



# Harmonisation

- By means of **Directives**
  - **Common standards** addressed to the MS, **not** common directly applicable **rules**
  - MS have the **option** to choose among the possible solutions offered by the Directive
  - Original project of **14 EC-CL** directives
  - **Differential scope of application** (Partnerships & Companies, Just companies, Just some company forms...)

# The original project (1961-1964)

#	Subject	First adoption	Current version
1 <sup>st</sup>	Disclosure, nullity, interest of third parties (acting on behalf of the company)	68/151/EEC	2017/1132/EU (2009/101/EC)
2 <sup>nd</sup>	Capital formation and maintenance	77/91/EEC (1976)	2017/1132/EU (2012/30/EU)
3 <sup>rd</sup>	Mergers of domestic companies	78/855/EEC	2017/1132/EU (2011/35/EU)
4 <sup>th</sup>	Annual accounts	78/660/EEC	2013/34/EU
5 <sup>th</sup>	Corporate governance	--	1972-1993-1991 †
6 <sup>th</sup>	Divisions of domestic companies	82/991/EEC	2017/1132/EU (previously amended by Dir 2007/63/EC)
7 <sup>th</sup>	Consolidated accounts	83/349/EEC	2013/34/EU

# The original project (1961-1964)

#	Subject	First adoption	Current version
8 <sup>th</sup>	Audit of annual and consolidated accounts	84/253/EEC	2006/43/EC (amended by dir 2014/56/EU) + Reg2014/537/EU
9 <sup>th</sup>	Groups of companies	--	1974-1984 †
10 <sup>th</sup>	Cross-border mergers	2005/56/EC	2017/1132/EU
11 <sup>th</sup>	Branches	1989/666/EEC	2017/1132/EU
12 <sup>th</sup>	Single members companies	89/667/EEC	2009/102/EC
<del>13<sup>th</sup></del>	Takeover bids	2004/25/EC	=
<del>14<sup>th</sup></del>	Cross-border transfer of registered office	--	2017/1132/EU (2019/2121/EU)

## And beyond...

- **Online constitution** (Companies – mainly private – Directive 2019/1151/EU)
- **Prospectus** (Financial Markets, 2003/71/EC)
- **Admission to Stock Exchange Listing** (Financial Markets, 2001/34/EC)
- **Shareholders' rights in listed companies** (Financial Markets, SRD1 2007/36/EC, SRD2 2017/828/EU)
- **MiFiD** (Markets in Financial Instruments Directive (Financial Markets, 2004/39/EC -> 2014/63/EU + Reg. 600/2014/EU)



## A couple of notes

- In the most recent directives, there is not the ordinal number anymore (e.g.: the so called 13<sup>th</sup> directive is not «officially» the 13<sup>th</sup> directive)
- The same for the amendments, or codified versions of directives that originally had the ordinal number (so for the First directive, or the Fourth and Seventh, or the Twelfth...)
  - The problem does not exist any longer for rules included in the codified directive



# Major news from 2017 on

- First, Second, Third, Sixth, Tenth and Eleventh Directives have been **codified** in Directive (EU) 2017/1132 (June 14, 2017), hereinafter: CodDir
- **Digitalisation (in the establishment)**: Directive (EU) 2019/1151, amending CodDir
- **Cross-border conversion and division**; amendment to cross-border mergers: Directive (EU) 2019/2121, amending CodDir
- **SRD2** (2017/828/EU)
- **New initiatives on sustainability** (NFS in 2014, and under amendment; Corporate Sustainability due diligence proposal, February 2022)

# Scope of application

Directive	Public companies	Private companies	Partnerships
1 <sup>st</sup> CODI	Yes	Yes	NO
2 <sup>nd</sup> CODI	Yes	NO	NO
3 <sup>rd</sup> CODI	Yes	NO	NO
4 <sup>th</sup> – 7 <sup>th</sup>	Yes	Yes	Yes – NO
6 <sup>th</sup> CODI	Yes	NO	NO
8 <sup>th</sup>	depending	depending	depending
10 <sup>th</sup> CODI	Yes	Yes	NO
11 <sup>th</sup> CODI	Yes	Yes	NO
12 <sup>th</sup>	Yes	Yes	NO
13 <sup>th</sup>	Yes	NO	NO
Beyond	Yes (only listed)	NO	NO



## This means that...

- **Top-down harmonisation** only works where a **directive** provides for that
- **Partnership** are basically **not harmonised**... but perhaps they do not need it
- **Private companies** are «freer» than public ones... but nothing prevents **bottom-up harmonisation**...
- To sum up: harmonisation is for many, but not for everyone!





# Harmonised... but not the same!

Regulatory competition reigns over...

- Private companies
- Public companies as for...
  - **Minimum capital requirement** (just above EUR 25,000...)
  - **Structure** (one-tier/two-tier)
  - **Debentures**
  - **Lifting the corporate veil**
  - ...

# Who has interest in harmonisation?

- **Third parties** (disclosure)
- **Investors** (Capital markets [prospectus, MiFiD, Takeover bids, ...], shareholders' rights, ...)
- The **system as a whole** (auditors)
- **SMEs?**
  - The answer is blowing in the wind of Corporate governance, Groups, and so on with failed initiatives...



# Harmonisation via Directives

- **Opt-in/opt-out**
- An original system?
  - The kingdom of comparative law in action
  - Pieces from different national experiences: **almost nothing comes out of the blue**
- Some kind of Frankenstein's monster, but, perhaps...





## In general, thus...

- Harmonisation should be seen as a sort of **cherry picking** of the best (or most meaningful) **European experiences** in different Company Law areas
- With a view to **attain[ing] freedom of establishment** by removing domestic obstacles



# As the system is incomplete...

...it deals just with **a few topics**; among the others:

- **Disclosure**
- **Validity vs. third parties in general** (nullity, representation)
- **Extraordinary operations** (mergers, divisions, in their disclosure meaning, and with a view to cross-border dimension)
- **Accountings** and **auditing** (disclosure, again)
- **Digitalisation** (but not always)



# As the system is incomplete...

- **Legal capital & shares**
- **Branches** (disclosure, again and again)
- **Single member companies**
- **Corporate governance & shareholders' rights** in listed companies
- **Takeover bids...**



# No agreement (yet...) for a few key issues

- Corporate governance
- Groups of companies
- Cross-border private company forms





# Therefore, three pillars!

EU action in MS' company law is based on **three pillars**.

1. Directives
2. Regulations
3. Decisions



# Therefore, three pillars!

## Art. 288 TFEU

*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but **shall leave to the national authorities the choice of form and methods.**

A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

*Recommendations and opinions shall have no binding force.*



# It looks quite easy, isn't it?

...but don't worry. It isn't.

For instance, on the one hand, **Regulations are not always directly self executive**;

on the other hand, **Directives could, sometimes, be directly applicable**;

and as for **Decisions**, one has to be patient...

...but they are the most meaningful part when it comes to the **interpretation of ECL**



# The origins: the first directive

- Also called «disclosure directive» (DD)
  - But it does not deal with just disclosure
- Proposal: 1964; Adoption: 1968; Amendment (lastly): 2003;  
Consolidated versions: 2009 + 2012; **Codification 2017**
- Official number: **Directive 2017/1132/EU - CodDir (arts 7-12;  
14-28; 161, 163, 165, annex 2)**
- Scope of application: **all the limited liability companies**
  - i.e.: **public and private companies**



## Annex 2 CodDir (art. 1 DD)

- List of company forms, but...
- ...what about if a MS introduces a new company form in the meanwhile? Automatic extension? Or not?
  - The case of French SAS and the Second Directive



# Key topics of DD

Disclosure (Arts 14-28 CodDir [Arts 2-7 DD])

&

Validity (in order to protect third parties) (Arts 7-9 CodDir [8-10 DD]: validity of obligations; Arts 10-12 CodDir [11-13 DD]: nullity)



# 1) Nullity

- ECL only deals with **registered companies**
  - Before registration: just domestic law
- Very restricted list of grounds for nullity. Why?

# Grounds for nullity

## Art. 11(b) CodDir [Art. 12(b) DD]

*The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:*

...

*(b) nullity may be ordered only on the grounds:*

*(i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;*

*(ii) that the objects of the company are unlawful or contrary to public policy;*

*(iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;*

*(iv) of failure to comply with provisions of national law concerning the minimum amount of capital to be paid up;*

*(v) of the incapacity of all the founder members;*

*(vi) that, contrary to the national law governing the company, the number of founder members is less than two.*



## ICC Art. 2332

Nullità della società

Avvenuta l'iscrizione nel registro delle imprese, la nullità della società può essere pronunciata soltanto nei seguenti casi:

- 1) mancata stipulazione dell'atto costitutivo nella forma dell'atto pubblico;
- 2) illiceità dell'oggetto sociale;
- 3) mancanza nell'atto costitutivo di ogni indicazione riguardante la denominazione della società, o i conferimenti, o l'ammontare del capitale sociale o l'oggetto sociale.

## FrCodComm Art. 235-1

La nullité d'une société ou d'un acte modifiant les statuts ne peut résulter que d'une disposition expresse du présent livre ou des lois qui régissent la nullité des contrats. **En ce qui concerne les sociétés à responsabilité limitée et les sociétés par actions, la nullité de la société ne peut résulter ni d'un vice de consentement ni de l'incapacité, à moins que celle-ci n'atteigne tous les associés fondateurs.** La nullité de la société ne peut non plus résulter des clauses prohibées par l'article 1844-1 du code civil.





## Just a few notes:

- Subparagraph vi is obsolete (see SMC Directive)
- Nullity as exceptional measure: grounds restricted and not extensible
- The problem is in particular with the concept of «contrary to public policy» under subparagraph ii
  - *de iure* violation, not *de facto* violation, form over substance in this case, principle of proportionality

# Declaration of nullity

## Arts 11(a)+12 CodDir [Arts 12(a)+13 DD]

*The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions:*

*(a) nullity must be ordered by decision of a court of law;*

...

*1. The question whether a decision of nullity pronounced by a court of law may be relied on as against third parties shall be governed by Article 16. Where the national law entitles a third party to challenge the decision, he may do so only within six months of public notice of the decision of the court being given.*

*2. Nullity shall entail the winding-up of the company, as may dissolution.*

*3. Nullity shall not of itself affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up.*

*4. The laws of each Member State may make provision for the consequences of nullity as between members of the company.*

*5. Holders of shares in the capital of a company shall remain obliged to pay up the capital agreed to be subscribed by them but which has not been paid up, to the extent that commitments entered into with creditors so require.*

## ICC Art. 2332

La dichiarazione di nullità non pregiudica l'efficacia degli atti compiuti in nome della società dopo l'iscrizione nel registro delle imprese.

I soci non sono liberati dall'obbligo di conferimento fino a quando non sono soddisfatti i creditori sociali.

La sentenza che dichiara la nullità nomina i liquidatori.

La nullità non può essere dichiarata quando la causa di essa è stata eliminata e di tale eliminazione è stata data pubblicità con iscrizione nel registro delle imprese.

Il dispositivo della sentenza che dichiara la nullità deve essere iscritto, a cura degli amministratori o dei liquidatori nominati ai sensi del quarto comma, nel registro delle imprese.



# Key issues

- Court decision
- Just *ex nunc* effects
- Liquidation procedure (national laws)
- Shareholders not automatically free from the duty of contributions

## 2) Validity of obligations before registration

### Art 7.2 CodDir [Art. art 8 DD]

*2. If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefor, unless otherwise agreed.*

### ICC Art. 2331

Per le operazioni compiute in nome della società prima dell'iscrizione sono illimitatamente e solidalmente responsabili verso i terzi coloro che hanno agito. Sono altresì solidalmente e illimitatamente responsabili il socio unico fondatore e quelli tra i soci che nell'atto costitutivo o con atto separato hanno deciso, autorizzato o consentito il compimento dell'operazione.

Qualora successivamente all'iscrizione la società abbia approvato un'operazione prevista dal precedente comma, è responsabile anche la società ed essa è tenuta a rilevare coloro che hanno agito.



## Key issues

- Before registration
- The problem of *Vorgesellschaft*
- In substance: in whose name the activity has been carried out? The future company? And existing pre-company?
- ECL simply sets the consequences, not the theoretical framework
- «unless otherwise agreed»: acts on behalf (not «in the name») of *Vorgesellschaft*, for instance.



## 3) Representation

- *Appointment* regulated by national laws
  - But, currently, the disqualification of directors is included (art. 13i)
- *Effects* harmonised by the DD
- For enhancing at the utmost third parties' (not other shareholders') *reliance* at a EU level
- Basic principle: *unrestricted representation power*
- MS can set both general and particular exceptions



## Art 9.1 CodDir (Art. 10.1 DD)

1. Acts done by the organs of the company shall be binding upon it **even if those acts are not within the objects of the company**, unless such acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it. Disclosure of the statutes shall not of itself be sufficient proof thereof.

### ICC, Art. 2384

Il potere di rappresentanza attribuito agli amministratori dallo statuto o dalla deliberazione di nomina è generale.



## Key issues

- Even *ultra vires* activities are binding the company towards third parties (not the shareholders)
- Questionable under Italian Law (perhaps *ultra vires* activities are to be considered as voluntary restrictions, which can be opposed to third parties not in *bona fide*, see below)
- Possible in other legal system a general exception re. *ultra vires*, but simple articles' disclosure is not enough
- Possible exception (general) according to **MS Law** when the activity is out of general powers of representatives -> Third parties have to know it





## Art. 9.2 & .3 CodDir (Art. 10.2 & .3 DD)

*2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may not be relied on as against third parties, even if they have been disclosed.*

*3. If national law provides that authority to represent a company may, in derogation from the legal rules governing the subject, be conferred by the statutes on a single person or on several persons acting jointly, that law may provide that such a provision in the statutes may be relied on as against third parties on condition that it relates to the general power of representation; the question whether such a provision in the statutes can be relied on as against third parties shall be governed by Article 16.*

### ICC Art. 2384

Le limitazioni ai poteri degli amministratori che risultano dallo statuto o da una decisione degli organi competenti non sono opponibili ai terzi, anche se pubblicate, salvo che si provi che questi abbiano intenzionalmente agito a danno della società



## Key issues

- Art. 9.2 CodDir [10(2) DD] does not deal with *exceptio doli*; that's why the Italian rule is acceptable (cases in which the third party was not in *bona fide* are not dealt with)
- Art. 9.3 CodDir [10(3) DD] : exceptional individual or joint representation, where allowed, can be relied on as against third parties under general disclosure conditions (see also art. 8 CodDir: «Completion of the formalities of disclosure of the particulars concerning the persons who, as an organ of the company, are authorised to represent it shall constitute a bar to any irregularity in their appointment being relied upon as against third parties unless the company proves that such third parties had knowledge thereof»)

## 4) Directors' disqualification (Art. 13i CodDir)

1. **Member States shall ensure that they have rules on disqualification of directors.** Those rules shall include providing for the possibility **to take into account** any disqualification that is in force, or information relevant for disqualification, in another Member State. For the purpose of this Article, directors shall at least include the persons referred to in point (i) of Article 14(d).

2. Member States may require that **persons applying to become directors declare** whether they are **aware of any circumstances** which could lead to a disqualification **in the Member State concerned.**

Member States **may refuse** the appointment of a person as a director of a company where that person is **currently disqualified from acting as a director in another Member State.**

3. Member States shall ensure that they are **able to reply to a request** from another Member State for **information relevant for the disqualification of directors** under the law of the Member State replying to the request.

## 4) Directors' disqualification (Art. 13i CodDir)

4. In order to reply to a request referred to in paragraph 3 of this Article, Member States shall at least make the **necessary arrangements to ensure that they are able to provide without delay information** on whether a given person is disqualified or is recorded in any of their registers that contain information relevant for disqualification of directors, by means of the system referred to in Article 22. Member States may also exchange further information, such as on the period and grounds of disqualification. **Such exchange shall be governed by national law.**

5. The Commission shall lay down **detailed arrangements and technical details** for the exchange of the information referred to in paragraph 4 of this Article, by means of the implementing acts referred to in Article 24.

6. Paragraphs 1 to 5 of this Article **shall apply mutatis mutandis where a company files information concerning the appointment of a new director in the register referred to in Article 16.**

## 4) Directors' disqualification (Art. 13i CodDir)

7. The personal data of persons referred to in this Article shall be processed in accordance with Regulation (EU) 2016/679 and national law, in order to **enable the authority or the person or body mandated under national law to assess necessary information** relating to the disqualification of a person as a director, with a view to preventing fraudulent or other abusive behaviour and ensuring that all persons interacting with companies or branches are protected.

Member States shall ensure that the registers referred to in Article 16, authorities or persons or bodies mandated under national law to deal with any aspect of online procedures **do not store personal data transmitted for the purposes of this Article any longer than is necessary**, and in any event no longer than any personal data related to the formation of a company, the registration of a branch or a filing by a company or branch are stored.

## 4) Directors' disqualification (Art. 13i CodDir)

Key issues:

- Substantive rules on disqualification: MS, but...
  - Include the *possibility* to **take into account** any *disqualification* “that is in force, or information relevant for disqualification” in another MS
  - Rules must be applied also at the appointment of a new director
- Director's statement on *the MS concerned*
  - The MS *may refuse* the appointment of a person disqualified in another MS
    - General basis? Differentiated basis?
      - And even if it is on a general basis: regulatory competition
    - Just *currently*?

## 4) Directors' disqualification (Art. 13i CodDir)

- Paragraph 3: may I disqualify in Italy a French citizen on the basis of a disqualification ground present in French Law?
  - And, even worse: a German citizen on the basis of a disqualification ground present in Poland?
- As of today, everything's up to MS's transposition
- Let's try to make this compatible with GDPR...



## 5) Disclosure

- **Duty to transfer information** from company to third parties -  
> liability in the case of lack of, or even wrong, compliance
- **Actual possibility of access to information** (Business registers and interconnection)
- **Balance between privacy and transparency** -> a clear preference for disclosure, in order to provide third parties with a useful protection system (mandatory disclosure)





# The areas of disclosure

- *Accounts* (IV, VII Directives)
- *Capital market* (XIII, Shareholders' rights, MiFID, ... Directives)
- *Mergers & Divisions* (III, VI, X Directives: now CodDir)
- *Branches* (XI Directive: now CodDir)
- *Limited liability for SMC* (XII Directive)
- *Share capital* (II Directive: now CodDir)
- *General framework in I Directive* (items, subjects, effects) - CodDir



# One disclosure...

... for three mainstream issues:

- Company's relationships with **third parties**
- Major company's **structural changes**
- **Right shareholders** are granted in listed companies and reliance on as against the company



# Items to be disclosed

## Art.14 CodDir [Art. 2 DD]

*Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:*

- (a) the instrument of constitution, and the statutes if they are contained in a separate instrument;*
- (b) any amendments to the instruments referred to in point (a), including any extension of the duration of the company;*
- (c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date;*
- (d) the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body:
  - (i) are authorised to represent the company in dealings with third parties and in legal proceedings; it shall be apparent from the disclosure whether the persons authorised to represent the company may do so alone or are required to act jointly;*
  - (ii) take part in the administration, supervision or control of the company;**



# Items to be disclosed

*(e) at least once a year, the amount of the capital subscribed, where the instrument of constitution or the statutes mention an authorised capital, unless any increase in the capital subscribed necessitates an amendment of the statutes;*

*(f) the accounting documents for each financial year which are required to be published in accordance with Council Directives 86/635/EEC and 91/674/EEC and Directive 2013/34/EU of the European Parliament and of the Council;*

*(g) any change of the registered office of the company;*

*(h) the winding-up of the company;*

*(i) any declaration of nullity of the company by the courts;*

*(j) the appointment of liquidators, particulars concerning them, and their respective powers, unless such powers are expressly and exclusively derived from law or from the statutes of the company;*

*(k) any termination of a liquidation and, in Member States where striking off the register entails legal consequences, the fact of any such striking off.*



# Additional provisions: Arts 3 & 4 CodDir (2 & 3 DD)

## Article 3

*The statutes or the instrument of incorporation of a company shall always give at least the following information:*

*(a) the type and name of the company;*

*(b) the objects of the company;*

*(c) where the company has no authorised capital, the amount of the subscribed capital;*

*(d) where the company has an authorised capital, the amount thereof and also the amount of the capital subscribed at the time the company is incorporated or is authorised to commence business, and at the time of any change in the authorised capital, without prejudice to Article 14(e);*

*(e) in so far as they are not legally determined, the rules governing the number of, and the procedure for, appointing members of the bodies responsible for representing the company vis-à-vis third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies;*

*(f) the duration of the company, except where this is indefinite.*

# Additional provisions: Arts 3 & 4 CodDir (2 & 3 DD)

## Article 4

*The following information at least shall appear in either the statutes or the instrument of incorporation or a separate document published in accordance with the procedure laid down in the laws of each Member State in accordance with Article 16:*

*(a) the registered office;*

*(b) the nominal value of the shares subscribed and, at least once a year, the number thereof;*

*(c) the number of shares subscribed without stating the nominal value, where such shares may be issued under national law;*

*(d) the special conditions, if any, limiting the transfer of shares;*

*(e) where there are several classes of shares, the information referred to in points (b), (c) and (d) for each class and the rights attaching to the shares of each class;*

*(f) whether the shares are registered or bearer, where national law provides for both types, and any provisions relating to the conversion of such shares unless the procedure is laid down by law;*



## Additional provisions: Arts 3 & 4 CodDir (2 & 3 DD)

*(g) the amount of the subscribed capital paid up at the time the company is incorporated or is authorised to commence business;*

*(h) the nominal value of the shares or, where there is no nominal value, the number of shares issued for a consideration other than in cash, together with the nature of the consideration and the name of the person providing the consideration;*

*(i) the identity of the natural or legal persons or companies or firms by which or in whose name the statutes or the instrument of incorporation, or where the company was not formed at the same time, the drafts of those documents, have been signed;*

*(j) the total amount, or at least an estimate, of all the costs payable by the company or chargeable to it by reason of its formation and, where appropriate, before the company is authorised to commence business;*

*(k) any special advantage granted, at the time the company is formed or up to the time it receives authorisation to commence business, to anyone who has taken part in the formation of the company or in transactions leading to the grant of such authorisation.*



## Additional provisions: Accounts

- What deals with Accounts is in IV directive, applicable also to private companies (based on Art. 14(f) CodDir)
- Principles:
  - *Continuous information* (original + amendments + consolidated versions)
  - *Standalone information* (I Directive) and Articles' information on capital (II Directive)
  - *Management bodies'* (+ procedure) + *auditors' disclosure*
  - *Seat and Register*
  - *Winding up and termination*
  - *Shares and Founders*





# The key actors: 1. The Register

- Paper & electronic
- EBR (2007) and BRITE (below)
- Information available **in full** or **just extract** (Art 16a CodDir), by everybody *even without specific interest* (see *Dahiatsu* case: Case C-97/96)
  - Modified by Dir. (EU) 2019/1151
    - Possible just by paper for older documents (before 2007)
    - Prices not exceeding administrative costs
      - And some for free: see Art. 19.2
    - Always true copies as a default rule, even if electronic (modified in 2019); responsibility of MS for authentication, complying with Reg. (EU) 910/2014 (trust services)



## The key actors: 2. The Gazette

- *Additional* disclosure by means of *publication* in a national gazette (Art 16.3 CodDir, added by Dir. 2019/1151): the function is just to render quickly public the substantial content of a registration
  - Publication in national gazette, even just by extract
  - *Publication* is now to be read as *optional* “Member States may also require that some or all of those documents and information are published in a national gazette designated for that purpose, or by equally effective means”
    - In case of discrepancies: the information made available in the register prevails (art. 16.4); it makes sense, due to gazette's *new* optional nature
  - Alternative means also detailed by Art. 16.3

# The key actors: 3. The Business correspondence

## Art. 26 CodDir

*Member States shall prescribe that letters and order forms, whether they are in paper form or use any other medium, are to state the following particulars:*

*(a) the information necessary in order to identify the register in which the file referred to in Article 16 is kept, together with the number of the company in that register;*

*(b) the legal form of the company, the location of its registered office and, where appropriate, the fact that the company is being wound up.*

*Where, in those documents, mention is made of the capital of the company, the reference shall be to the capital subscribed and paid up.*

*Member States shall prescribe that company websites are to contain at least the particulars referred to in the first paragraph and, if applicable, a reference to the capital subscribed and paid up.*



# Negative effect of disclosure

Party which had to register cannot invoke changes: Art. 16.5  
CodDir

5. The documents and information referred to in Article 14 may be relied on by the company as against third parties **only after they have been disclosed** in accordance with paragraph 3 of this Article, **unless the company proves that the third parties had knowledge thereof.**

However, with regard to transactions taking place **before the sixteenth day following the disclosure, the documents and information shall not be relied on as against third parties** who prove that it was **impossible for them to have had knowledge thereof.**

Third parties may always rely on any documents and information in respect of which the disclosure formalities have not yet been completed, save where non-disclosure causes such documents or information to have no effect.



## So...

- Failure to register produces *negative effects*
  - Unless a *probatio diabolica* is given: "third party had knowledge thereof"
- 15 days of freezing period: even if the publication has been made, third party is allowed to prove that it was impossible to have the information
  - Some MS are even more liberal...



## Positive effects

Disclosure operates with an absolute presumption of knowledge, at least in many MS: this means that «The documents and information referred to in Article 14 may be relied on by the company as against third parties», save for the 15 days of freezing term.



# News on disclosure?

From 2019 (Dir. (EU) 2019/1151) on, all *online*!

- Unique identifier
- Art. 16.2 «All documents and information referred to in Article 14, irrespective of the means by which they are filed, shall be kept in the file in the register or entered directly into it in electronic form. Member States shall ensure that all documents and information that are filed by paper means are converted by the register to electronic form as quickly as possible»
- That's why the gazette turns out to be just optional
- Business Registers Interconnection System: interconnection of registers by means of a central platform (Art. 22)
  - Documents must be made available in the MS of registration's language, and may be made available in any official language of the EU (Art. 21.2); the original is preferred in case of discrepancy (Art. 21.4)



# Company's online constitution

- Novelty from Dir. (EU) 2019/1151, amending CodDir
    - Title I, Chapter III, Section IA, Arts 13g on
  - At least for private companies
  - General principle: it should be possible to establish a company fully online everywhere in the EU, with no need of a physical presence in the place where you want to establish the company
    - Problems with identification (e-IDAS requirements)
-





# Company's online constitution

- Online payment of capital and taxes
    - Problems with in-kind contributions
  - Company's registration in 5 days tops, if model articles are used (10 days otherwise)
  - Other company forms: optional
  - Principle of freedom of establishment in practice
  - MS implemented the Directive (not all of them...) by August 1<sup>st</sup>, 2021
-