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Council of Bars and Law Societies of Europe
The voice of European Lawyers

Rue Joseph II, 40/8 - B-1000 Brussels
+32 (0)2 234 65 10 | ccbe@ccbe.eu | www.ccbe.eu

Proposal for a Directive amending Directive 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law (COM (2023) 177 final)

12/05/2023

EXECUTIVE SUMMARY

- The CCBE welcomes the proposed Directive and supports the objectives put forward by the European Commission to expand and upgrade the use of digital tools and processes in EU company law and increase transparency of companies information at European level. As a way to improve the text of the proposal, the CCBE would like to refer to the comments below, in particular:

- **Involvement of lawyers**: It is important that the proposal also refers to the role played by lawyers in company law along notaries, in compliance with Member States' legal traditions. In preamble 9, it should be added the possible involvement of notaries "and of lawyers" as well, when dealing with administrative or judicial control.

- **Types of companies and partnerships covered by the proposal**: The CCBE notes that the term of "commercial partnerships" is not defined in the proposal and might not be appropriate as certain Member States do not have the distinction between "commercial" and "civil" or other partnerships. It could be more appropriate to characterise such partnerships as "for-profit partnerships" and to clarify whether the intention of the legislator is to include all companies with an economic purpose or only those which intend to, or are able to, distribute dividends to their members (see below points 6.1 and 6.2).

- **Group of companies**: The CCBE believes that a number of technical amendments would be beneficial in this regard (see below points 3 to 3.5).

- **EU Company Certificate**: This is a new element put forward in the proposal which would require additional information currently not provided in the business register, the CCBE would thus welcome that the text clarifies the type of information to be provided therein (see below point 4).

- **EU Power of Attorney**: The CCBE believes that the text of the proposal should be clarified as regard the national requirements for drawing up the digital EU power of attorney (see below point 5.1).

- **Safeguard in case of reasonable doubt:** The CCBE would like to gain more clarity on the option provided for in the proposal for a register (under certain conditions laid down in Article 16e(2)) to refuse a request by another register to validate/confirm a copy/extract/information (see below point 7.1).

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE has considered the Commission proposal of 29 March 2023 for *a Directive amending Directive 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law (COM (2023) 177 final*)[1] and wishes to congratulate the Commission for taking up this initiative and putting forward this proposal.

The CCBE supports the objectives put forward by the European Commission and recognises a number of positive and modern elements attached to the proposal. With this paper, the CCBE would like to share its observations in relation to the text of the proposed Directive.

In this context, the CCBE has identified several provisions (see below) of the proposal where we see a need for further clarification and amendments. The CCBE would welcome the opportunity to discuss in details these provisions.

Comments

1. PREVENTIVE CONTROL

Preamble 9

It talks about administrative or judicial control, respecting member states traditions including the possible involvement of notaries. It should be added “and of lawyers” as well.

2. CENTRAL ADMINISTRATION & PRINCIPAL PLACE OF BUSINESS

Preamble 14; Art 14(b)[l & m]; Art. 14a(q & r); Art. 28

The proposal suggests that companies also publish in the register the place of their “central administration” and “principal place of business”, if any of these are in a different member state than the registered office. As the existent CJEU case law has already shown in private international law disputes concerning the application of Rome I and II Regulations (interpretation of the company’s domicile) as well as of the Brussels I Regulation (recast) and the Cross-border Insolvency law regulation (interpretation of COMI “Centre of Main Interests”) especially in relation to the term “central administration”, this must be assessed based on several factors not always easily ascertainable. We are concerned about the proposal that such information should be published in the business register as we think it may be (intentionally or unintentionally) misleading for stakeholders. It might also create uncertainty about where certain documents should be served on the company: where at its registered office or the place stated as the central administration or principal place of business. We consider

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A177%3AFIN

that for purposes of disclosure in the business register (the issue of what should be disclosed to authorities is completely different) the obligation to disclose the registered office is appropriate as it is objectively identifiable and does not require any prior legal or factual analysis.

It should be noted that there is no harmonisation among the laws of the Member States regarding the applicable criteria that are necessary in order to establish where the "central administration" or the "principal place of business" are located. If the proposed Directive is to continue to require companies to disclose these locations, it should clarify whether these terms are EU company law terms independent from any national company laws as well as from other laws such as insolvency, tax law or international private law where the same or similar terms are used and, if so, what the definition is for this purpose.

3. GROUPS OF COMPANIES

3.1. Preamble (17-21)

The CCBE expresses its concern about the administrative cost of the disclosure obligation in relation to groups of companies as in many Members States there is no such obligation at present.

3.2. Article 14b(1)(d)

This refers to "the name of the group", if different from the name of the ultimate parent company. The CCBE is not sure that a group will necessarily have a name. If it does not, what should be disclosed? The same point applies to article 14b(5) (a) and (b).

3.3. Article 14b(2-5) & Article 28

What if the EU subsidiary is unable to provide the required information about the group (e.g., the group refuses to produce the information) and the parent company and other intermediate companies are in third countries?

3.4. Article 14b(3)

This requires disclosure of "the proportion of the capital held between the ultimate parent company and all the subsidiary companies of the group". We do not think it is clear what this means, and this should be clarified. For example, if ultimate parent A holds 100% of the shares in B which holds 80% of the shares in C, is it enough just to provide this information (which we think should be the answer) or is it necessary to show what proportion A holds indirectly in C?

3.5. Article 14b(8)

This requires a subsidiary to disclose a change within 2 weeks of the change occurring, but the subsidiary may not know of the change. Perhaps an obligation could be added on any parent to notify the subsidiary of the change – but if the parent is outside the EU, this may not be enforceable. Alternatively, we suggest that the requirement should be to disclose a change within 2 weeks of learning of the change. This could, perhaps, be coupled with an obligation on the subsidiary to check the position once a year, but this might be onerous for a subsidiary in a large group.

4. EU COMPANY CERTIFICATE

Article 16b

This requires information to be included in the EU Company Certificate, but not all the information is information that a company is required to provide to the register, e.g. (f)(g) (j) and (n). Should the drafting only require this to be included if the register includes it? (k) does not seem to deal with a case where a person represents the company (rather than persons as a body or as members of a body are authorised to represent the company).

5. EU POWER OF ATTORNEY

5.1 Article 16c

This says the national requirements for drawing up the digital EU power of attorney shall at least include "the verification of the identity, legal capacity and authority to represent the company of the person granting the power of attorney". We do not think it is clear what this means. It is the company that is the legal person that grants the power of attorney. Is it intended to mean the person who is authorised by the national law to act on behalf of the company to grant the power of attorney for the company (e.g., a director of the company)? It is not clear how the identity is to be verified and whether this is a matter which is left to national law. It would be helpful to clarify this.

5.2 Article 16c(3)

This does not give a time period to file the power of attorney and it would be helpful to add this.

5.3 Article 16c(4)

This does not deal with a charge for access and the CCBE thinks this should be clarified. Any such charge should be proportionate to the actual cost for the register.

6. TYPES OF COMPANIES AND PARTNERSHIPS COVERED BY THE PROPOSAL

6.1. Preamble (15 & 16)

The proposed Directive introduces certain disclosure obligations for "commercial" partnerships. The term is however not defined. The use of such term might not be appropriate as certain Member States do not have the distinction between "commercial" and "civil" or other partnerships. Also, the notion of "commercial" might not be interpreted in the same way among the Member States. It might be more appropriate to characterise these partnerships as for-profit partnerships and to clarify whether the intention of the legislator is to include all companies with an economic purpose (as applicable under art. 54 TFEU) or only those which intend to, or are able to, distribute dividends to their members.

6.2. Annexes II & IIB

Is the intention of the EU legislator to provide disclosure obligations which will apply to all types of EU companies with limited liability and to all types of "commercial" partnerships (existing or which might be legislated in the future) under the laws of the Members States, or is the intention that the relevant provisions are exclusively applicable to the types of companies mentioned in Annexes II & IIB although e.g. other types of companies with limited liability might exist under national law? The question is also relevant for the disclosure obligation introduced for groups, in the event that types of companies which are not included in the annexes are involved (if they do not have the disclosure obligations provided in Directive 2017/1132/EU if they are not included in these annexes).

7. OTHER ISSUES

7.1. Safeguards in case of reasonable doubt - Article 16e (2)(subparagraph 2) & (4)

We understand that the purpose of paragraph 2(subparagraph 2) which gives the right to a register under certain conditions laid down in paragraph 2(subparagraph 1) to refuse a request by another register to validate/confirm a copy/extract/information is to prevent requests from registers to other registers without proper reason and hence to avoid the overburdening of those registers by the registers of other Member States. However, paragraph 4 allows the register requesting the validation/confirmation to refuse to accept the said copy/extract/information if the authenticity of the copies and extracts is not confirmed. This right to refuse to accept the copies/extracts, even in a case where the requesting authority's request for confirmation is not reasonable, would create a situation where the persons wishing to use these documents will not be able to do so because of the "dispute" or miscommunication between the registers. Such a "conflict" should be avoided. The CCBE suggests that paragraph 4 should be redrafted, so that a requesting authority may only decide not to accept documents and information where the register to which the request is made has confirmed that the authenticity of the copies and extracts is not confirmed. This would mean that there would be a presumption of validity. It is also suggested that, if an authority makes a request to another registry because of a reasonable doubt as to the origin and authenticity of a document, they should have to notify the person submitting those documents to them if the other register does not confirm their authenticity within 5 working days of receiving notice that the other register does not confirm their authenticity.

7.2. Exemption of translation - Article 16f (1)

It is not clear if the cases where a translation is not to be required in (a), (b) and (c) are alternatives. If so, it would be helpful to add "or" at the end of (b).