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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Company Law

Subject:	Presidency Flash 18/12/2023 - Company Law WP meeting
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Delegations will find attached the Presidency Flash in view of the Company Law Working Party meeting
on 18 December 2023

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Working Party on Company Law Upgrading digital tools 18th December 2023

Dear colleagues,

We are most pleased to invite you to the second meeting of the Working Party on Company Law (Upgrading digital tools), which will be held on **18th December 2023, morning and afternoon sessions**.

We would also like to thank you for sending the written comments requested, and also for your constructive approach.

While the official agenda for the meeting has been already sent, we would like to take the opportunity of this Flash to provide you with further details on the different items to be discussed:

- First, we will have the opportunity to analyse the second presidency text. Our aim on the 18th is to examine the full text again, article by article and also the most important recitals linked to the changes introduced in the text and thus to advance maximum possible towards a common approach for the incoming Belgian Presidency to finalise it.
- Secondly, there will not be any other meetings under Spanish presidency, so we will proceed to the handover to the incoming Belgian presidency.
- Following the discussion at the last Council Working Party on 30 October and Member States' written comments, the following changes were introduced into the text:

Preventive control (amended Art. 10, recital 9)

The revised recital 9 together with Article 10 now expressly include notaries as competent authorities to carry out the preventive administrative or judicial control. In addition, recital 9 clarifies that the preventive control can be carried out jointly by different authorities.

As regards partnerships, the revised text also makes it clear that where the national law does not require the instrument of constitution for the formation of the company or for its registration, the legality check should focus on those documents and information that are required for the application/filing for the entry into the register (Art. 10(2), third subparagraph).

Following the comments of some delegations, the second and third subparagraphs of Article 10(3), which concern forms of formation other than fully on-line, are moved to a new Article 13k. Paragraph 6 of Article 13j concerning forms of filing other than fully on-line is also moved to that new Article 13k. These changes are thus purely presentational.

Once-only principle (Articles 13g(2a) and 28a(5a) and recitals 11, 11a and 30) and implementing Act (Art. 24(2) point/lit. a))

The revised text provides that the information about the founder company, both when setting up cross-border subsidiaries or branches, 1) can be exchanged between registers (retrieved through BRIS) or 2) can be accessed and consulted directly on the E-Justice portal through BRIS or 3) can be accessed and consulted directly in the national register of the founder company. Each of these alternative ways relies on information or documents that are already registered in the business register, and the company cannot be required to submit this information or documents again (first subparagraph of Article 13g(2a), first subparagraph of Article 28a(5a)).

As regards the second subparagraph of Articles 13g(2a) and 28a(5a), the text now makes clear that the register where the subsidiary/branch will be formed only needs to provide the relevant information about the founder company to any authority/body/person in case where the relevant information is not publicly available through BRIS and only upon request of such authority/body/person. Similarly to the case of the transmission of the pre-operation certificate to the relevant authorities through BRIS under the Cross-border Mobility Directive (e.g. Art. 86n), Member States are free to decide the means how to provide the relevant information to any authority/body/person. It is also left to Member States whether they charge fees or not (recital 11a). Recital 30 on the application of the once-only principle for setting up branches is also adapted accordingly.

The paragraph relating to cases of fraud or abuse was moved to a separate, more horizontal Article (xxx). The recital from the previous Presidency text has been modified accordingly. One new recital (xxx) have been added to provide additional explanations.

The information and documents and the technical specifications defining the methods of retrieval of information between the registers will be specified through an Implementing Act (Art. 24(2) point/lit. a).

Disclosure of information on partnerships (new Article 14a)

In Article 14a, “or equivalent” is added in point (c) to cover cases where partnerships do not have a registered office. In point (f) a reference was added to the contribution of limited partners as in some Member States limited partners are not directly liable for the obligations of the partnership, but only as to the amount of their contributions. Point (h) now reflects the wording in Article 16b.

Point (j) is reworded to focus on the particulars of “partners, directors or other statutory representatives who are authorised to represent the partnership” following comments from Member States that the term “persons” was too wide in this context. Finally, the clarification “where this information is recorded in the national registers” has been added in points (m), (n), (o) and (p) dealing with winding up, nullity or liquidation.

Information on group structure (Article 14b, recitals 17-21)

The text of Art. 14b has been significantly simplified and Art. 14c has been deleted.

We understood by all the comments provided in the last working party and also in written, the reluctance to include this information in the text. Many comments referred to administrative burden on business registers and companies. Therefore the proposal is now not only drafted in a simple way, but also the scope is significantly narrowed down, the information companies need to provide is also reduced and it is now up to Member States whether they wish to disclose this information in national business

registers. The text is placed in brackets, and also the definitions linked to the articles. The Presidency would like to invite the delegations to provide their views on the main changes explained below.

First, the scope is now limited to limited liability companies (Annex II) and to those partnerships (Annex IIB) where all the general partners are limited liability companies (Annex II). Second, the text now explains that only the EU ultimate parent or EU intermediate parent company (in case of a third country group) will have to provide the relevant information to the register. The obligation for individual subsidiaries (in case there is no EU ultimate/intermediate parent) to provide information about the group and to update group information has been removed. In addition, the text does not require any more that the group information should be disclosed in the register of the EU ultimate/intermediate parent or in the register of the subsidiary company (Art. 14b(1)(2)).

In addition, it is now left to Member States to determine how the EU ultimate/intermediate parent fulfils this information requirement (recital 18). Member States may decide, for example, that the EU ultimate/intermediate parent files this information separately or together with other documents. Alternatively, business registers may collect such information directly, for instance from documents (e.g. accounting documents) already registered or from another register.

As to the information about subsidiaries, the Presidency invites the delegations to consider the following options:

- 1) the group information would be limited to EU subsidiaries;
- 2) the group information would cover all subsidiaries (i.e., EU and third country subsidiaries).

Concerning the specific information about the companies belonging to the group (EU ultimate/intermediate parent and EU subsidiaries), the text lists a set of information that is already registered in the business registers for EU companies (i.e., name, legal form, Member State of registration and EUID). As to the third country ultimate parent and third country subsidiaries (in case those would be included), the information is similar (i.e. name, legal form, registration number and third country of registration) (Art. 14b(1)(2)(9)). The information about the proportion of capital between the ultimate parent and subsidiaries is maintained as a Member State option.

As to the need for keeping the group information up to date, the Presidency proposes to limit the related requirement to an update once per year merely in case a change has occurred. No update is thus required in case no change happened during the year nor at the moment a change occurs. Also, it is left to Member States when the annual update should take place (Art. 14b(6) and recital 20).

Given that Article 14c on the visualisation of the group structure through BRIS has been deleted, the text provides for a new paragraph 9 that explains which group information would be publicly available through BRIS.

Finally, recital 21 explains that the visualisation of the group structure requires more detailed information and, therefore, its feasibility should be part of a future assessment. This aspect is therefore included in Article 4 on reporting and review.

Up-to-date company registers (amended Article 15)

As to Art. 15, delegations' comments were divided. While some delegations consider that the deadline of 15 days for registers (Art. 15(2)b) is too short, other delegations consider that deadline too long given the moment (clarified in recital 22) from which the deadline starts to run. For this reason, the text has not been modified.

The wording of Art. 15(2)b and recital 22 concerning the moment from which the deadline starts are aligned with the wording of Digitalisation Directive (Art. 13g(7) and recital 16 of directive 2019/1151). When considering the appropriate deadline, it is important to keep in mind that under Art. 13g(7), the deadline for the formation of companies is either 5 or 10 days, with a longer deadline in exceptional cases.

EU Company Certificate (Article 16b, recital 24)

In Article 16b, various changes have been introduced in paragraph 2, including the added reference "where recorded in the national registers" in point (j) on the status of the company and in point (l) on the object of the company. The notion of "status" in point (j) is described the same as in the existing Article 19 together with a number of examples. The reference to NACE codes in point (l) is taken out from the Article (and remains only in the recital as an example) and "or activities" is added for cases where companies have more than one activity. It is also clarified that the "limited" character in point (m) refers to the duration of the company.

Regarding the EU Company Certificate, paragraph 3 on partnerships is aligned with changes in Articles 14a and 19a. In addition, a reference to point (k) is removed as the details regarding those who can represent the partnership are covered in points (b) and (c) of paragraph 3.

A reference to "equivalent means" is added to paragraph 7 to make this paragraph relevant for Member States that do not any more use seals or stamps in business registers. This same change has been introduced in Article 16d(1).

Paragraph 8a is removed (as explained under Article 13g).

Digital EU Power of attorney (Article 16c and recitals 25 and 25a)

The revised text now ensures that the PoA must be filed with the relevant register. In addition, while the EU PoA can only be consulted by those with a legitimate interest, the text provides that some basic information about the PoA (that it exists, it has been amended or revoked) will be publicly available, free of charge, through BRIS. As to the minimum mandatory content, the text now explicitly says that the exact content will be defined by an Implementing Act (Art. 24(2)g), while recital 25 provides clarifications regarding the possible scope (i.e. activities) and the minimum mandatory content of the PoA. Finally, recitals 25 and 25a clarify that the EU PoA is without prejudice to national existing powers of attorney including the rules on limitations to the use of powers of attorney.

The second subparagraph of paragraph 2 is removed (as explained under Article 13g).

Exemption from translations (Article 16f and recital 28a)

In Article 16f, the text now clarifies that Member States should not require a translation "as a first resort" in cases covered by paragraph 1 of Art. 16f. A new paragraph 3 is added to explain that this Article is without prejudice to the existing Articles 21 and 32 of Directive (EU) 2017/1132, which stipulates rules about the translation of documents

and information to be disclosed by registers. The related recital 28a includes additional clarifications.

Implementing Act (Art. 24(2)) and Transposition (Art. 3)

Article 24(2) now includes a deadline for the adoption of the Implementing Acts, i.e. 18 months after the entry into force of this Directive.

As to the transposition deadline, the text now provides for a transposition deadline of 36 months after the entry into force of this Directive (Art. 3(1)), and an additional period of 6 months for the application of the new provisions.

- Should you have any questions, please do not hesitate to contact us:

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██████████ and ██████████

We very much look forward to seeing you all on 18th December!

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The Spanish Presidency Team of the Working Party on Company Law