

Conference of European Civil-Law Notaries, Salzburg, 21 April
Notaries going digital - Current Practices and Future Visions for Europe

Upgrading Digitalisierung Gesellschaftsrecht

Ralf Sauer, Deputy Head of Unit – Company law, DG Justice and Consumers,
European Commission

Introduction

Hochverehrte Frau Ministerin Zadić [Minister for Justice]

Sehr geehrte Frau Pallauf, Herr Umfahrer, Herr Mondel and
Herr Stelmaszcyk,

verehrte Teilnehmer und Gäste,

Es ist eine besondere Ehre für mich, heute bei Ihnen zu sein
und an einer der bedeutendsten Notarkonferenzen in Europa
teilzunehmen. Ein herzliches Dankeschön für die Einladung,
und einen besonderen Glückwunsch an Herrn Präsidenten
Umfahrer für die hohe Auszeichnung, die er soeben erhalten
hat!

Ich freue mich, im Rahmen der diesjährigen Konferenz eines
der zentralen Gesetzgebungsvorhaben im laufenden Mandat
der Kommission vorstellen zu dürfen, und es im Anschluss
mit Ihnen zu diskutieren.

And with this I switch to English, mindful that this is a European conference with an audience much beyond the German-speaking world.

The overarching theme for this event – digitalisation – is now the subject of many papers, conferences and initiatives. It affects the way we work, communicate and interact with each other. Even persons from the analog world cannot escape its impact, as the Digital Interactive Mozart Edition that I saw this morning in a shop window on my way to the conference venue shows.

As was already mentioned by Minister Zadić in her opening remarks, the Covid pandemic has been an eye-opener when it comes to the importance – and benefits – of digitalisation in all ways of life. This includes company law in its various dimensions. What the pandemic clearly demonstrated is the key role of digital tools in ensuring the easy interaction of companies with business registers and public authorities. For obvious reasons, one professional group particularly concerned and impacted by these developments are you, the notaries. Judging from the title of the conference and what I have read, that impact is a rather positive one. The notaries in Europe, and particularly Austrian notaries, have invested

heavily in digital infrastructure to be able to perform well their functions. I find that excellent news.

Digitalisation is also a central focus of my institution.

The European Commission saw the importance of digitalisation already some time ago. Driving it forward remains key for this Commission, as reflected for instance in its Communication on the “2030 Digital Compass”¹. Another important objective is to further advance the Single Market, which was established on 1 January 1993, almost exactly 30 years ago. Obviously, companies and their activities are crucial for making that internal market a reality, and EU company law plays an important role in harmonising the legal framework in which these activities take place. Given that most of these companies are SMEs, company law also directly links to the Commission’s SME strategy.²

This conference is therefore extremely timely. As you know, on 29 March the European Commission adopted its proposal for an amending Directive in the area of company law that seeks to further expand and upgrade the use of digital tools and processes. With this proposal – which will now be

¹ Communication: 2030 Digital Compass: the European way for the Digital Decade, 9 März 2021.

² As it has been formulated, for instance, in the Commission’s Communications on “Updating the 2020 New Industrial Strategy” (COM(2021) 350 final) and on the “SME Strategy for a sustainable and digital Europe” (COM (2020) 103 final).

discussed by the co-legislators – the EU will take a further, second step in the digitalisation of company law.

Digitalisation Directive

As you know, the first step in this area was made with the Company Law Package of 2019. In particular, the Digitalisation Directive aimed to make company law procedures fully online, without the need to appear in person before any authority or other competent body or person. This was a big step that we therefore undertook in close consultation with stakeholders. Notaries were an important partner in this endeavour, and we worked closely with you, in particular to ensure that digitalisation comes with the necessary safeguards. This includes verification of the applicant's identity, his or her legal capacity and the authority to represent the company, but also the possibility, on a case-by-case basis, to request the physical presence of the applicant.

In all this, one overarching guiding principle was that, while company law procedures should become simpler and faster, the existing legal traditions of Member States would be

respected.³ That includes the central role of notaries as “gatekeepers” in company law procedures. In fact, with a view to ensuring the necessary checks, the Digitalisation Directive explicitly confirms the choice of certain Member States to involve notaries at all stages of the online procedure.⁴ In addition, both the Digitalisation Directive and the Mobility Directive recognise the role of notaries as bodies entrusted with public tasks and therefore exercising the function of public authority.⁵

Commission proposal for a Directive amending Directives 2009/102/EC and 2017/1132/EU as regards further expanding and upgrading the use of digital tools and processes in company law

Our recent proposal aims at a further, second step in the digitalisation of EU company law. It complements the Digitalisation Directive but focuses on other areas where digitalisation can support and strengthen company law procedures. In particular, it aims to ensure the availability and

³ Article 13c and recital 19; Article 13g(4)(c) (in combination with Art 13j(4)); Article 13h(2), 2nd sub-para.

⁴ Recital 20. For online formation and online filing, see also Article 13g(4)(c) in combination with Art 13j(4); for online registration of branches, see Article 28a(4)(d).

⁵ See Art 13g(4)(c) of the consolidated Company Directive as amended by the Digitilization Directive (notary recognised as “person or body mandated under national law to deal with any aspect of the online formation of a company”); recital 34 of the Mobility Directive (“competent authority could comprise courts, notaries or other authorities”) and Article 86m (“Member States shall designate the court, notary or other authority or authorities competent to scrutinise the legality of cross-border conversions ... (“the competent authority”)”; same in Articles 127, 160m) of the consolidated Company Directive as amended by the Mobility Directive.

reliability of company information, and its use in cross-border situations.

Despite what has already been achieved, access to – and the use of – company information from registers in cross-border situations still faces barriers.

The new initiative therefore pursues three overarching objectives:

- First, to **increase transparency** with respect to companies, through better access to company information, in particular at EU level; apart from improving the information available to creditors, investors and consumers, this should also make it easier for companies to access finance and reduce the need for registers and public authorities to request documents from companies.
- Second, to **enhance trust** when dealing with companies in the Single Market, by ensuring that company data available through business registers and the BRIS platform is accurate, up to date and reliable.

- And finally, to **facilitate the cross-border operations and activities of companies** by removing administrative barriers such as legalisation or translation; in particular, the proposal seeks to make the setting-up of subsidiaries and branches in other Member States less time-consuming and more cost-effective by applying the **“once-only principle”**.

All three aspects will be particularly important for SMEs, which as we know are the backbone of the EU economy⁶. The Commission’s objective is to support them when they seek to expand their activities to other EU markets, as this should help to stimulate economic growth. The initiative also aims to contribute to the fight against abuse and the pursuit of other public interest objectives, such as to effectively implement EU sanctions against Russia.

Let me run through some of the **new measures** that the Commission proposes to achieve these objectives. As you will see, these measures build on the groundwork laid by the Digitalisation Directive. Where possible, they rely on existing concepts and requirements in EU law, and in several cases on

⁶ SMEs account for 98-99% of limited liability companies in the EU; around 40% of SMEs are engaged in cross-border activities/investment.

already existing practices in the Member States. As such, they represent a cautious next step – an **evolution, not a revolution**. As for the Company Law Package, the new measures come again with important safeguards.

Improving transparency in business environment

As just mentioned, the **first main objective** is to **improve transparency in the business environment**. Not surprisingly perhaps given the increase of cross-border business interactions, we have heard strong calls for more transparency from investors, creditors and consumers, but also from companies themselves. At the same time, our assessment and stakeholder consultations show that company information needed by stakeholders is not yet sufficiently available, and that stakeholders encounter difficulties when looking for it. EU company law already provides for harmonised disclosure requirements about limited liability companies, but some important data – for instance about companies’ central administration and principal place of business, or about group structures – is still not available at EU level, and only rarely in national registers. There is also no information at EU level about entities other than limited liability companies, such as

partnerships, which play an important role in the economies of many Member States.

The proposal therefore aims to make additional company information that stakeholders have identified as particularly relevant publicly available, both at national level and at EU level through the so-called BRIS. This concerns several different measures. Without being exhaustive, let me briefly mention some of the most important ones:

First, harmonised disclosure requirements will no longer be restricted to limited liability companies but extended to **partnerships**.⁷ These requirements will be largely modelled on the existing requirements for limited liability companies, with adaptations where necessary. According to our information, this concerns about 2 million partnerships in the EU.⁸

Second, information on the **place of central administration** and the **principal place of business** of companies (where these are in a different Member State or country than the place of registration) will be added as new disclosure requirements.⁹ This will increase legal certainty, by shedding light on how

⁷ Article 14a; see also Article 28(a) for penalties.

⁸ While there are around 16 million limited liability companies in the EU.

⁹ Article 14(l), (m).

companies are conducting their business and to what extent they are connected to the European Union. Knowing this can be relevant in different contexts, from company investments to insolvency proceedings, competition law, tax, social security, or the fight against fraud and abuse, for instance in case of letterbox companies. It will also allow stakeholders to better protect their interests.

Third, the proposal formulates a new disclosure requirement with respect to **group structures**.¹⁰ This includes key information on the ultimate parent company and each subsidiary (name, legal form, country of registration), plus basic group information (such as group name, place of the subsidiary in the group structure). To provide a user-friendly, concise overview, BRIS will visualise that group structure based on the information obtained from registers.

Finally, the proposal aims to **link BRIS** with the **interconnection of beneficial ownership registers** and the **interconnection of insolvency registers**.¹¹ This will further increase transparency, facilitate access to company information and contribute to the fight against abuse (such as

¹⁰ Article 14b; see also Article 28(a) for penalties.

¹¹ Article 22(7).

money laundering or terrorism financing). The unique identifier for companies (the EUID) can then be used to trace the information about a particular company across the three systems.

Strengthening trust in the business environment

A **second main objective** of our proposal is to **strengthen trust in the business environment**.

All stakeholders, from companies to authorities and the public at large, need to be able to rely on information about companies for business and various other purposes, for instance administrative or court procedures. It is therefore paramount that company data entered into business registers and accessible through BRIS is **accurate, up to date and reliable**.

The Digitalisation Directive made an important first step in this regard, by requiring controls on the identity and legal capacity of persons that form a company, register or branch, or that file documents or information online. However, to facilitate the cross-border use of company information it is now crucial to take a further step to improve its reliability. Our analysis shows that **all Member States already engage**

in some form of ex-ante scrutiny of company information and documents. But **national procedures** in this context **differ**. We also know from the consultation that this negatively affects trust between Member States. Worse, it creates situations where company documents or information from the business register in one Member State are not accepted as evidence in another Member State without additional, burdensome formalities.

The proposal therefore prescribes a **legality check** in the form of a “**preventive administrative or judicial control**”.¹² As the term suggests, this mandatory check will have to be carried out before company information is entered into business registers. It will apply to all forms of company formation as well as the filing of documents and company information, independent of whether this is done on- or offline¹³. In the case of company formations, it has to cover the instrument of constitution. In addition, the proposal specifies that the legality check will have to include **certain key issues: formalities, mandatory minimum content, absence of evidence for substantive irregularities, and the payment of contribution**. This will ensure a **harmonised**

¹² Article 10.

¹³ Article 13j(4), (6).

level of control. At the same time, Member States will remain free to decide *how* to organise this control, in line with their legal traditions. As the proposal makes clear, this includes the “possible involvement of notaries”.¹⁴

A complementary measure is the introduction of **new procedural requirements** for companies and registers to **ensure that register information is accurate and up to date.**¹⁵ This includes i) a 3-week-deadline for companies to file changes to company information in business registers, ii) the obligation for registers to publicise such new information within 5 working days, and iii) the requirement for a yearly confirmation by companies that their information in the register is up to date. In addition, Member States will have to put in place **procedures to verify and update the status of companies**, for instance whether they are still active or have been wound-up or dissolved. This will help to identify companies that no longer fulfil the requirements to be registered. While it is in the interest of companies to make sure that their information is updated in the register, given that this information can be relied upon by third parties, the

¹⁴ Recital 9.

¹⁵ Article 15; see also Article 14b(6)(8) for groups.

proposal requires Member States to provide for **sanctions** in case of late or omitted filings.¹⁶

Together, these measures should provide comfort – and thus trust – that company information in registers is accurate and up to date, and thus can be relied upon wherever the register is located in the EU.

Helping companies and cutting red tape

With this I come to the **third** (and last) **main objective** of our proposal, which is to **facilitate the cross-border operations and activities of companies by cutting red tape.**

As our consultations show, the direct use of company information in cross-border situations is often hindered, or made impossible, due to existing administrative barriers. These create burdens for companies and might even deter them from cross-border operations, in particular in the case of SMEs. For instance, when setting up a subsidiary or branch in another Member State, it is often not clear whether companies can rely on already existing information, or need to re-submit. Also, companies often need to get documents legalised by obtaining an apostille. In addition, company extracts vary and

¹⁶ Article 28(b).

can often not be used in cross-border situations without burdensome and costly formalities.

To address these obstacles, we have proposed a **bundle of complementary measures**. They **build on the trust-enhancing measures** that I just mentioned in my previous point:

First, the proposal clarifies that, **when setting up subsidiaries or branches in another Member State, companies do not have to re-submit documents or information that already exist in their domestic register**. Instead, relevant information will be retrieved electronically by the register of the subsidiary or branch through the BRIS, without any need for certification, or subject to any legalisation.¹⁷ Moreover, such information should be made available, by the receiving business register, to any authority, body or person mandated under national law to deal with a company's formation. That includes notaries. The application of this **“once-only principle”** will help to cut costs and reduce administrative burdens, including the length of procedures. As such, it will facilitate the expansion of companies in the Single Market.

¹⁷ Article 13g(2a): subsidiaries; Article 28a(5a): branches.

Second, to *further* remove administrative burdens and facilitate the cross-border operation of companies, our proposal introduces two new instruments, the “**EU Company Certificate**”¹⁸ and a “**digital EU power of attorney**”¹⁹. Both instruments will be available in all EU languages. As a company extract harmonised in both content and appearance, registers and public authorities in other EU Member States will have to accept the **EU Company Certificate** as conclusive evidence that the company is incorporated, exists and that the set of company information included in the certificate reflects the content of its register. The **digital EU power of attorney**, on the other hand, will serve as evidence for a person’s authority to represent the company in company law procedures. While it will be drawn up in accordance with national law, it will have a minimum mandatory content as a matter of EU law.

Third, the Commission proposes to **remove the need for an apostille on certified copies, extracts and translations of company documents and information** provided by business registers.²⁰ According to our proposal, this will also apply to

¹⁸ Article 16b.

¹⁹ Article 16c.

²⁰ Article 16d.

notarial acts used in procedures covered by EU company law. **Specific safeguards** apply, including the possibility for the public authority in another Member State to which the document is presented to double-check its authenticity with the register in case of reasonable doubts. That public authority may then reject the document if the authenticity is not confirmed.²¹

Lastly, the proposal **limits the need for translations of company documents and information** provided by business registers.²² This applies, in particular, where information is included in the EU Company Certificate or is accessible through BRIS and can therefore be identified through the explanatory labels used in that system.

The role of notaries

Let me conclude this overview with just a few remarks on the role of the notaries under our proposal. As already pointed out, the **Digitalisation and Mobility Directives** specifically recognise the role of notaries in company law procedures as part of the legal traditions of Member States. Not only that, they acknowledge the position of notaries as bodies entrusted

²¹ Article 16e. See also the condition of the authentication of electronic documents through trust services, Article 16d(1),(3).

²² Article 16f.

with public tasks, and in fact as competent authorities for the purposes of company law procedures. The **new proposal** maintains this approach. Like the Digitalisation Directive, it **does not seek to change company law or company law procedures**, and it **leaves Member States the flexibility to implement the new Directive in line with their legal traditions**. Where notaries are part of that tradition, their role will remain unchanged, and the proposal should facilitate their work.

Last but not least, when it comes to the **“once-only principle”**, the proposal provides for strong safeguards to ensure trust. As explained, one important safeguard is a **legality check based on a common checklist** to ensure a high-level of accuracy and reliability of company information. At the same time, the proposal again specifically recognises the legal traditions of Member States. That includes traditions and legal systems that combine judicial with notarial control, but also those where the control is exclusively exercised by notaries. This should address the concerns expressed by Dr. Umfahrer and Dr. Stelmaszcyk in their welcome speeches this morning.

Next steps

That brings me to the next steps: following the adoption of the Commission's proposal in March, the file is now in the hands of the **co-legislators, Council and European Parliament**.

Given the importance of the proposal, we would hope the negotiations to advance rather quickly, to allow the Directive to bring concrete results on the ground. While the Commission is itself not one of the co-legislators, it will play its role as an honest broker in the negotiations. Today's conference is therefore a great opportunity to hear your views, and I hope that you will work with us and the co-legislators to achieve the best-possible outcome: one that makes European companies become more competitive and works for you.

I stop here – thank you very much for your attention and looking forward to the discussion!