee participation and from improved information for employees in cross-border operations. Creditors and minority shareholders would benefit from harmonized protection and thus legal certainty. The conflict-of-law rules would improve legal certainty and thus bring economic benefits. Increased cross-border operations could result in a net reduction in the number of companies in some Member States and a net increase in others. This might have a negative impact on taxation in some Member States, but this should be mitigated by the introduction of safeguards against the risks of social and tax abuse.

The possibility to operate beyond national borders is a part of the natural life-cycle of the company⁷¹. This includes the option to carry out a cross-border merger, division, or conversion, offers them an important chance to survive and grow e.g. by having new business opportunities in other EU countries, by reorganizing, cutting organizational costs, or adapting to changing market conditions. For example, a survey carried out in 2016⁷² found out that 22% of the business executives had immediate plans for expansion in the internal market.

⁶⁹ Commission staff working document impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and 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, SWD/2018/141 final - 2018/0113 (COD)

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² EY Attractiveness Survey, 2016, 1,469 executives participated in the survey. MS covered by the study were Germany, France, the Netherlands, the UK, Belgium or Portugal.

The situation before the Directive on cross border operations⁷³ concerning cross-border corporate mobility provided a very fragmented picture across the EU. Before Directive 2019/2121 EU legal framework provided rules only for cross-border mergers of companies, while cross-border divisions and conversions were subjected to national rules if such rules existed at all. Besides, it was not always certain which law applied to the internal functioning of companies with operations in more than one Member State. Since there were no harmonized rules at the EU level, the case-law of the Court of Justice has developed the principles, based on freedom of establishment, especially related to cross-border conversions,⁷⁴ but also to the recognition of companies incorporated in another Member State.⁷⁵ In its judgments, the court has always stated that it is for the legislator to establish a detailed procedure/rules.⁷⁶

3.2. THE DIRECTIVE ON CROSS-BORDER CONVERSIONS, MERGERS, AND DIVISIONS

The EU Directive 2019/2121 of the European Parliament and Council amending the former Directive 2017/1132 on cross-border conversions, mergers and divisions was published in the Official Journal of the European Union a year ago, on 12 December 2019. The Directive must be implemented by all Member States until 31 January 2023. It introduces a harmonized regime for cross-border transformations namely those involving more than one Member State. For the first time divisions and conversions are included. Until now, only cross-border mergers have been subject to harmonized rules.⁷⁷ The provisions

⁷³ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

⁷⁴ CJEU cases VALE, Cartesio, Polbud

⁷⁵ CJEU cases Centros, Überseering, Inspire Art

⁷⁶ The case law on freedom of establishment uncertainty in practice is nowadays mostly the result of uncertain national laws and less because of lack of harmonization. Member States are free to determine the connecting factors and should respect each other's choices. Since it will be more and more difficult to determine where the real seat of an internationally operating company is located, harmonization will probably follow bottom-up over time into the direction of the incorporation theory. After Überseering, e.g. Germany changed to the incorporation theory. More about freedom of establishment see: Horak, Dumančić, Šafranko: THE FREEDOM OF ESTABLISHMENT - WHAT DOES THE PROPOSAL OF THE FOURTEENTH COMPANY LAW DIRECTIVE BRING INTO THE EUROPEAN UNION LAW? Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33 No. 2, 2012.

⁷⁷ First in Directive 2005/56/EC and then consolidated in Directive 2017/1132

for cross-border mergers of limited liability companies have been included in the Croatian Companies Act in 2007.

The Directive set out an identical process for the three legal operations. What is important is that information can be submitted online, the ‘one-time, last time’ principle applies. That means that information only has to be submitted once and information can be placed on the website as an alternative.

As a consequence of a cross-border operation, members often face a situation whereby the law applicable to their rights changes because they become members of a company governed by the law of a Member State other than the Member State the law of which was applied to the company before the operation.⁷⁸ Member States should, therefore, at least provide for members holding shares with voting rights and who voted against the approval of the draft terms to have the right to exit the company and receive cash compensation for their shares that is equivalent to the value of those shares. The Directive provides various forms of protection for shareholders, creditors, and employees. In addition to the right to information, special provisions apply to each stakeholder. Besides the right of approval in the general meeting, the most important protection for shareholders is the right of a sell-out in cases where shareholders would become shareholders in a foreign company as a result of the legal operation.

Regarding cross-border conversions, the new regulation aims to allow companies established under the law of one Member State to convert into a company governed by the law of another Member State, assuming that the conditions foreseen by the law of such other Member State are satisfied, with particular reference to the criteria therein provided, such as connecting factors to the national legal system.⁷⁹ The most important is the introduction of harmonized

⁷⁸ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

⁷⁹ Freedom of establishment is one of the fundamental principles of Union law. Under the second paragraph of Article 49 of the Treaty on the Functioning of the European Union (‘TFEU’), when read in conjunction with Article 54 of the TFEU, the freedom of establishment for companies or firms includes, *inter alia*, the right to form and manage such companies or firms under the conditions laid down by the legislation of the Member State of establishment. This has been interpreted by the Court of Justice of the European Union as encompassing the right of a company or firm formed in accordance with the legislation of a Member State to convert itself into a company or firm governed by the law of another Member State, provided that the conditions laid down by the legislation of that other Member State are satisfied and, in particular, that the test adopted by the latter Member State to determine the connection of a company or firm with its national legal order is satisfied (Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44)

substantive rules, which operate in relation to the safeguard of shareholders, creditors, and employees, intending to ensure a “minimum level of protection” for their interests.⁸⁰ As a consequence of the cross-border conversion, the company resulting from the conversion (the ‘converted company’) should retain its legal personality, its assets, and liabilities, and all its rights and obligations, including any rights and obligations arising from contracts, acts, or omissions.⁸¹ In particular, the converted company should respect any rights and obligations arising from contracts of employment or employment relationships, including any collective agreements. The procedure requires the management body of the company to be converted to prepare a plan for cross-border conversion and a report for members and employees justifying the operation in legal and economic terms. Each Member State will have to appoint the competent authority, says the Directive, to verify if the cross-border conversion procedure is regular for the part governed by the law of the Member State of departure. The competent authority has to issue a pre-conversion certificate⁸² which will be recognized by the Member State of destination and will constitute proof that all of the applicable conditions have been met and that all procedures and formalities in the Member State of departure have been fulfilled. The pre-conversion certificate should be shared through the system of interconnection of registers.⁸³

⁸⁰ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

⁸¹ Ibid.

⁸² If the competent authority of the Member State of departure comes to the conclusion that the cross-border operation is lawful, the national competent authority will issue the pre-operation certificate. A pre-operation certificate can be declined on one of the following grounds: (1) the cross-border operation does not comply with the national legislation of the Member State of departure or not all necessary procedures and formalities of the Member State of departure have been completed, or (2) the cross-border operation could be used for abusive or fraudulent purposes leading to or aimed at evading or circumventing European Union or national law, or criminal purposes (the anti-abuse check). After the pre-operation certificate is transmitted to the Member State of destination. The competent authority of the Member State of destination will thereafter check whether the cross-border operation fully complies with its relevant national legislation –<https://www.burenlegal.com/en/news/directive-cross-border-mergers-conversions-and-divisions-has-been-adopted> visited on 13th November, 2020

⁸³ To enhance the transparency of cross-border operations, it is important that the registers of the Member States involved contain the necessary information from other registers about the companies involved in those operations in order to be able to track the history of those companies. In particular, the file in the register in which the company was registered prior to the cross-border operation should contain the new registration number attributed to that company after the cross-border operation. Similarly, the file in the register in which the company is registered after the cross-border operation should contain the initial registration number attributed to the company prior to the cross-border operation – Directive (EU) 2019/2121 of

As a consequence of the cross-border merger, the assets and liabilities and all rights and obligations, including any rights and obligations arising from contracts, acts, or omissions, should be transferred to the acquiring company or the new company, and the members of the merging companies who do not exercise their exit rights should become members of the acquiring company or the new company respectively.⁸⁴ In particular, the acquiring company or the new company should respect any rights and obligations arising from contracts of employment or employment relationships, including any collective agreements.

As a consequence of the cross-border division, the assets and liabilities and all rights and obligations, including any rights and obligations arising from contracts, acts, or omissions, should be transferred to the recipient companies in accordance with the allocation specified in the draft terms of division, and the members of the company being divided who do not exercise their exit rights should become members of the recipient companies, should remain members of the company being divided or should become members of both. In particular, recipient companies should respect any rights and obligations arising from contracts of employment or employment relationships, including any collective agreements.

In all cases (conversions, mergers, and divisions) the registered office will have to move to the destination Member State. Whether this also applies to the so-called real seat depends on the conflict of law theory applied by the country of destination.

The most noticeable provision, newly introduced, in the Directive, relates to the prevention of abuse. Where the competent authority has serious doubts indicating that the cross-border operation is set up for abusive or fraudulent purposes, the assessment should consider all relevant facts and circumstances, and should take into account, where relevant, at a minimum, indicative factors relating to the characteristics of the establishment in the Member State in which the company or companies are to be registered after the cross-border operation, including the intention of the operation, the sector, the investment, the net turnover and profit or loss, the number of employees, the composition of the balance sheet, the tax residence, the assets and their location, equipment, the beneficial owners of the company, the habitual places of work of

the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

⁸⁴ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions PE/84/2019/REV/1, OJ L 321, 12.12.2019, p. 1–44

the employees and of specific groups of employees, the place where social contributions are due, the number of employees posted in the year prior to the cross-border operation, the number of employees working simultaneously in more than one Member, and the commercial risks assumed by the company or companies before and after the cross-border operation.⁸⁵ The assessment can include the requirement of an independent expert report. So, if the competent authority believes that the cross-border operation could be used for abusive, fraudulent, or criminal purposes, the competent authority will have an additional three months for further assessment.

3.3. CROSS BORDER OPERATIONS IN CROATIA

Croatian legislation does not provide solutions for the cross-border conversion or division of a Croatian limited liability company into the European Union equivalent at this moment. All cross-border conversions or divisions involving a Croatian limited liability entity are therefore currently based on the case-law of CJEU regarding the freedom of establishment.⁸⁶ But also based on this new Directive. Croatian Companies Act⁸⁷ has provisions only on cross border mergers and acquisitions. Cross-border mergers and acquisitions are regulated by Articles 549.a to 549.k of Companies Act. With the Amending Companies Act from 2007. the Republic of Croatia has implemented the Cross-Border Directive on mergers and acquisitions. These articles entered into force on the day of Croatia's accession to the EU. Croatian law has no entry restrictions when it comes to cross-border mergers and acquisitions if it is about capital companies that are validly established under the law of an EU. In December 2013, with amendments to the Court Register Act,⁸⁸ the registration rules on the implementation of cross-border merger registration are regulated in more detail. The Republic of Croatia has created a substantive and procedural legal framework for implementation registration of cross-border mergers and acquisitions and we are expecting that it will be the same with the new rules.

⁸⁵ Ibid.

⁸⁶ Cartesio, Vale and Polbud

⁸⁷ Official gazette no 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19

⁸⁸ Official gazette no 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, 91/10, 90/11, 148/13, 93/14, 110/15, 40/19

MBS	The name of the subject ⁸⁹	STATUS
40001012	BKS Bank, dioničko društvo	deleted
40020883	Valamar Riviera dioničko društvo za turizam	active
40085253	MAJDATEKSTIL društvo za proizvodnju tekstila i trgovinu, društvo s ograničenom odgovornošću u stečaju	deleted
60177947	KOMPAS YACHTING društvo s ograničenom odgovornošću za nautiku, turizam i putničku agenciju	deleted
60260869	Loipart društvo s ograničenom odgovornošću za trgovinu i usluge	deleted
60334938	KSENIJA jednostavno društvo s ograničenom odgovornošću za ugostiteljstvo i usluge u stečaju	deleted
60350350	DOMUS REAL ESTATE d.o.o. za usluge, turistička agencija	active
60359769	MARKO I TOMO jednostavno društvo s ograničenom odgovornošću za ugostiteljstvo u stečaju	deleted
80000604	INA-INDUSTRIJA NAFTE, d.d.	active
80027461	OLYMPUS d.o.o. za trgovinu	deleted
80136413	Thyssenkrupp Dizala d.o.o.	deleted
80373087	LM TRADE d.o.o. za trgovinu	deleted
80406871	Enikon Aerospace d.o.o. za projektiranje, nadzor, proizvodnju i usluge	active
80458785	SOPOT ADRIATIC društvo s ograničenom odgovornošću za poslovanje nekretninama	deleted
80642294	Koios savjetovanje društvo s ograničenom odgovornošću za analitička informatička rješenja	active
80655516	KD životno osiguranje dioničko društvo	deleted
80664076	CUPA-KAMEN d.o.o. za trgovinu	deleted
80727047	Agro LDCII d.o.o. za usluge	deleted
80750758	SVEA EKONOMI društvo s ograničenom odgovornošću	active
80892140	Tieto društvo s ograničenom odgovornošću za usluge	deleted
80979356	MONSENA d.o.o. za trgovinu i usluge	active
81065536	ADRIA ENERGO društvo s ograničenom odgovornošću za	active
81083771	ROI CONSEILLER d.o.o. za poslovno savjetovanje	active
81087994	Fortuna Virtual d.o.o. za usluge	deleted
120003758	NORD PRODUKT d.o.o. za proizvodnju, trgovinu i usluge	active
130061911	SUN TECHNOLOGY društvo s ograničenom odgovornošću za trgovinu i usluge u likvidaciji	deleted
130063361	TEHNIČKI SUSTAVI DVA društvo s ograničenom odgovornošću za trgovinu i usluge u likvidaciji	deleted
130070795	RIORDINAMENTO MOTORI d.o.o. za trgovinu	active
130084331	OMEGA DIFFUSION društvo s ograničenom odgovornošću za trgovinu i usluge	active

⁸⁹ 29: total number of cross-border mergers and acquisitions in the territory of the Republic of Croatia in the period 2013-2020. Status 'active' means that company in the Republic of Croatia was (is) 'take over company' and it is 'active' on 30th November, 2020. Status 'deleted' means different things: that a company was deleted on the grounds of cross-border merger, or any other grounds (bankruptcy, liquidation, etc.) that happened after the merger/acquisition. Source: Ministry of justice and administration.

4. CONCLUSION

Practitioners in the justice sector, as we judges are, confront difficult challenges in sorting through how the flood of different e-justice technologies affects accessibility, legitimacy, legality. These judicial values are crucial determinants of the quality of justice and the adoption of e-justice technologies, such as BRIS, e-establishment, etc., should depend on how they affect those values.

The aforementioned digital tools in Croatia are another small, but significant, part of a comprehensive and inevitably long-lasting process of digitalization that brings citizens closer to the judiciary, facilitates navigation and exercise of rights in the legal system. This is especially important in times when the Croatian economy is shaken by pandemics and natural disasters, such as earthquakes, which require citizens to be responsible and refrain from unnecessary social contacts because it saves valuable time, resources and does not distract from business processes. The plan for the future in Croatia is to enable the submission of applications for all other proceedings (establishment of other entities and forms of companies, registration of changes of entities, delivery of announcements) in the court register in electronic form. The digital transformation will fully enable the electronic business of the court and secure access to the court via the Internet.

The concern of the authors of this paper is that the Directive on digital tools would skip the bodyguard role that notaries and courts have in deterring fraud through fake or hidden identities and fraudulent document submission. The digitalization of registration (establishment) of companies is widely considered as very important, without a doubt. But at what cost?

The Directive on cross border operations removes obstacles to the freedom of establishment of EU companies. Would it be effective? We will wait and see. Digitalization strongly interacts with procedures as effective digital communication between the business registers through the BRIS would enable them to establish a clear point in time to which a company merges, divides, and converts cross-border and changes its legal form.

The biggest challenge would be in the building and/or adapting infrastructures to allow for the use of digital tools and processes in company law. Positive outcomes require proper design and management of information and communications technology driven judicial and other reforms. Once again, technology should be in the function of the law, a law should benefit from it. Balance and protection are what these two directives represent and what we have to have in mind when implementing them in national legislation.

LITERATURE

1. Horak, Hana; Dumančić, Kosjenka; Poljanec, Kristijan; Vuletić, Dominik: European Market Law - Handbook (Vol.I) Voronezh/Zagreb: Voronezh State University, Faculty of Law; University of Zagreb, Faculty of Economics and Business, 2014.
2. Horak, Hana; Dumančić, Kosjenka; Poljanec, Kristijan: European Market Law Textbook, Vol. 1. / Horak, Hana (ur.), Zagreb: Ekonomski fakultet Sveučilišta u Zagrebu, 2015.
3. Horak, Hana; Dumančić, Kosjenka; Pecotić Kaufman, Jasminka: Uvod u europsko pravo društava, Zagreb: Školska knjiga, 2010.
4. Horak, Hana; Dumančić, Kosjenka: Harmonisation of the Croatian Company Law with *acquis communautaire* of the European Union u: Horak, Hana; Bodiroga Vukobrat Nada; Dumančić, Kosjenka; Šafranko, Zvonimir (ur.), Hrvatsko i europsko pravo društava/Croatian&European Company Law, Zbornik radova/Proceedings, Zagreb, 2012. - Horak, Hana; Dumančić, Kosjenka, Usklađivanje u području prava društava Republike Hrvatske s pravnom stečevinom EU, Pravo i porezi, 20:5/2011, p. 86-93
5. Horak, Poljanec: Neusklađenost prava pripajanja i spajanja na unutarnjem tržištu EU kao prepreka slobodi poslovnog nastana, 20 godina primjene Zakona o trgovačkim društvima u interdisciplinarnom okruženju, Zagreb, Hrvatska, 2015.
6. Horak, H.; Dumančić, K., Cross-Border Transfer of the Company Seat: One Step Forward, Few Steps Backward, *US-China L. Rev.* 711 (2017), pp. 711 – 728
7. Horak, Dumančić, Šafranko: The freedom of establishment - what does the proposal of the fourteenth company law directive bring into the European Union law? Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 33 No. 2, 2012.
8. Bregeš, Jakupak: Digitalization of Business Register, *InterEULawEast : journal for the international and european law, economics and market integrations*, Vol. 4 No. 2, 2017., p. 91-99
– DOI: <https://doi.org/10.22598/iele.2017.4.2.6>

LEGAL ACTS

1. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences, Official Journal C 326, 26/10/2012 P. 0001 – 0390
2. Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law OJ L 169, 30.6.2017, p. 46–127;

3. Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ L 186, 11.7.2019, p. 80–104;
4. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, p. 1–44
5. Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies, OJ L 258, 1.10.2009, p. 20–25
6. Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, p. 1–9
7. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21
8. Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1–9
9. Regulation (EU) 2018/1724 establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, OJ L 295, 21.11.2018, p. 1–38
10. Proposal for a Directive of the European parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law COM/2018/239 final - 2018/0113 (COD) – including Annex
11. 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- COM/2018/241 final - 2018/0114 (COD)
12. Commission Implementing Regulation (EU) 2015/884 of 8 June 2015 establishing technical specifications and procedures required for the system of interconnection of registers established by Directive 2009/101/EC of the European Parliament and of the Council (OJ L 144, 10.6.2015, p. 1) and Annex
13. Companies Act (Official gazette 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19)
14. Court Register Act (Official gazette 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, 91/10, 90/11, 148/13, 93/14, 110/15, 40/19)
15. Regulation on the method of entry in the court register (Official gazette 22/12)
16. The Conditions and Manner of Establishing Electronic Communication with the Court Registry (Official gazette 40/07, 62/08, 107/08, 20/09)

OTHER SOURCES

1. Final Report - Assessment of the impacts of using digital tools in the context of cross-border company operations, Everis, December 2017
2. Commission staff working document impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and 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, SWD/2018/141 final - 2018/0113 (COD)
3. Analysis of the proposed Directive on “the use of digital tools and processes in company law” Briefing paper series on the Company Law Package Sig Vitols, WZB and ETUI (svitols@etui.org)
4. Communication EU eGovernment Action Plan 2016-2020 - Accelerating the digital transformation of government COM(2016)179 EUe
5. DRAFT: COMMISSION IMPLEMENTING REGULATION (EU) .../... 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) 2015/884 and Annex

WEB SITES REFERENCES

1. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en
2. <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-digital-technologies-in-company-law>
3. <https://ec.europa.eu/digital-single-market/en/node/81744>
4. <http://pubdocs.worldbank.org/en/165711456838073531/WDR16-BP-Estonian-eGov-ecosystem-Vassil.pdf> visited on 2nd November, 2020
5. <https://www.hitro.hr/en/about-us> visited on 2nd November,2020
6. <https://www.hitro.hr/en/e-company> visited on 2nd November, 2020
7. <https://www.doingbusiness.org/content/dam/doingBusiness/country/c/croatia/HRV.pdf>
8. <http://psc.hr/en/establishment/>
9. <https://pravosudje.gov.hr/vijesti/e-izvadak-iz-sudskog-registra/21811>
10. <https://www.burenlegal.com/en/news/directive-cross-border-mergers-conversions-and-divisions-has-been->

11. <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-digital-technologies-in-company-law>
12. https://ec.europa.eu/info/publications/ey-study-assessment-and-quantification-drivers-problems-and-impacts-related-cross-border-transfers-registered-offices-and-cross-border-divisions-companies_en
13. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2018%3A142%3AFIN>
14. <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/v103et9ib5zq#p1>
15. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en
16. <https://engage.dhsc.gov.uk/digitalpassport/tools/>

