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A NEW(?) FRAMEWORK(?) ON DIGITALISATION IN EUROPEAN (?) COMPANY(?) LAW?

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A basic difference

- Digitalisation **in** European companies
 - Rules and standards

- Digitalisation **for** European companies
 - Framework

An effort towards digitalisation

- Theoretical framework:
 - 2002 Winter Report
 - Some proposals later received in Shareholders' Rights Directive (Pre-meeting information, participation in the meeting, voting rights)
 - 2003 Action Plan
 - Again just issues the Shareholders' rights directive deals with (Winter Report reassessed)
 - 2010 Digital Agenda for Europe

An effort towards digitalisation

- Setting up enterprises digitally, regardless of the original location of entrepreneurs
- 2011 Green Paper on CG, 2012 Action Plan, 2015 Single Digital Market Strategy for EU
 - No additional information on digitalisation in CL
 - General Once only principle
- 2016 ICLEG Report on digitalisation
 - Remarks on internal (in companies) and external (for companies) digitalisation

2016 ICLEG Report

- Deals with both internal and external digitalisation, to be integrated with existing rules
- Internal:
 - Communication between company and shareholders
 - Information
 - Website
 - Disclosure
 - In general: two-ways system
 - Communication towards third parties
 - Website
- External:
 - Online establishment of companies

Existing framework for digitalisation in ECL

- CCLS (EU) 1132/2017
 - Business registers
 - Website
- Revised Shareholders' Rights Directive (2017)
 - Again website (pre-meeting information)
 - Proxy voting
- Accounts Directive (2013)
 - Accounts' electronic publication system
 - Website, again...

News: The new Single Digital Gateway Regulation

- Approved in October 2018
- No ECL, but close areas
- Single gateway for information to the citizens (Your Europe)
- Some procedures with fully online completion
- Once-only principle

Draft Directive Proposal April 2018

- New?
 - Many solutions already previously proposed in different (unsuccessful) drafts: e.g. SUP
- Framework?
 - No comprehensive framework, simply loose rules on many issues
- Digitalisation
- European?
 - No EU rules, bus simply rules to be applied by MS
- Company?
 - Mainly dealing with registration... that is a company-related administrative law procedure
 - Not dealing with companies themselves (just external digitalisation)
- Law

Digitalisation proposal

- In general: **only external** digitalisation
- Not just digitalisation
 - Also partially-related subjects: e.g. disqualification of directors
- **Structure:**
 - General provisions
 - Online registration of
 - Companies
 - Branches
 - Additional free-of-charge disclosure
 - Other issues

1. General provisions

Identification of European citizens under e-IDAS standards

- fully online (paper version is maintained as available)
 - exception in case of genuine suspicion of fraud
- different e-IDAS standards (in any case, optional)
 - if not compliant: no automatic mutual recognition, but reciprocity principle

Already seen in the last version of SUP Proposal

Critical issues on the notion of “genuine suspicion of fraud”, to be checked on a case-by-case basis

Information and payments

- MS have to provide founders with **minimum information** in the gateway regarding domestic company law
 - Less detailed for public companies
 - More detailed for private companies
- **Equal treatment** for domestic and cross-border **payment of fees**

2. Online registration and filing

- Coming from the SUP proposal, again
- MS would be free not to lay down provisions on that for public companies...
- ...while they must be set down for private ones (but not mandatory online registration)
 - Not clear how to deal with limited partnerships by shares
- Templates for registration (to be prepared by MS)
- Identity and capacity check
- Possibility for notarial intervention, where required (however, completion within 5 working days)

2. Online registration and filing

- Exceptions to fully online process:
 - Genuine suspicion of fraud
 - In-kind contributions, if MS so provides for (for cash contributions, equivalence principle operates)
- For branches
 - Application of once-only principle
 - Basically same rules as for companies

Filing of information

- Fully online filing, with no physical presence (apart in case of genuine suspicion of fraud)
- Electronic verification of filed documents
- For branches: once-only principle, thanks to the BRIS

3. Housekeeping provisions

1. Disqualified directors

- Not directly dealing with digitalisation
- Digitalisation related as a consequence of BRIS
- What if a director is disqualified in MS A?
is he entitled to be a director in MS B?
 - Many problematic issues: cross-border extension of foreign disqualification?

3. Housekeeping provisions

- Is this covered by the legal basis of the Draft Proposal?
- Non-EU disqualifications?
- Just starting directors, or also ongoing directors?
- Privacy rules for lists of disqualified directors?

3. Housekeeping provisions

2. Disclosure and access to information

- Changes to art. 16
 - No more definition of “electronic means”
- Not required national gazette any longer (possible, but not mandatory): preference for BRIS
- “Electronic copies supplied to an applicant shall be certified as ‘true copies’ unless the applicant dispenses with such certification”

3. Housekeeping provisions

3. Scope of disclosure and fees

- Information to be disclosed in BRIS also for **other types of companies** (which ones???)
- **Fees**: more minimum information for free
 - Website
 - Legal status
 - Object
 - Number of employees
 - Representatives...

4. Bonus track

Annex IIA

- Not just private companies, or...
- Too many private companies!
- Even company forms not acknowledged by

Annex II

- Some simplified forms (but not all of them)
- Even not formally “company” forms (EURL)

Final remarks

- More **administrative** law than company law
- Just **external** digitalisation, very few hints on internal, and real digitalisation
- Too much focus on **startup**, and almost no focus of day by day management
- Enhanced **BRIS**
- **Once-only**, and **single point** principles: principles of civilisation

Thank you for your attention!

Questions?

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