



## 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)
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# 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
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## Former Eleventh directive – Branch Directive

- Official name: 89/666/EEC; now Arts 20.1 .2 .3; 29-42, 161 CodDir
- Just for branches? Yes, subsidiaries are already protected, as they have legal personality, they are formally autonomous companies
- The background is that the company is liable for the branch's obligations
- The purpose is always disclosure-related; it deals also with consolidated accounts directive (VII directive)



## Former Eleventh directive – Branch Directive

- The BRIS applies to branches, too
- The national gazette is now optional in this case, too
- Rules also on European branches of Third countries' companies
  - Now really relevant due to Brexit



## Key principles

- Same scope of application of I Directive, same effects, same means (Register)
- Just for cross-border branches
- Not relevant the business at the main seat (see *Centros* EUCJ decision; and perhaps the *Polbud* decision as well)



## Items to be disclosed : Art. 30.1 & .2

*1. The compulsory disclosure provided for in Article 29 shall cover the following documents and particulars only:*

*(a) the address of the branch;*

*(b) the activities of the branch;*

*(c) the register in which the company file referred to in Article 16 is kept, together with the registration number in that register;*

*(d) the name and legal form of the company and the name of the branch, if that is different from the name of the company;*

*(e) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings:*

*— as a company organ constituted pursuant to law or as members of any such organ, in accordance with the disclosure by the company as provided for in Article 14(d),*

*— as permanent representatives of the company for the activities of the branch, with an indication of the extent of their powers;*



## Items to be disclosed : Art. 30.1 & .2

*(f) – the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in accordance with disclosure by the company as provided for in Article 14(h), (j) and (k),*

*– insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;*

*(g) the accounting documents in accordance with Article 31;*

*(h) the closure of the branch.*

*2. The Member State in which the branch has been opened may provide for the disclosure, as referred to in Article 29, of*

*(a) the signature of the persons referred to in points (e) and (f) of paragraph 1 of this Article;*

*(b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, in accordance with points (a), (b) and (c) of Article 14, together with amendments to those documents;*

*(c) an attestation from the register referred to in point (c) of paragraph 1 of this Article relating to the existence of the company;*

*(d) an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities.*



## In addition...

- The information required not by directive, but by MS
  - but pay attention to the case *Inspire Art!*
- Accounts
- Translations may be required for acts of creation and accounts
- Practically the same duties are imposed over third Countries' branches (exceptions in matter of accounts)





# That's almost all...





## Just joking!

- It seems that after the hyper-activity during the last years, we have come to a pretty stabilized situation, but...
- Never say never again: there's a looming blockchain...



# The Capital (Former Second Directive)

- The capital debate
- Capital functions:
  - Organisation
  - Production
  - Information
  - Creditors' protection???



# Is it time to replace the capital?

Enriques & Macey

SLIM Group

Winter Report

Lutter Group

Rickford Group

Dutch Group

...

Action Plan 2003



# Is capital an outdated concept?

- If we just consider the creditors' protection function, yes
- As for the remaining functions, not necessarily, but they can be replaced by means of contracts
- But is it useful to replace it? And how? ► solvability tests
- KPMG for EC (2006): more costs in replacing than in maintaining



# Capital & Shares in CodDir

- Sources
  - Official name: 2012/30/EU (recast of the II Directive: original in 1977; now CodDir arts 2.1-2; 3-6; 43-44; 46-86; 165-168; Annex I, III, IV)
- Scope of application: **just public companies**
- Topics the directive deals with:
  - Minimum capital
  - Considerations/contributions (mainly in kind) + acquisitions from members and directors
  - Shares' par value
  - Own shares' purchase by the company
  - Capital maintenance
  - Distributions
  - Financial assistance



# Minimum legal capital

## Art. 45.1 CodDir [2<sup>nd</sup> Directive, art 6(1)]

*1. The laws of the Member States shall require that, in order for a company to be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed the amount of which shall be not less than EUR 25 000.*

## ICC Art. 2327

La società per azioni deve costituirsi con un capitale non inferiore a cinquantamila euro.



# Authorised capital (notion)

## Art. 68.2 CodDir [2<sup>nd</sup> Directive, Art. 29(2)]

*2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which is to be published in accordance with the rules referred to in paragraph 1, may authorise an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.*