PART I

1

Community rules applicable to the incorporation and capital of public limited liability companies

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I Introduction

1. Clear and similar rules on the incorporation and capital of limited liability companies are necessary in order to ensure easy cross-border cooperation between companies and individuals established in different Member States. Creditors of these companies need to know how the debtor's property, i.e., the company's capital, is protected and can be used. For these reasons the Community legislature coordinated the rules applicable to the incorporation and capital of public limited liability companies in 1976. These rules were laid down in Second Council Directive 77/91/EEC of 13 December 1976 on coordination 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, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (the "Second Company Law Directive").[1] This directive was later amended by Council Directive 92/101/EEC of 23 November 1992.[2]

Initially, the coordination was restricted to public limited liability companies, as these are most likely to operate cross border.[3] However,

[1] *Official Journal* L 26 of 31 January 1977.
[2] *Official Journal* L 347 of 28 November 1992.
[3] First recital to the Second Company Law Directive.

several Member States extended these rules to all or most types of national corporate forms with limited liability for shareholders, i.e., the liability of shareholders for obligations of the company is limited to their capital contributions.

2. Practice indicated that simplifying the rules laid down in the Second Company Law Directive could promote business and competition without undermining the protection afforded to shareholders and creditors. Thus, Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 was passed, amending the Second Company Law Directive.[4] The proposed changes are intended to create more flexibility and reduce the financing costs of public limited liability companies.

Directive 2006/68/EC is based on a proposal by the European Commission of 29 October 2004.[5] In its Explanatory Memorandum, the Commission states that the amendments are intended to facilitate capital-related measures taken in public limited liability companies by eliminating specific reporting requirements, facilitating specific changes in the ownership of own shares and providing a harmonised legal procedure for creditors in the event of a capital reduction. The changes are based on the 1999 recommendations of the Company Law Working Group made in the context of the fourth phase of the Simplification of the Legislation on the Internal Market (SLIM) and are in line with the findings of the High Level Group of Company Law Experts, which finalised its report in November 2002.

The Economic and Social Committee formulated an opinion on the proposed changes on 13 July 2005 and approved in general the proposed amendments, but pointed out that simplification should not result in the diminishment of creditors' rights.[6]

Based on a report of its Committee on Legal Affairs, the European Parliament approved a number of amendments to the proposal on 14 March 2006 and sent the amended proposal back to the European Commission for finalisation.[7] The Commission accepted all of the amendments and incorporated them into the final draft of the Directive.

Directive 2009/109/EC of 16 September 2009 made a few changes to the Second Company Law Directive to take into account the formalities imposed in the event of mergers and divisions.[8]

[4] *Official Journal* L 264 of 25 September 2006.
[5] COM (2004) 730 final.
[6] *Official Journal* C 294 of 25 November 2005.
[7] *Official Journal* C 291E of 30 November 2006.
[8] *Official Journal* L 259 of 2 October 2009.

Recently, the Second Company Law Directive was restated to consolidate all the changes made through the abovementioned directives.[9] The restated Second Company Law Directive 2012/30/EU of 25 October 2012 can be found in Annex I to this book.

3. In light of these changes, a complete overview of the framework put in place by the Second Company Law Directive is in order. This chapter contains a general overview of the provisions of Community law applicable to the formation of public limited liability companies, the minimum share requirements, the limitations on the distribution of profits and other funds to shareholders, and capital increases and reductions. The following chapters examine the implementation of these rules into the national law of the thirty Member States of the European Union and the European Economic Area.

II Application

4. The Second Company Law Directive has been transposed into national law by all Member States.

It also applies to the member countries of the European Economic Area (EEA), i.e., the EU Member States plus Norway, Iceland and Liechtenstein.[10] Therefore, all references in this chapter to the European Union or its Member States should be construed to include these three EEA countries as well, unless specified otherwise.

The deadline for transposition of Directive 2006/68/EC of 6 September 2006 into national law by the Member States was 15 April 2008 (Art. 2 Dir.). Most Member States were late in enacting implementing legislation, although currently, all Member States have transposed the Directive of 6 September 2006.[11]

III Scope

5. The Second Company Law Directive is intended to harmonise national laws on the incorporation and capital of public limited liability

[9] *Official Journal* L 315 of 14 November 2012.

[10] Further to EEA Joint Committee's Decision No 95/2007 of 6 July 2007, amending Annex XXII (Company Law) to the EEA Agreement (*Official Journal* L 328 of 13 December 2007).

[11] Directive 2006/68/EC of 6 September 2006 was made applicable to Norway, Iceland and Liechtenstein further to the EEA Joint Committee's Decision No 95/2007 of 6 July 2007, amending Annex XXII (Company Law) to the EEA Agreement (*Official Journal* L 328 of 13 December 2007).

companies in the Member States of the European Union. Its scope is therefore limited to public limited liability companies. Of course, the Member States may extend these provisions to other types of companies, and several Member States have indeed applied the provisions of the Directive to other types of companies with limited liability for shareholders.

The Second Company Law Directive lists the different types of public limited liability companies by Member State that fall within its scope in an annex to the Directive (Annex II to this book).

The name of a company which is incorporated in a form listed in the Second Company Law Directive must contain a description which is distinct from that required of other types of companies (Art. 1(1) Dir.).
6. Member States may decide not to apply the rules of the Second Company Law Directive to investment companies with variable capital ("open-ended investment funds") and to cooperatives which take the form of a public limited liability company. Open-ended investment companies are excluded from the scope of the Directive as their capital must remain flexible.[12]

An investment company with variable capital is a company (i) whose sole purpose is to invest in various stocks and shares, land or other assets in order to spread the investment risk and provide its shareholders with the benefit of the results of the management of their assets, (ii) which offers its own shares to the public and (iii) whose articles of association provide that, within specified minimum and maximum limits, it may at any time issue, redeem or resell its shares (Art. 1(2) Dir.). Such companies are governed by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended.

If a Member State excludes such investment companies from the scope of the Second Company Law Directive, its national law should provide that they must indicate that they are not subject to the provisions implementing the Directive. To this end, excluded investment companies must mention on their letterhead and order forms, together with their name and corporate form, the words "investment company with variable capital". Furthermore, cooperatives that take the form of a public limited liability company and which are excluded from the scope of the Second

[12] Explanatory Memorandum to the Second Company Law Directive, COM (70) 232 final, pp. 21–2.

Company Law Directive must indicate on their letterhead and order forms that they are a cooperative (Art. 1(2) Dir.).

IV Applicable law

7. The national rules implementing the Second Company Law Directive apply to all public limited liability companies governed by the laws of that particular EEA Member State (see no 5 of this chapter). These national rules will differ from one country to another.

In order to determine the applicable national law, reference should be made to the conflict-of-laws rules. Pursuant to these rules, the publication of corporate documents, the incorporation, capital and shares issued by a company and the rights attached to its shares, such as the right to vote and to share in the profits, are all governed by the law of the country where the company's offices are situated.

The conflict-of-laws rules are provisions of national law and may thus differ from state to state. National law will determine the factors used to determine whether that country's law applies to an EU-based company.[13] Throughout the European Union, national law refers to the location of the corporate offices as the relevant factor, but a company's office, for this purpose, is defined differently from one Member State to another.

The term 'office' can refer, depending on the applicable conflict-of-laws rules, to the company's registered office, i.e., the place where it has been incorporated, or its head office, i.e., the place from where the company is managed.

Several Member States follow the incorporation theory, which provides that a legal entity is governed by the law of its place of incorporation (i.e., the location of its registered office). This is the case for Bulgaria,[14] Cyprus, Czech Republic, Denmark, Estonia,[15] Finland, Hungary, Iceland, Ireland, Italy,[16] Lithuania, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia (with a few exceptions), Sweden and the United Kingdom.

Other Member States apply the head office (*siège réel*) theory, in accordance with which the law of the place where the head office is

[13] European Court of Justice, 16 December 2008, *Cartesio*, ECR, 2008, I-09641.
[14] But if a company is not incorporated or incorporated in several states, the head office is decisive.
[15] However, the *siège réel* theory is applied to companies from outside the EEA.
[16] Although companies with their head office in Italy are also governed by Italian law.

located applies. This is the case for Austria, Belgium, France, Germany, Greece, Luxembourg, Latvia, Portugal and Spain. The head office is defined as the place where the company is effectively managed and controlled; it is the place where the central management and administration are located.[17]

The (national) law governing the company will also determine the manner in which corporate information is made public; publication will be made in that Member State (see no 13 of this chapter).

V Minimum information in the articles of association and related documents

1 General remarks

8. Creditors and third parties must have a clear understanding of the company with which they are interacting or trading. This means that essential information allowing them to correctly understand the type of company with which they are dealing and its financial situation must be made available. In this respect, the Second Company Law Directive seeks only to ensure publication of the company's capital situation. Its overall financial situation can be determined from its annual accounts, which must be prepared and published in accordance with the rules laid down in the Fourth Company Law Directive of 25 July 1978 on the annual accounts of certain types of companies.[18]

Thus, the Second Company Law Directive requires that certain provisions relating to the status of a company be included in its articles of incorporation or association. This implies that any change thereto is subject to the rules applicable to amending the articles of association.

A second rule provides for the publication of certain information about the company, regardless of whether this information is contained in the articles of incorporation or in another document prepared upon incorporation. Publication is intended to ensure that third parties are aware of relevant information about the company. Any changes to this

[17] ECJ, 27 September 1988, *Daily Mail and General Trust*, ECR, 1988, I-5483; 16 December 2008, *Cartesio*. In accordance with Regulation No 2137/85 of 25 July 1985 on the European economic interest grouping, the head office is defined as the place of 'central administration' (Art. 4). In the French version of this regulation, head office is translated as *administration centrale*.

[18] *Official Journal* L 222 of 14 August 1978.

information must likewise be rendered public so as to ensure that third parties at all times have a clear view of the company's characteristics.

This information is in addition to that which must be published pursuant to the First Company Law Directive (Directive 2009/101/EC) of 16 September 2009.[19]

9. The Second Company Law Directive refers to the articles of association as 'statutes' and distinguishes them from the instrument of incorporation.

The articles of association refer to the rules established by the founders or shareholders upon creation of the company, determining its structure, the rights and obligations of shareholders and the holders of other securities issued by the company, and its organisational structure. The content of the articles of association is determined by applicable national law.

The instrument of incorporation refers to the document signed by the founders at the time of incorporation. It typically contains, in addition to the articles, other provisions, such as the identity of the founders and their capital contributions, the amount of paid-in capital upon incorporation, and the identity of the company's first directors and certified auditor.

Article 2 of the Second Company Law Directive defines the minimum information that must be included in the instrument of incorporation. In general, national law will indicate additional information that must be included in the instrument of incorporation and the articles of association. The form of both documents is also determined by national law.

2 *Minimum information in the articles of association*

10. The instrument of incorporation or the articles of association (the "statutes") must include at all times the following information:

(i) the company's corporate form and name;
(ii) the objects or corporate purpose;
(iii) the amount of subscribed capital (if the company has no authorised capital) or the amount of authorised capital and the capital which has been subscribed upon incorporation or when the company is authorised to start business and at the time of any change in the

[19] The First Company Law Directive was first enacted as Directive 68/151/EEC of 9 March 1968 (*Official Journal* L 65 of 14 March 1968). Following several amendments, it was restated and replaced by Directive 2009/101/EC of 16 September 2009 (*Official Journal* L 258 of 1 October 2009).