COMPANY LAW

European company law is partially codified in Directive (EU) 2017/1132 relating to certain aspects, and Member States continue to operate separate company acts, which are amended from time to time to comply with EU directives and regulations. The ongoing efforts for establishing a modern and efficient company law and corporate governance framework for European undertakings, investors and employees aim to improve the business environment in the EU.

LEGAL BASIS

Articles 49, 50(1) and (2)(g) TFEU; Article 54 TFEU, second paragraph; Articles 114, 115 and 352 TFEU.

OBJECTIVES

An effective corporate governance framework creates a positive EU-wide business environment in the internal market. The objective of harmonising company law is to promote the achievement of freedom of establishment (Title IV, Chapter 2 TFEU) and to implement the fundamental right laid down in Article 16 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business within the limits of Article 17 of the Charter (right to property) (4.1.2).

Article 49, second subparagraph TFEU guarantees the right to take up and pursue activities in a self-employed capacity and to set up and manage undertakings, in particular companies or firms (2.1.4).

The purpose of EU rules in this area is to enable businesses to be set up anywhere in the EU enjoying the freedom of movement of persons, services and capital (2.1.3), to provide protection for shareholders and other parties with a particular interest in companies, to make businesses more competitive, and to encourage businesses to cooperate over borders (2.1.5).

Since the internal market implies the creation of Europe-wide companies and there are around 24 million companies in the EU, of which approximately 80% are limited liability companies. While around 98-99% of limited liability companies are SMEs, companies must be able to act throughout the EU according to a uniform legal framework.

ACHIEVEMENTS

A. A minimum set of common obligations

Although there is no codified European company law as such, harmonisation of the national rules on company law has created some minimum standards and covers areas such as the protection of interests of shareholders and their rights, rules on takeover bids for public limited companies, branch disclosure, mergers and divisions, minimum rules for single-member private limited liability companies, financial reporting and accounting, easier and faster access to information on companies, and certain disclosure requirements for companies.

1. Setting up a company, capital and disclosure requirements

The First Council Directive (68/151/EEC) dates back to 1968 and has been amended many times (most recently by Directive 2012/17/EU and Directive (EU) 2017/1132). It aims to give the public easier and faster access to information on companies and deals, among other things, with the validity of obligations entered into by a company and nullity of the company. It applies to all public and private limited liability companies. A second Council Directive (77/91/EEC of 1976, replaced by Directive 2017/1132/EU) relates only to public limited liability companies; the constitution of such companies requires a minimum amount of authorised capital (currently EUR 25 000) as security for creditors and a counterpart to the limited liability of members. There are also rules on maintaining and modifying the capital and a minimum content requirement for public limited liability companies' instruments of incorporation. The 12th Company Law Directive (2009/102/EC of 16 September 2009) provides a framework for single-member private limited liability companies where all shares are held by a single shareholder.

2. Company operations involving more than one country

The 11th Company Law Directive (89/666/EEC, as amended) introduces disclosure requirements for foreign branches of companies. It covers EU companies that set up branches in another EU country or companies from non-EU countries setting up branches in the EU. Council Directive 2014/86/EU of 8 July 2014 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States introduces tax rules which are neutral from the point of view of competition for groups of companies of different Member States. There is no double taxation of dividends distributed by a subsidiary in one Member State to its parent company in another (see also Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital).

Directive 2004/25/EC on takeover bids aims to establish minimum guidelines for the conduct of takeovers of companies governed by the laws of Member States. It sets minimum standards for takeover bids or changes of control and aims to protect minority shareholders, employees and other interested parties. Directive 2012/17/EU deals with the interconnection of central, commercial and companies registers (business registers). It amended three company law directives — 89/666/EEC, 2005/56/EC and 2009/101/EC (now all repealed and replaced by Directive (EU) 2017/1132 of 14 June 2017). In addition, Commission Implementing Regulation (EU) 2015/884 sets

out technical specifications and procedures required for the system of interconnection of business registers.

3. Company restructuring (domestic mergers and divisions, transfer of seat)

Shareholders and third parties have the same guarantees during restructuring of the company (mergers and divisions). Directive 2011/35/EU (repealing the Third Council Directive 78/855/EEC) concerning mergers between public limited liability companies) covers protection for shareholders, creditors and employees. The Sixth Council Directive (82/891/EEC) on the division of public limited liability companies (amended by Directive 2007/63/EC, regarding the requirement for an independent expert's report in the event of the merger or division of public limited liability companies, by Directive 2009/109/EC, in order to simplify the obligations as regards reporting and documentation requirements) has now been codified by Directive (EU) 2017/1132. It also covers protection for shareholders, creditors and employees. The 10th Company Law Directive (2005/56/EC) on cross-border mergers of limited liability companies is intended to facilitate cross-border mergers between companies with share capital. Transferring the registered office of a limited liability company from one Member State to another as well as merging or dividing it is an inherent aspect of the freedom of establishment guaranteed by Articles 49 and 54 TFEU (Cartesio ruling of the European Court of Justice[1]). However, the principle of freedom of establishment does not permit a company to move from its home Member State to another Member State while preserving its legal capacity. Parliament has therefore called on numerous occasions for a proposal on the cross-border transfer of seat ('14th Company Law Directive'). The question of cross-border transfer of registered office has not yet been resolved. In Case C-106/16 Polbud, the Court of Justice, in answer to a preliminary question, further specified the 'freedom of establishment', stating that it is applicable also to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purpose of its conversion. Concerning cross-border conversions, the Commission proposal of 25 April 2018 seeks to allow companies to convert the legal form they have in one Member State into a similar legal form in another Member State. This process should ensure: (i) that companies retain their legal personality throughout the procedure, without being obliged to dissolve or wind up in the Member State of departure, and (ii) that they constitute a new entity in the Member State of destination. Companies are to take a decision at a general meeting on whether to pursue the cross-border conversion. That decision, together with the relevant information and documents, would then be submitted to the competent national authority of the Member State of departure, which is responsible for deciding whether or not to issue a pre-conversion certificate.

Concerning cross-border mergers, the proposal seeks to address shortcomings by providing in particular for harmonised rules for the protection of creditors and shareholders. The company should provide, in the cross-border transformation project, the protection it intends to provide to creditors and shareholders. Creditors not satisfied with the protection offered could apply to the appropriate administrative or judicial authority for adequate safeguards. Shareholders who have not voted for cross-border

[1]Judgment of 16.12.2008, *Cartesio*, Case C-210/06, ECLI:EU:C:2008:723, paragraphs 111-113 (CJEU).

mergers or do not have voting rights would have the right to end their connection with the company (sell their shares) and receive adequate compensation.

Concerning allowing any capital company to carry out a cross-border division, the Commission proposal seeks to simplify procedures. The objectives remain similar to cross-border conversions: (i) to enable companies to divide cross-border in an orderly, efficient and effective manner; and (ii) to protect the most affected stakeholders, such as employees, creditors and shareholders, in a suitable and proportionate manner.

4. Guarantees concerning the financial situation of companies

To ensure that information provided in accounting documents is equivalent in all Member States, the Fourth, Seventh and Eighth Directives (78/660/EEC, 83/349/EEC and 84/253/EEC) were replaced by Directives 2013/34/EU and 2006/43/EC requiring company accounts (annual accounts, consolidated accounts and approval of persons responsible for carrying out statutory audits) to give a true and fair view of the company's assets, liabilities, financial position and profit or loss. Regulation (EC) No 1606/2002 on the application of international accounting standards harmonises the financial information presented by publicly traded companies in order to guarantee protection for investors. Directive 2013/34/EU also introduced the obligation for EU listed companies to provide a corporate governance statement in their annual report. Directive 2006/43/EC aims to improve the reliability of the financial statements of companies by establishing minimum requirements for the statutory audit of annual and consolidated accounts. Directive 2009/49/EC simplifies the financial reporting requirements for micro-enterprises in order to enhance their competitiveness and release their growth potential. Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings (based on Article 81 TFEU on civil law cooperation) helps to resolve conflicts of jurisdiction and laws and ensures the recognition of judgments across the EU. It does not harmonise substantive insolvency laws of the Member States; rather, it simply establishes common rules on the court competent to open insolvency proceedings, the applicable law, and the recognition of the court's decisions. The main objective is to avoid the transfer of assets or judicial proceedings from one Member State to another. The current Commission proposal of December 2016 for a directive on preventive restructuring frameworks[2] (or 'second chance for entrepreneurs') would help increase the efficiency of restructuring, insolvency and discharge procedures.

5. The cross-border exercise of shareholders' rights

Directive 2007/36/EC (amended by Directives 2014/59/EU and (EU) 2017/828) on the exercise of certain rights of shareholders in listed companies abolishes the main obstacles to a cross-border vote in listed companies that have their registered office in a Member State, by introducing specific requirements for a certain number of shareholder rights at the general meeting. It also sets out certain rights for shareholders in listed companies, including timely access to relevant information on general meetings and easier proxy voting. Directive (EU) 2017/828 encourages shareholder engagement, and introduces requirements in relation to identification of shareholders, transmission of information, facilitation of exercise of shareholders' rights, transparency of institutional

[2]COM(2016) 723 final

investors, asset managers and proxy advisors, remuneration of directors and related party transactions.

B. EU legal entities

European legal entities apply throughout the EU and coexist with the national ones.

1. The European Company (SE)

After a long period of stalemate (the negotiations lasted 30 years), the Council adopted the two legislative instruments necessary for the establishment of a European company, namely Regulation (EC) No 2157/2001 on the Statute for a European company and Directive 2001/86/EC supplementing the Statute with regard to the involvement of employees in the European company. This enables a company to be set up within the territory of the EU in the form of a public limited liability company, known by the Latin name 'Societas Europaea' (SE). Several options are made available to undertakings of at least two Member States which wish to set themselves up as an SE: merger, establishment of a holding company, formation of a subsidiary, or conversion into an SE. The SE must take the form of a company with share capital. In order to ensure that such companies are of reasonable size, a minimum amount of capital is set, i.e. not less than EUR 120 000.

Directive 2001/86/EC is aimed at ensuring that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of that SE.

2. The European Cooperative Society (SCE)

Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) puts in place a genuine single legal statute for the SCE. It enables a cooperative to be established by persons resident in different Member States or by legal entities established under the laws of different Member States. With a minimum capital of EUR 30 000, these new SCEs can operate throughout the single market with a single legal personality, set of rules and structure.

Directive 2003/72/EC supplements this statute with regard to the involvement of employees in the SCE, in order to ensure that the establishment of an SCE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of that SCE.

3. European Economic Interest Grouping (EEIG)

Council Regulation (EEC) No 2137/85 sets out a statute for European Economic Interest Groupings (EEIGs). The EEIG, which is endowed with legal capacity, enables a company in one Member State to cooperate in a joint venture (for example, to facilitate or develop the economic activities of its members, but not to make profits for itself) with companies or natural persons in other Member States, the profits being shared between the members. An EEIG may not invite investment by the public.

4. Single-member private limited liability company (SUP)

On 10 April 2014, the Commission submitted a proposal (COM(2014) 0212) for a Directive of the European Parliament and of the Council on single-member private limited liability companies (Societas Unius Personae). The objective of this proposal

would be to make it easier to set up such a company with a single shareholder in the EU across borders between Member States.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has always succeeded in amending legislation, e.g. defending worker participation in companies or making progress in the creation of the various forms of European companies in order to facilitate the cross-border activities of enterprises. In February 2007, Parliament therefore asked the Commission to present a proposal for a European private company adapted to the needs of SMEs and to prepare for a review of the European company statute in order to simplify procedures for the constitution of such companies. Following the withdrawal of the two proposals for regulations on a European association and mutual society, Parliament has invited the Commission to resurrect these projects. It has also called for an appropriate legal framework for foundations and associations. On 8 February 2012, the Commission proposed a Council Regulation on the Statute for a European Foundation, 'Fundatio Europaea' (FE), designed to make it easier for such organisations to work for the public good anywhere in the EU.

In its resolution of 14 June 2012 on the future of European company law, Parliament took the view that EU company forms supplementing the existing forms available under national law have considerable potential and should be further developed. Parliament urged the Commission, in order to serve the specific needs of SMEs, to make further efforts with a view to the adoption of the Private Company Statute (SPE). In response to the Commission communication on the matter, in February 2013 Parliament adopted a resolution on a renewed EU strategy for corporate social responsibility. Parliament's resolution of 14 March 2013 on the Statute for a European mutual society contained recommendations to the Commission on such a statute. Finally, the EP has on numerous occasions called for a directive on the cross-border transfer of company seats, through various resolutions and oral questions deploring the current lack of common rules that undermine corporate mobility and thus freedom of establishment[3]. On 25 April 2018, the Commission finally proposed new company law rules to facilitate the conversions, mergers and divisions of companies within the Single Market (amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions).[4]

In April 2014, the Commission presented a proposal for a directive on single-member private limited liability companies with a view to facilitating the creation of companies with a single shareholder across the EU (on 7 March 2015 the Commission withdrew this proposal).

In Parliament's resolution of 13 June 2017 on cross-border mergers and divisions, attention was drawn to the rights of minority shareholders and rules on creditor protection, as well as to the lengthy and complex procedures required for cross-border divisions.

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[3]For example: resolution of 25 October 2007 on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat (OJ C 263 E, 16.10.2008, p. 671); resolution of 13 June 2017 on cross-border mergers and divisions (Texts adopted, P8_TA(2017)0248).
[4]COM(2018)241

A number of petitions dealing with digitalisation of EU company law and cross-border operations have been received by Parliament. The Committee on Petitions usually asks the Commission to provide relevant information or give its opinion on the points raised by the petitioner. (4.1.5.).

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