

The Informal Expert Group on Company Law and Corporate Governance
(ICLEG)

**Report on
cross-border use
of company information**

March 2023

The current ICLEG was established by the European Commission (EC) in 2020 to assist it with expert advice on issues of company law and corporate governance and it held its first meeting on 2 July 2020. The agendas of its meetings are available online in the [Register of Commission Expert Groups and Other Similar Entities](#).

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In 2021, the European Commission requested ICLEG to consider the issue of cross-border use of company information in the framework of the initiative “Upgrading digital company law”, and three ICLEG members (Pierre-Henri Conac, Jesper Lau Hansen and Jessica Schmidt) were charged with producing a report on behalf of the Group. Catherine Cathiard and Christian Zib provided expertise on this work as observers. After consultation within the Group, this report reflects the advice of ICLEG to the European Commission as to matters that ICLEG believe merit further consideration.

Disclaimer:

This Report has been drafted by the ICLEG (The Informal Expert Group on Company Law and Corporate Governance).

The views reflected in this Report are the views of the members of the ICLEG. They do not constitute the views of the European Commission or its services.

Contents

1	General	5
2	Once-only principle	7
3	Scrutiny of information before it is entered into the register	9
3.1	The current situation	9
3.2	The current state of EU law	11
3.2.1	The standard set by the 1968 Publicity Directive	11
3.2.2	The new rules introduced by the 2019 DigiD	12
3.3	Proposal: Extended EU minimum standard	13
3.3.1	General outline	13
3.3.2	Horizontal extension of formation checks to both traditional and online formation of all companies covered by the CLD	13
3.3.3	Horizontal extension to filing checks to “traditional” filing	14
3.3.4	Vertical extension (higher minimum standard of the items to be checked)	14
3.3.5	EU minimum standard for checking procedures	15
4	Reliance on registered information and mutual recognition of register data	17
4.1	Reliance on registered information by private third parties	17
4.1.1	Negative publicity (third party may rely on “silence”)	17
4.1.2	Third parties may rely on the “real” situation	17
4.1.3	Positive publicity (third party may rely on what the disclosure “says”)	18
4.1.4	Proposal	19
4.2	Mutual recognition of register data	21
4.3	Further supporting measures	22
4.3.1	Possibility to obtain a certified copy (in electronic form) from BRIS	22
4.3.2	Recognition of certified BRIS certificates and certified certificates from national registers by all Member States courts and authorities	22
4.3.3	Companies European Key Information Document (CEKID)	23
5	Summary of recommendations	26

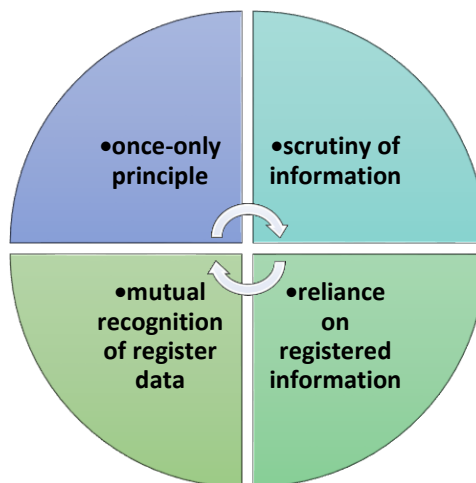
1 General

Access to information about companies, especially companies with limited liability, is vital to the public's trust in business and to ensure a fair and efficient business environment throughout the European Union. The realisation and effective utilisation of the internal market requires that companies can operate across borders both in respect of establishment and for the provision of services. Such cross-border activities also require effective access to information about companies for customers, suppliers, and employees irrespective of where that information is stored. Finally, in an efficient and competitive economy, it is crucial that the costs to companies of providing this information is kept as low as it is safely and technically possible. BRIS is a system that ensures efficient distribution of data registered in the different national company registers of the Member States and has proven to be an important step forward in achieving these goals. However, mutual recognition of registered data should be enhanced further going beyond the BRIS cooperation. This report aims at providing the next step in the ongoing process of providing a seamless interconnection of company information that serves both the public and companies.

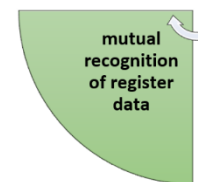
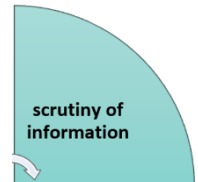
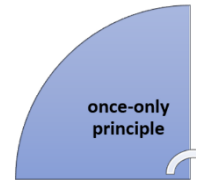
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Effective use of company information saved in national company registers in cross-border and administrative proceedings and other cross-border situations depends on several factors, all of which are interconnected:

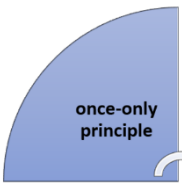
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- **once-only principle:** Data should have to be submitted by companies only once. Companies should not be required to file data again in Member State B if they already filed it in Member State A. It is for the Member States and their competent authorities to ensure cross-border compatibility of information filing and retrieval systems.
- **scrutiny of information:** The level of scrutiny to which the information is subject before being entered into the register correlates with the reliability of registered information: The more intensive the examination, the more reliable the registered information. At the same time, there is a balance of costs and benefits, as the enhancement of reliability must be measured against the costs and timeliness of the scrutiny.
- **reliance on registered information:** Reliable information in registers is essential in order for courts, authorities, businesses and citizens to be able to rely on the register data and recognition of register data in other Member States.
- **mutual recognition of register data:** In order to facilitate the cross-border use of company data and also reach the full potential of BRIS, once sufficient scrutiny to achieve reliability has been ensured, register data must be mutually recognised in all Member States in all matters where domestically registered data is normally relied on. This, in turn, is a prerequisite for the once-only principle.



These factors will be examined in the following.



2 Once-only principle

In the interest of efficiency and a good business environment, all Member States registers connected via the BRIS system should adhere to the once-only principle. Once company data is in a Member State’s register connected to the BRIS system, the relevant company should not have to file it again to make use of it outside the Member State where the data is registered.

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The importance of the once-only principle can be illustrated by an example taken from the regulation of branches. The availability of secondary establishment by way of branches is vital to companies registered in the EU. Although disclosure requirements for branches have been harmonised since 1989¹ and online registration of branches has been harmonised by the recent Digitalisation Directive (DigiD)², the EU legal framework for branches still displays an arrangement that increasingly appears inefficient and unnecessary considering the enhanced technical measures available with BRIS. Currently, when a company registered in one Member State (A) sets up a **branch in another Member State (B)**, it must file not only information about the branch, but also about the company itself although the information about the company is already disclosed in its “home” Member State and thus generally also available via BRIS.

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As the table below shows, most of the information which is required to be disclosed by the Company Law Directive (CLD)³ in the branch Member State, is already available in the register of the company’s home Member State and thus via BRIS.

5

Mandatory information about the company to be disclosed in the branch Member State		Information available about the company in its “home” Member State
Art. 30(1) CLD	register and registration number of the company (c)	Art. 16(1), 19(2)(b), (c) CLD
	name and legal form of the company (d)	Art. 19(2)(a) CLD
	appointment, termination of office and particulars of the persons authorised to represent the company (e)	Art. 14(d) CLD
	certain information in case of winding-up or insolvency of the company (f)	Art. 14(h) CLD
	accounting documents (g)	Art. 14(f) CLD

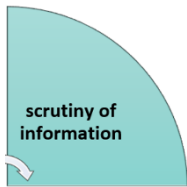
¹ Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, [1990] OJ 395/36; now Title I Chapter III Sections 1 and 2 of the Company Law Directive (fn. 3).

² Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, [2019] OJ L 186/80.

³ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, [2017] OJ L 169/46; last amended by Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132 (CCPRRR), [2021] OJ, L 22/1.

Options for Member States		Information available about the company in its "home" Member State
Art. 30(2) CLD	signature of the persons authorised to represent the company (a)	-
	instrument of constitution, memorandum and articles of association together with any amendments to these documents (b)	Art. 14(a)-(c) CLD
	certificate from the company's register relating to the existence of the company (c)	-
	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 (d)	-

- 6 The situation is similar when a company registered in one Member State (A) wants to set up a **subsidiary in another Member State (B)**. Again, the company has to file all information about itself with the authorities of Member State B, although this information is already available via BRIS.
- 7 In the future, whenever a company is called upon to provide documents or other registered information – irrespective of whether this is mandated by EU law or national law –, the company should not be required to file data which is already filed with the register of one Member State (A) – and is thereby generally available via BRIS – yet again with the register of another Member State (B). Instead, **the register in Member State (B) should simply retrieve the data regarding the company which is available in the other relevant national register via BRIS.**
- 8 An obstacle that practitioners encounter is that some Member States and therefore some registers are more vigilant than others as regards the quality, veracity and updating of the information published (→ 3).
- 9 In order for this to work effectively, however, the information in the Member States' registers (and therefore generally available through BRIS) must be as reliable as possible and register data must be mutually recognised (→ 4), which in turn requires that national registers scrutinise the input they receive from companies for registration (→ 3).



3 Scrutiny of information before it is entered into the register

3.1 The current situation

In making this report, ICLEG relied on a survey of the 12 EU/EEA Member States: Austria, Denmark, France, Germany, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Norway, Poland and Spain⁴ detailing the scrutiny carried out of information that is provided by private parties concerning a company for the inclusion in the national company register. Although this is not a full survey of all Member States, as that is beyond the reach of ICLEG, it does provide a detailed enough overview that allows for some conclusions to be reached.

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The results of the survey make it clear that Member States subject information to various levels of scrutiny before it is entered into the national registers. The consequence of these different standards of scrutiny is that data in the register of some Member States is not accepted as evidence in some other Member States – probably due to the perceived risk of inaccuracy of the registered information from another Member State. Instead, they require additional evidence produced ad hoc, which generates costs and delays for the parties relying on the registered information.

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Examples:

- Germany⁵: As regards the power of the director(s) to represent the company, for example, German courts often require a certificate attesting to the power of representation by a German notary who accessed the foreign register.⁶ Where the legal value of the foreign register does not correspond with that of the German register (at least from the court's point of view), because the foreign register does not verify the accuracy of the information, German courts do not even accept this and require various other documents (varying from court to court).⁷ This may, for example, be a certificate issued by a German notary who not only accessed the foreign register, but also relevant company documents filed with the foreign register.⁸ Alternatively, it may be a certificate issued by a foreign notary who accessed the foreign register and relevant company documents filed with the foreign register; such a certificate of a foreign notary must usually be translated to German and an apostille must be attached to it.⁹ However, even then, such a certificate issued by foreign notary does not have the same evidentiary value as a certificate issued by a German notary.¹⁰ The relevant judgments mostly concern UK companies, but the position would presumably be the same with respect to, for example, Irish or Danish companies.

⁴ EU/EEA Member States of the ICLEG members and observers.

⁵ See in detail e.g. *M. Schmidt* in: Hauschild/Kallrath/Wachter, *Notarhandbuch Gesellschafts- und Unternehmensrecht*, 3rd ed. 2022, § 28 paras. 163 ff.

⁶ See e.g. OLG Schleswig of 16 May 2022 – 2 Wx 40/21, ECLI:DE:OLGSH:2022:0516.2WX40.21.00.

⁷ See e.g. OLG Düsseldorf of 21 August 2015 – I-3 Wx 190/13, NZG 2015, 199 para. 9.

⁸ See e.g. OLG Düsseldorf of 7 August 2019 – I-3 Wx 64/17, NZG 2019, 1385, para. 12-13.

⁹ See e.g. OLG Düsseldorf of 21 August 2015 – I-3 Wx 190/13, NZG 2015, 199 para. 9; OLG Nürnberg of 25 March 2014 – 15 W 381/14, FGPrax 2014, 156.

¹⁰ See e.g. OLG Nürnberg of 25 March 2014 – 15 W 381/14, FGPrax 2014, 156, 157.

- Austria: The Supreme Court of Justice of Austria held in 2015 that if an Austrian notary gets an excerpt from the Dutch companies register and certifies it, this document does not have the evidentiary value of a public document.¹¹ It can thus not be used to prove who can represent the company for purposes of entry into the Austrian land register. The OGH reasoned that in case of foreign registers, it can be difficult for the notary to check the plausibility of the register data due to the different legal system and language.
According to an Austrian practitioner, excerpts from company registers of other EU Member States are usually accepted by the Austrian land register and the Austrian companies register if there is a certified translation and an apostille. Sometimes the registrar also requires a certified translation of the apostille.
- France: As there is no legal provision, the Coordinating Committee of the Business and Companies Register (CCRCS) has issued an opinion (CCRCS, Avis n° 2018-008) according to which a foreign commercial company opening an establishment in France must register with the Trade and Companies Register (RCS) in France. The application for registration must include the identification of the corporate bodies of the foreign company and more generally "shareholders/partners and third parties having the power to direct, manage or bind the foreign company on a regular basis with the indication that they bind alone or jointly the company vis-à-vis third parties". If applicable, it should also indicate, for the establishment in France, the identity of the persons having the power to engage, in a usual capacity by their signature, the responsibility of the establishment in France but there is an obligation to indicate them only if one has been appointed, which is not necessarily the case when the establishment is managed directly from the head office located abroad. When only a legal person appears in the RCS in France as manager of the foreign company and no individual responsible of the establishment in France is appointed in France, the name of the natural person(s) having the power to validly commit the company is not mentioned in the RCS in France and the information is not disclosed/available in France.

12 The survey carried out by ICLEG shows that in the Member States surveyed, comprehensive checks are being carried out, but checking procedures and checking intensity vary as do the competent authorities. Although we do not detect any significant deficiencies in scrutiny, it appears rather that there is the application of very different methods and different levels of scrutiny, which may explain the reluctance among national competent authorities of the Member States to mutually recognise information registered by other authorities. Naturally, a broader survey including all Member States would have provided an even better overview of the current state of affairs, but the group believes that the present survey is sufficient to serve as a basis for this report. We thank all ICLEG colleagues and national officials of the various authorities that helped to provide this information.

¹¹ OGH of 19 June 2015 – 5 Ob 96/15a, ECLI:AT:OGH0002:2015:00500B00096.15A.0619.000.

3.2 The current state of EU law

3.2.1 The standard set by the 1968 Publicity Directive

In the 1960s and before the adoption of the Publicity Directive in 1968¹², the standards in the then six Member States as regards formation control of companies were very different: Germany required both judicial control and notarisation of the statutes; Italy required judicial control; the Netherlands required a control by the Ministry of Justice; Belgium and Luxembourg required notarisation of the statutes; France, since 1966, only required a declaration by the founders that the company had been formed in accordance with all legal requirements.¹³ **13**

Hence, in the course of the negotiations on the Publicity Directive, it was only possible to agree on a rather basic standard, which was set out in Art. 10 Publicity Directive. **14**

Today, this provision has become **Art. 10 CLD**. It requires Member States to provide for either: **15**

- preventive administrative or judicial control at the time of the formation of the company; or
- for the instrument of constitution, the company statutes and any amendments to those documents to be drawn up and certified in due legal form.

Member States are also free to combine these two alternatives. This is, for example, the case in Germany¹⁴.

Art. 10 CLD does not lay down any specific requirements as regards the procedure and intensity of the administrative or judicial control or the certification. This was deliberately left to national law. So, for a long time it was entirely up to the individual Member State to specify the items to be checked, the intensity of the checks and all other details of the checking procedures. This may have been sufficient in a time when cross-border activity was modest and the technological means for electronic information filing and retrieval were nascent. But the situation today is very different and calls for action. **16**

¹² First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, [1968] OJ L 65/8.

¹³ See *Einmahl AG* 1969, 210 f.; *Edwards*, EC Company Law, 1999, S. 46; in detail: *Fischer-Zernin*, Der Rechtsgleichungserfolg der Ersten gesellschaftsrechtlichen Richtlinie der EWG, 1986, S. 165 ff.

¹⁴ German law requires both notarisation of the statutes and judicial control (cf §§ 2(1), 9c GmbHG, §§ 23(1), 39 AktG).

3.2.2 The new rules introduced by the 2019 DigiD

- 17 Things changed considerably with the 2019 Digitalisation Directive (DigiD)¹⁵. It was a major step towards a fully digitalised company law regime offering a significant break with the more traditional paper-based and unilateral approach in use by Member States. It ushered in a far-reaching acceptance of digitalisation, that is, the registration of and the reliance on data stored on electronic media rather than printed on paper-based media. Digitalisation has the crucial advantage to paper that it allows the swift and easy access to the registered data independently of physical access, thus making it possible to utilise registered data across the Union. But, as shall be seen, it has not been used to its full potential.
- 18 The DigiD introduced for the first time provisions that require Member States to lay down detailed rules on certain verification and checking procedures as part of the control required under article 10 CLD :
- Art. 13g(3), (4) CLD as regards **online formation**: this is only mandatory for the online formation of companies listed in Annex IIA (i.e. private limited liability companies, such as SARL, GmbH, Srl, etc...), cf Art. 13g (1) Subpara. 2 CLD
 - Art. 13j(4) CLD in conjunction with Art. 13g(3), (4) CLD as regards **online filing of company documents and information**: this concerns all limited liability companies covered by the CLD
- 19 Only the items listed in Art. 13g(3) CLD are mandatory and require detailed rules, sometimes only if it is provided for under national law. The provision reads as follows:
- 3. The rules referred to in paragraph 2 shall at least provide for the following:*
- (a) the procedures to ensure that the applicants have the necessary **legal capacity and have authority to represent the company**;*
 - (b) the means to verify the **identity of the applicants** in accordance with Article 13b;*
 - (c) the requirements for the applicants to use trust services referred to in Regulation (EU) No 910/2014;*
 - (d) the procedures to verify the legality of the object of the company, insofar as such checks are provided for under national law;*
 - (e) the procedures to verify the legality of the name of the company, insofar as such checks are provided for under national law;*
 - (f) the procedures to verify the appointment of directors.*
- 20 Items listed Art. 13g(4) CLD are merely Member State options. The provision reads as follows:
- 4. The rules referred to in paragraph 2 **may**, in particular, also provide for the following:*
- (a) the procedures to ensure the legality of the company instruments of constitution, including verifying the correct use of templates;*
 - (b) the consequences of the disqualification of a director by the competent authority in any Member State;*

¹⁵ Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, [2019] OJ L 186/80.

(c) *the role of a notary or any other person or body mandated under national law to deal with any aspect of the online formation of a company;*

(d) *the exclusion of online formation in cases where the share capital of the company is paid by way of contributions in kind.*

Moreover, Art. 13h(2) Subpara. 1 sentence 2 CLD now provides that where an applicant uses a **template for online formation** in compliance with the rules referred to in Art. 13g(4)(a) CLD, the requirement to have the company instruments of constitution drawn up and certified in due legal form where preventive administrative or judicial control is not provided for, as laid down in Article 10, shall be deemed to have been fulfilled.

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Yet, one might question whether it would not have been more appropriate to apply the minimum standard of formation control laid down in Art. 10 CLD (to either provide for preventive administrative or judicial control at the time of the formation of the company; or for the instrument of constitution, the company statutes and any amendments to those documents to be drawn up and certified in due legal form) *mutatis mutandis* also to online formations.¹⁶ However, one has to bear in mind that it is by no means the case that Member States are freed from carrying out any formation control in case of online formations by Art. 13h(2) Subpara. 1 sentence 2 CLD. Rather, Art. 13g(2), (3) CLD lays down a minimum standard for the control of online formations. Moreover, the reference to Art. 13g(4)(a) CLD in Art. 13h(2) Subpara. 1 sentence 2 CLD means that the requirements of Art. 10 CLD are only deemed to have been fulfilled where the Member State provides for “procedures to ensure the legality of the instruments of constitution, including verifying the correct use of templates”. Therefore, some control must take place.

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3.3 Proposal: Extended EU minimum standard

3.3.1 General outline

The introduction of minimum standards for verification and checking procedures by the DigiD has been a very important first step. However, in order to further improve the reliability of registered information and the use of company information in cross-border administrative and court proceedings, ICLEG proposes to extend the current EU minimum standard beyond that introduced by the DigiD. The verification and checking procedures should in general be made mandatory, more explicit, and extended:

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- **horizontally** to the formation and online filing of all companies covered by the CLD;
- **vertically** to set a higher minimum standard (i.e. include additional checks and/or require a certain intensity of the checks).

3.3.2 Horizontal extension of formation checks to both traditional and online formation of all companies covered by the CLD

Currently, Art. 13g(3) CLD explicitly sets out a minimum standard of verification and checking procedures only for the formation of limited liability companies listed in Annex IIA (i.e. “private” limited liability companies). Yet, it would be paradoxical if Member States were only

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¹⁶ Cf PE627.805v01-00, S. 115; *Bormann/Stelmaszczyk* NZG 2019, 601, 611; *Halder* NJOZ 2020, 1505, 1509.

required to check the items listed there in case of online formation, but not in case of other “traditional” forms of formation. Moreover, there is no justification why these items should be checked in case of formation of companies listed in Annex IIA, but not in case of formation of other companies covered by the CLD. On the contrary, EU company law generally subjects public limited companies listed in Annex I to much more stringent requirements, which ought to be the case here, too.

3.3.3 Horizontal extension to filing checks to “traditional” filing

- 25 Where Member State still allow “traditional” paper filing methods in addition to online filing, the same minimum standards should apply in respect of the checking procedures. There is no justification to set laxer standards for “traditional” paper filing methods. At the end of the day, all information entered into the register should be subject to the same checking standard.

3.3.4 Vertical extension (higher minimum standard of the items to be checked)

- 26 It should be considered to extend the items to be checked. It is recommended to require mandatory checks in particular also of the following items:
- 27 (i) **legality of the objects of the company:** Currently, Art. 13g(3)(d) CLD requires this “insofar as such checks are provided for under national law”. Yet, this is an essential feature of the company and – as the survey shows – most Member States already check it in some form anyway.
- 28 (ii) **legality of the name of the company:** Currently, Art. 13g(3)(e) CLD requires this “insofar as such checks are provided for under national law”. Yet, this is also an essential feature of the company and – as the survey shows – most Member States already check it in some form anyway. The control of the “legality of the name of the company” does not include issues of competition law and protection of intellectual property rights but some Member States do some controls on this. It should be made clear that they can still control these elements if they so desire.
- 29 (iii) **legality of the company instruments of constitution, including verifying the correct use of templates:** Currently, this is only a Member State option (Art. 13g(4)(a) CLD). However, the instrument of constitution as the “founding document” is one of the essential building blocks of the company and should therefore be checked. Moreover, as the survey shows, most Member States already check it in some form anyway. We note that Member States may ease this control by using standard templates, online or paper-based, that help ensure that the actual constituent documents conform to the legal requirements.
- 30 (iv) **disqualification of a director:** Currently, there is only a Member State option in Art. 13g(4)(b) CLD with respect to rules regarding the consequences of the disqualification of a director by the competent authority in any Member State. At the moment, reasons for the disqualification of a director are governed by national law. Considering its Union-wide aspect, it should be considered to harmonise the instrument of disqualification in EU company law; however, that is beyond this report. Furthermore, in order to ensure that disqualified persons cannot become directors, checks in this respect should also be made mandatory across national borders. Currently, Art. 13i(1) 2 CLD only provides that Member States shall ensure that they

have rules providing for the possibility to take disqualifications in other Member States into account.

We note that in some Member States, disqualification is subject to strict provisions on confidentiality. It is, however, desirable to prevent disqualified directors from taking up office in other Member States from where they can conduct their activities across borders and for that reason it is urged that this area is subjected to harmonisation that counter this risk. However, until a harmonisation of the reasons for disqualification has been achieved, there is a strong case for giving Member States a discretion whether or not to consider a person disqualified in another Member State as also disqualified in its own Member State. Notwithstanding, a Member State would have to know whether a person has been disqualified in another Member State in order to make an informed decision.

- (v) **payment of contributions:** As the capital of a limited liability company ab initio consists only of the contributions of the shareholders, it is of utmost importance to check that the contributions have been paid as required by the relevant legal rules. In case of non-cash contributions of public limited companies, the CLD generally requires an experts' report (Art. 49-51 CLD). There is currently no specific requirement to check before the company is entered into the register that the contributions (whether cash or non-cash) have been paid. The survey shows that this is already checked in most Member States, either by the register and/or by the notary; but there are 2 out of 12 EU/EEA Member States where this is not checked. Hence, harmonisation requiring such checks is warranted. In addition, it might be considered to extend the requirement of an expert report in case of non-cash considerations to all limited liability companies, including the private limited liability companies (SARL, GmbH, Srl, etc...) listed in Annex IIA. This latter consideration is unrelated to the question of a legal minimum capital upon formation, which only applies to public limited companies (cf. Art. 45 CLD), because it concerns the reliability of the registered information about its capital and not whether this capital is sufficient in respect of the company's intended business activities.

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3.3.5 EU minimum standard for checking procedures

Moreover, it should be considered to lay down an EU minimum standard as regards checking procedures. In this respect, the EU should strive for a common standard, but at the same time it will be necessary to take the different national legal traditions and the level of technical application into account. In particular, Member States that rely on notaries will not be willing to do without them, whereas those that do not will not see the need to introduce them. Some Member States rely on online registration to a large extent, others are less reliant beyond the requirements of the 2019 DigiD. While it is likely that the use of online and IT based solutions will increase, it is at present sufficient to ensure that harmonisation does not prevent Member States from going further in their use of IT. In other words, harmonisation should set a minimum standard that allows further use of IT as long as the minimum standards are met.

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A compromise could be a kind of “**modular system**” which provides different options for Member States to choose from, but which would also ensure that all options generally provide an equivalent level of scrutiny and checks. Such options could, for example, be control by national authorities such as a court or a national competent authority, by a notary or, only to

33

confirm the receipt of funds, an authorised lawyer or a financial institution under national supervision.

34 In addition, control could be performed via certain **automatic systems**. Some Member States, for example Denmark, already use them very successfully. Besides being automatic and thus ensuring an efficient administration at low costs, an automatic system ensures that access to registration is limited to persons previously authorised to make such registration on behalf of the company and furthermore ensures that certain key persons designated by the company and, where the registration concerns one or more persons, these physical persons are alerted to the registration taking place and are thus able to respond if the registration is unwarranted or inaccurate. Such systems can be set up in many ways. At any rate, it should be assessed how digital tools can be best used for such checks relying on the expertise of the national registration authorities. After consulting with these national experts, the Union could develop standardised digital tools for Member States to use in this respect (e.g. systems to check company names or identities).

35 In order to establish such a modular system, the following **provisions** could be **added to the CLD**:

(1) Member States shall ensure that the checking procedures provided for in [...] are carried out by one or more of the following control authorities:

(a) a judicial authority;

(b) an administrative authority;

(c) a notary certifying the instrument of constitution and, if they are contained in a separate instrument, the company statutes;

Member States may provide that the control of the payment of contributions is carried out, separately or in coordination with one of the authorities mentioned in Subparagraph 1, by an authorised lawyer or a financial institution established in a Member State.

(2) The control authorities listed in paragraph 1 may use automatic systems to perform the control. The Commission shall lay down minimum technical standards for such automatic systems by means of an implementing act.

4 Reliance on registered information and mutual recognition of register data

A further essential element of optimal cross-border use of company data is that private third parties may rely on the registered data as if it was registered in the national company register and similarly that register data is mutually recognised by public authorities and courts in all Member States. Only then can an internal market for company information be achieved.

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4.1 Reliance on registered information by private third parties



4.1.1 Negative publicity (third party may rely on “silence”)

EU law has always provided and continues to provide that the documents and information required to be disclosed may be relied on by the company as against third parties only after they have been disclosed, unless the company proves that the third parties had knowledge thereof (art. 3(5) sentence 1 Publicity Directive¹⁷ = art. 16(6) subpara. 1 CLD 2017¹⁸ = art. 16(5) subpara. 1 CLD). Hence, third parties may rely on the “silence” of the register: If a document or information which should have been disclosed has not been disclosed, the third party may rely on that it does not exist (so-called negative publicity).

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Example: A had been appointed as director of X-company and this was properly disclosed. Then A was removed as a director, but this was not disclosed.

→ X-company cannot rely on the removal of A as a director as against *bona fide* third parties; *bona fide* third parties may rely on the “silence” of the disclosure with respect to the removal of A as a director. This may, for example, be important for a *bona fide* third party who has concluded a contract with A acting as director for X-company.

4.1.2 Third parties may rely on the “real” situation

In addition, EU law has always and continues to allow third parties to rely on the “real” situation: 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 (art. 3(7) Publicity Directive = art. 16(7) subpara. 3 CLD 2017 = art. 16(5) subpara. 3 CLD).

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Example: A had been appointed as director of X-company and this was properly disclosed. Then A was removed as a director, but this was not disclosed.

→ Third parties may rely on the “real” situation that A was removed as director. This may, for example, be important when A terminated a valid contract between X-company and a third party.

¹⁷ Fn. 12.

¹⁸ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, [2017] OJ L 169/46.

4.1.3 Positive publicity (third party may rely on what the disclosure “says”)

- 39 Positive publicity means that a third party may rely on what the disclosure “says” – even if this is factually incorrect.
- 40 Art. 8 CLD expressly provides for positive publicity with respect to the irregularities in the appointment of company organs: 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.
- 41 However – in contrast to art. 3(6) subpara. 2 Publicity Directive = art. 16(7) subpara. 2 CLD 2017 – the CLD (as amended by the DigiD) does not contain an express general rule on positive publicity.
- 42 The new default rule is that disclosure is effected by making the documents and information publicly available in the register (art. 16(3) sentence 1 CLD).¹⁹
- 43 However, the CLD does not expressly provide that third parties may rely on such disclosure (unless they had knowledge that it is incorrect). Art. 16(4) subpara. 3 CLD only states that “In cases of any discrepancies under this Article the documents and information made available in the register shall prevail.” Since art. 16(4) subpara. 1 CLD requires Member States to take the necessary measures to avoid any discrepancies between what is in the register and in the file, art. 16(4) subpara. 3 CLD presumably pertains to such cases of discrepancies between what is in the register (and thus publicly available) and what is in the file.
- Example: A and B have been appointed as directors of X-company with joint power of representation. The file says that A and B are directors and that they have joint power of representation, but the register (which is publicly available) says that A and B each have individual power of representation.
- 44 Some authors opine that the CLD does currently not provide for any “positive publicity” of the register, i.e. that it is up to the Member States whether third parties may rely on what is disclosed by being made publicly available in the register.²⁰ In their opinion, art. 16(4) subpara. 3 CLD only sets out the primacy of the register.
- 45 Other authors argue that art. 16(4) subpara. 3 CLD must be interpreted to the effect that third parties can rely on documents and information disclosed by being made publicly available in the register (unless they had knowledge that they are incorrect).²¹ ICLEG favours this interpretation.

¹⁹ Special issues arise if a Member State makes use of the option in art. 16(3) sentence 2 CLD to continue requiring an additional publication in a national gazette or by equally effective means. These issues have deliberately not been included in this paper.

²⁰ *Lieder* NZG 2020, 81, 87; *Linke* NZG 2021, 309, 313; *Hopt/Merkt*, HGB, 42nd ed. 2023, § 15 para. 18; see also *Omlor* DStR 2019, 2544, 2548.

²¹ Seminal: *Bayer/J. Schmidt* BB 2019, 1922, 1925; see further *MükoHGB/Krebs*, 5th ed. 2021, § 15 HGB para. 3; *Noack*, Unternehmensrechtliche Notizen, 30 August 2019; *J. Schmidt* FS Hopt, 2020, 1097, 1099 f.; *J. Schmidt* ZIP 2021, 112, 119.

4.1.4 Proposal

To provide legal certainty in this respect, it is proposed to **expressly provide for “positive publicity”** by adding the following provision to the CLD:

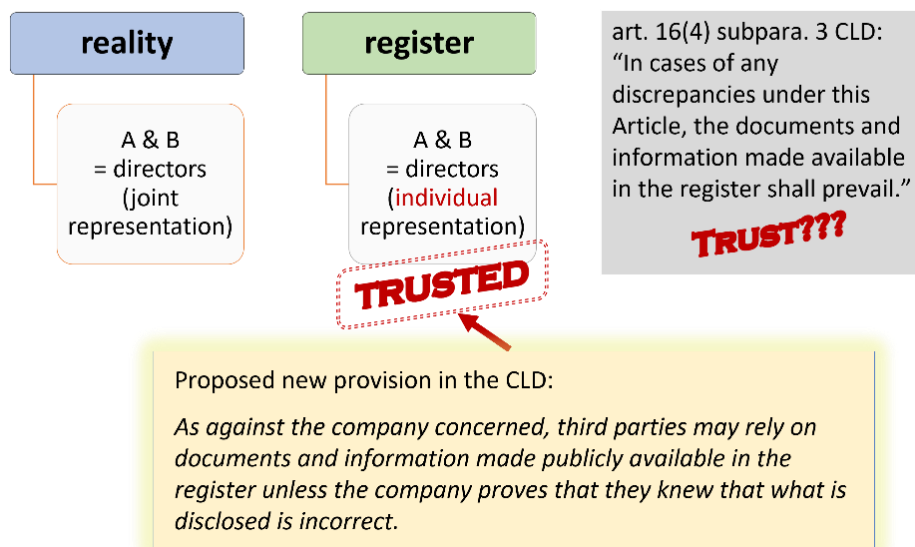
46

As against the company concerned, third parties may rely on documents and information made publicly available in the register unless the company proves that they knew that what is disclosed is incorrect.

This provision would make it unequivocally clear that bona fide third parties may rely on the documents and information made publicly available in the register, i.e. that EU law guarantees positive publicity. This is of essential importance: After all, **why make the effort to have registers, when the public cannot rely on them?** Moreover, it would be highly contradictory if third parties could rely on the “silence” of the register (art. 16(5) subpara. 1 CLD), but not on what the register “says”.

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positive publicity in the “register only”-system



If this new provision is adopted as a general rule for “positive publicity”, the current **art. 8 CLD** (which governs a special case) could be **deleted**.

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A special problem are cases where the public availability of a document or of information in the register was not in any way **caused by the company** (not even by an incorrect filing). Such cases will probably be very rare in practice, but they may occur, e.g. where a third party manages to fraudulently file information on behalf of the company or where the registration authority enters information into the register by mistake. On the one hand, one could argue that the company is better equipped to take recourse against the person responsible and to

49

monitor the register content.²² On the other hand, there are also good arguments for excluding such cases from the scope of positive publicity of the register because otherwise publicity would ultimately go to the detriment of “innocent bystanders”.²³ In the wording of the proposed provision, one may infer this from the words “as against the company concerned” and “made”. However, for the sake of clarity, it should also be made clear in the explanatory memorandum of the legislative proposal and/or the recitals to avoid doubt as to the exact meaning.

²² See e.g. *Grundmann*, *European Company Law*, 2011, para. 52 with further references.

²³ See e.g. *Lutter/Bayer/J. Schmidt*, *Europäisches Unternehmens- und Kapitalmarktrecht*, 6th ed. 2018, 18.56 with further references.

4.2 Mutual recognition of register data

Register data should be mutually recognised in all Member States. Each Member State must respect and trust the approach followed by other Member States where they are reasonable and fulfil certain minimum requirements.²⁴ This goal could be achieved in one of two ways:

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Option 1:

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Mutual recognition of register data

A Member State shall grant the same legal value, as recognised under its national law for data included in its register, to data included in the register of another Member State.

This option for a new provision in the CLD would be the most efficient way and would ensure that the potential of BRIS is used in an optimal way.

Option 2:

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Mutual recognition of register data

(1) A Member State shall grant the same legal value, as recognised under its national law for data included in its register, to data included in the register of another Member State.

(2) However, a Member State may limit recognition of register data from other Member States to recognition of the documents and particulars to be disclosed by companies pursuant to Article 14 CLD. In that case, a Member State must notify the Commission; the Commission publishes a list of the Member States limiting recognition in this way.

[(3) A Member State may decide to only recognise register data from Member States which subject information to an equivalent level of scrutiny, including when the data has been scrutinized by a public notary, before it is entered into the register. In that case, a Member State must notify the Commission; the Commission publishes a list of the Member States limiting recognition in this way.]

This option for a new provision in the CLD may be easier to agree on politically. It would at least ensure mutual recognition of the “basic” register data mandated by Article 14 CLD.

²⁴ A duty for the national authorities of one Member State to be flexible and accommodating vis-à-vis the registration and supervision carried out by other Member States and not just insists on applying its own rules lay behind the Court of Justice’s decision of 6 June 1996 in case C-101/94, *Commission v Italy*, ECLI:EU:C:1996:221. The principles of this and similar decisions continue to be important in areas not yet fully harmonised.

Paragraph (3) would, of course, only be relevant if there is no EU minimum standard. If an EU minimum standard for checking procedures is established (as proposed above → 3.3.5), there would be equivalent scrutiny standards in all Member States and a limitation like in paragraph 3 would not be justified.

4.3 Further supporting measures

4.3.1 Possibility to obtain a certified copy (in electronic form) from BRIS

- 53 Moreover, to expand the possible use of company registers it should be possible to obtain a certified copy (in electronic form) from BRIS of information stored in the company register of a Member State.
- 54 In company law, it is often essential to prove that certain facts existed at a certain point in time (e.g. that a certain person was a director of a company at a certain point in time). For this purpose, certified register copies are commonly used. Art. 16a CLD gives the applicant the right to obtain certified electronic copies of the register content.
- 55 Currently, it is possible to access data from the national registers via BRIS, but it is not possible to obtain a certified copy (in electronic form) directly from BRIS. This can only be obtained from the relevant national register. It would be much easier and efficient to make it possible to obtain a certified copy (in electronic form) in respect of company data from all Member States directly from BRIS.

4.3.2 Recognition of certified BRIS certificates and certified certificates from national registers by all Member States courts and authorities

- 56 A further essential element to ensure optimal use of company data in cross-border administrative and court proceedings is a clear rule in the CLD that all national courts and authorities of the Member States must recognise certified BRIS copies and certified copies from national registers of other Member States. This ties in with the obligation of mutual recognition of registered company information discussed in Part 4.2 above, but it may be useful to regulate the use of certified BRIS certificates specifically to ensure a broader acceptance of this kind of certified information across borders.
- 57 Currently, Art. 13g(2) 2 CLD only requires that Member States must ensure that online formation of companies listed in Annex IIA may be carried out by submitting documents or information in electronic form, including electronic copies of the documents and information referred to in Art. 16a(4) CLD.
- 58 This rule should be extended to require Member States to **recognise both electronic and paper certified copies of national registers in all administrative and court proceedings**. Moreover, they should also be required to **recognise electronic BRIS copies** in all administrative and court proceedings.

In addition, Member States should be **prohibited from requiring legalisation or an apostille** for such documents. Currently, courts and authorities in some Member States (e.g. Germany²⁵) require a legalisation or an apostille for documents from other Member States, which leads to costs and delays. The Public Documents Regulation²⁶ already provides that certain public documents (e.g. birth or marriage certificates) shall be exempt from all forms of legalisation and similar formality. Likewise, Art. 74 EU Succession Regulation²⁷ and Art. 61 Brussels Ibis Regulation²⁸ provide that no legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of the respective regulation. The same should be true for all documents issued in a Member States in the context of the system of national registers and BRIS under the CLD.

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A potential hurdle in this respect could be the **language** issue because most national registers currently only offer certified copies in the relevant national language(s). One simple step could be to require the use of a translator registered with a national public authority and recognise the translation of a certified certificate as authentic according to national law. Additionally or alternatively, one could follow the model now included in the proposal for the ESAP Regulation²⁹ and allow machine translation services (which work very effectively nowadays). Another potential solution could be to require all registers to issue certified copies in a language generally understood across the Union, such as English, and to require the recognition of these English certified copies in all national administrative and court proceedings.

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4.3.3 Companies European Key Information Document (CEKID)

As a solution to the language problem described above, we recommend developing a standard **Companies European Key Information Document (CEKID)**. This would at the same time also solve the issue of different national standards for the content of certified copies. Such standard documents have already been successfully used in other areas, e.g. the European Certificate of Succession or the Key Information Document (KID).

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The CEKID could contain **predefined fields** (entitled in all official EU languages) for the information listed in Art. 14 CLD. This would effectively reduce the potential need for a translation to the objects of the company. One could also consider requiring all companies to register their objects also in English or allow machine translation services.

62

²⁵ According to German law, a foreign public document must be recognised if there is a legalisation (§ 438(2) ZPO). Since Germany is a party to the HCCH 1961 Apostille Convention, legalisation is replaced by an apostille for documents from other countries which are party to that convention. If a foreign public document does not have a legalisation or apostille, it is in the court's discretion to recognise it.

²⁶ Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, [2016] OJ L 200/1.

²⁷ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L 201/107.

²⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

²⁹ Art. 7(1)(e) of the proposal for an ESAP Regulation (COM(2021) 723) provides that ESMA shall ensure that ESAP provides the functionality of a machine translation service.

- 63 The CEKID would significantly **facilitate mutual recognition** of register data. National courts and administrative authorities would have a standardised documents on which they could rely.
- 64 All national register authorities of the Member States should be required to issue a CEKID upon request of the respective company. Fees should not exceed the administrative costs.
- 65 An example of what such an CEKID could look like can be found on the following page.

Companies European Key Information Document (CEKID)



1. Identification

company name: ECID example GmbH
EUID: DEKBOBCE.9001.272.475
national register number: HRB 9999
register name: Amtsgericht Bayreuth
legal form: GmbH

2. Further information regarding the company

amount of subscribed capital: 500.000 €
registered office: Universitätsstraße 150, 95447 Bayreuth
date of creation: 28.03.2022
date of registration: 29.03.2022
duration of the company: unlimited

3. Persons authorised to represent the company

a)

name: John Doe
date of birth: 1.1.1980
nationality: German
address: Universitätsstr. 150, 95447 Bayreuth, Germany
power of representation: alone

b)

name: Jane Doe
date of birth: 1.1.1981
nationality: German
address: Universitätsstr. 150, 95447 Bayreuth, Germany
power of representation: joint with a)

4. Activity of the company

objects: business consultancy
NACE code: M70.2.2
address of head office: Universitätsstr. 150, 95447 Bayreuth, Germany
other places of business
(branches/establishments): -

5 Summary of recommendations

1. **Once-only principle:** When a company registered in one Member State (A) wants to set up a branch or a subsidiary in another Member State (B), it should not be required to file data which is already available in the register of Member State A via BRIS again with the register of Member State B. Instead, the register in Member State B should simply retrieve the data regarding the company which is available in the relevant national registers via BRIS.
2. **Scrutiny of information before it is entered into the register**
 - a) **Horizontal extension:** Mandatory formation checks should be extended to the formation and online filing of all companies covered by the CLD.
 - b) **Vertical extension:** It should be considered to extend the items to be checked. It is recommended to require mandatory checks in particular also of: legality of the objects of the company, legality of the name of the company, legality of the company instruments of constitution, including verifying the correct use of templates, disqualification of a director, payment of contributions.
 - c) **EU minimum standard for checking procedures:** A reasonable approach could be a modular system which provides different options for Member States to choose from (e.g. control by judicial authority, administrative authority, notary) and also allows the relevant control authority to use automatic systems.
3. **Reliance on registered information by private parties:** It is proposed to expressly provide for “positive publicity” by adding the following provision to the CLD: “As against the company concerned, third parties may rely on documents and information made publicly available in the register unless the company proves that they knew that what is disclosed is incorrect.”
4. **Mutual recognition of register data:** Register data should be mutually recognised in all Member States. A provision to that effect should be added to the CLD (see options presented in Part 4.2).
5. **Further supporting measures**
 - a) It should be possible to obtain a certified copy (in electronic form) from BRIS of information stored in the company register of a Member State.
 - b) There should be a clear rule in the CLD that all national courts and authorities of the Member States must recognise certified BRIS copies and certified copies from national registers of other Member States.
 - c) It is recommended to develop a standard Companies European Key Information Document (CEKID).