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 (Text with EEA relevance)

DIRECTIVE (EU) 2019/1151 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 50(1) and points (b), (c), (f) and (g) of Article 50(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Directive (EU) 2017/1132 of the European Parliament and of the Council[(3)] lays down *inter alia* rules on disclosure and interconnection of central, commercial and companies registers of Member States.

(2) The use of digital tools and processes to more easily, rapidly and time- and cost-effectively initiate economic activity by setting up a company or by opening a branch of that company in another Member State, and to provide comprehensive and accessible information on companies, is one of the prerequisites for the effective functioning, modernisation and administrative streamlining of a competitive internal market and for ensuring the competitiveness and trustworthiness of companies.

(3) Ensuring that a legal and administrative environment equal to the new social and economic challenges of globalisation and digitalisation exists is essential, on the one hand, in order to provide the necessary safeguards against abuse and fraud and, on the other, in order to pursue objectives such as promotion of economic growth, creation of jobs and attracting investment to the Union, all of which would bring economic and social benefits to society as a whole.

(4) There are currently significant differences between Member States when it comes to the availability of online tools enabling entrepreneurs and companies to communicate with authorities on matters of company law. eGovernment services vary between Member States. Some Member States provide comprehensive and user-friendly services entirely

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online, while others are unable to provide online solutions at certain major stages of a company's lifecycle. For example, some Member States only allow the formation of companies, or the filing of changes to documents and information with the register, to be done in person, some allow those actions to be done either in person or online, and in other Member States they can only be done online.

(5) Furthermore, regarding access to company information, Union law stipulates that a minimum set of data always has to be provided free of charge. However, the scope of such information remains limited. Access to such information varies, with more information being made available free of charge in some Member States than in others, thus causing an imbalance in the Union.

(6) The Commission, in its Communication 'A Digital Single Market Strategy for Europe' and in its Communication 'EU e-Government Action Plan 2016-2020: Accelerating the digital transformation of government', stressed the role of public administrations in helping businesses to easily start their activities, operate online and expand across borders. The EU e-Government Action Plan specifically recognised the importance of improving the use of digital tools when complying with company law-related requirements. Furthermore, in the 'Tallinn declaration on eGovernment' of 6 October 2017, Member States made a strong call to step up efforts for the provision of efficient, user-centric electronic procedures in the Union.

(7) In June 2017, the interconnection of Member States' central, commercial and companies registers became operational thereby greatly facilitating cross-border access to company information in the Union and allowing registers in Member States to communicate with each other electronically in relation to certain cross-border operations which affect companies.

(8) In order to facilitate the formation of companies and the registration of branches and to reduce the costs, time and administrative burdens associated with those processes, in particular by micro, small and medium-sized enterprises ('SMEs') as defined in Commission Recommendation 2003/361/EC[(4)], procedures should be put in place to enable the formation of companies and registration of branches to be completed fully online. This Directive should not oblige companies to use such procedures. Member States should, however, be able to decide to make some or all online procedures mandatory. The current costs and burdens associated with formation and registration procedures derive not only from administrative fees charged for forming a company or registering a branch, but also from other requirements which make the overall process longer to complete, in particular when the physical presence of the applicant is required. In addition, information on such procedures should be made available online and free of charge.

(9) Regulation (EU) 2018/1724 of the European Parliament and of the Council[(5)], which establishes the Single Digital Gateway, provides for general rules for online provision of information, procedures and assistance services relevant for the functioning of the internal market. This Directive establishes specific rules relating to the online formation of limited liability companies, registration of branches, and filing of documents and information by companies and branches ('online procedures'), which are not covered

by that Regulation. In particular, Member States should provide specific information about online procedures provided for in this Directive and models of instruments of constitution ('templates') on the websites accessible by means of the Single Digital Gateway.

(10) Enabling the formation of companies, registration of branches and filing of documents and information to be done fully online would allow companies to use digital tools in their contacts with competent authorities of Member States. In order to enhance trust, Member States should ensure that secure electronic identification and the use of trust services is possible for national as well as cross-border users in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council[(6)]. Furthermore, in order to enable cross-border electronic identification, Member States should set up electronic identification schemes which provide for authorised electronic identification means. Such national schemes would be used as a basis for the recognition of electronic identification means issued in another Member State. In order to ensure that there is a high level of trust in cross-border situations, only electronic identification means which comply with Article 6 of Regulation (EU) No 910/2014 should be recognised. In any event, this Directive should only oblige Member States to enable online formation of companies, registration of branches and online filing of documents and information by applicants who are Union citizens, through the recognition of their electronic identification means. Member States should decide on the way in which the identification means that they recognise, including those not falling under Regulation (EU) No 910/2014, are made publicly available.

(11) Member States should remain free to decide which person or persons are to be considered under national law as applicants with regard to online procedures, provided that that does not limit the scope and the objective of this Directive.

(12) In order to facilitate online procedures for companies, Member States' registers should ensure that the rules on fees applicable to the online procedures provided for in this Directive are transparent and applied in a non-discriminatory manner. However, the requirement of transparency of rules on fees should be without prejudice to contractual freedom, where applicable, between applicants and persons who assist them in any part of the online procedures, including the freedom to negotiate an appropriate price for such services.

(13) Fees charged by the registers for online procedures should be calculated on the basis of the costs of the services in question. Such fees could also cover, *inter alia*, the costs of minor services performed without charge. In calculating their amount, Member States should be entitled to take account of all the costs related to carrying out the online procedures, including the proportion of the overheads which can be attributed thereto. Furthermore, Member States should be allowed to impose flat-rate charges and fix the amount of such charges for an indefinite period, provided that they check at regular intervals that such charges continue not to exceed the average cost of the services in question. Any fees for online procedures charged by the register in the Member States should not exceed the recovery cost of providing such services. Moreover, where the completion of the procedure requires a payment, it should be possible that the payment

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can be made by means of widely available cross-border payment services, such as credit cards and bank transfers.

(14) Member States should assist persons seeking to form a company or register a branch by providing certain information through the Single Digital Gateway and, where applicable, on the e-Justice Portal, in a concise and user-friendly way, concerning the procedures and requirements on the formation of limited liability companies, registration of branches and filing of documents and information, rules relating to the disqualification of directors and an outline of the powers and responsibilities of the administrative, management and supervisory bodies of companies.

(15) It should be possible to form companies fully online. However, Member States should be allowed to limit online formation to certain types of limited liability companies, as specified in this Directive, due to the complexity of the formation of other types of companies in national law. In any event, Member States should lay down detailed rules for online formation. It should be possible to carry out online formation with the submission of documents or information in electronic form, without prejudice to Member States' material and procedural requirements, including those relating to legal procedures for drawing up instruments of constitution, and to the authenticity, accuracy, reliability, trustworthiness and appropriate legal form of documents or information that are submitted. However, those material and procedural requirements should not make online procedures, in particular those for the online formation of a company and online registration of a branch, impossible. Where obtaining electronic copies of documents satisfying the requirements of Member States is not technically possible, by way of exception, the documents in paper form could be required.

(16) Where all formalities required for the online formation of a company are complied with, including the requirement for all documents and information to be correctly provided by the company, the online formation before any authorities or any persons or bodies mandated under national law to deal with any aspect of online procedures, should be fast. However, in cases where there are doubts about the fulfilment of necessary formalities, including concerning the identity of an applicant, the legality of the name of the company, the disqualification of a director or the compliance of any other information or document with legal requirements, or in cases of suspicion of fraud or abuse, the online formation might take longer and the deadline for the authorities should not commence until such formalities are complied with. In any event, where it is not possible to complete the procedure within the deadlines, Member States should ensure that the applicant is notified of the reasons for any delay.

(17) In order to ensure the timely online formation of a company or online registration of a branch, Member States should not make that formation or registration conditional on obtaining any licence or authorisation before that formation or registration can be completed, unless national law so provides for the purpose of ensuring that there is a proper oversight of certain activities. After formation or registration, national law should govern the situations in which companies or branches are not allowed to carry out certain activities without obtaining a licence or authorisation.

(18) In order to assist businesses, in particular, SMEs in setting-up, it should be possible to form a private limited liability company with the use of templates, which should be available online. Member States should ensure that such templates can be used for online formations, and should remain free to determine what their legal value is. Such templates could contain a pre-defined set of options in accordance with national law. The applicants should be able to choose between using templates or forming a company with bespoke instruments of constitution, and Member States should have the option of providing templates also for other types of companies.

(19) In order to respect Member States' existing traditions regarding company law, it is important to allow flexibility as regards the manner in which they provide a fully online system for formation of companies, registration of branches and filing of documents and information, including in relation to the role of notaries or lawyers in any part of such online procedures. Matters concerning online procedures which are not regulated in this Directive should continue to be governed by national law.

(20) Furthermore, in order to tackle fraud and company hijacking and to provide safeguards for the reliability and trustworthiness of documents and information contained within national registers, provisions concerning online procedures provided for in this Directive should also include controls on the identity and legal capacity of persons seeking to form a company or register a branch or to file documents or information. Those controls could be a part of the legality check required by some Member States. The means and methods for carrying out those controls should be left to Member States to develop and adopt. To that effect, Member States should be able to require the involvement of notaries or lawyers in any part of the online procedures. However, such involvement should not prevent the completion of the procedure in its entirety online.

(21) Where justified by reason of the public interest in preventing identity misuse or alteration, or in ensuring that the rules on legal capacity and on applicants' authority to represent a company are complied with, Member States should be allowed to take measures, in accordance with national law, which could require the physical presence of the applicant before any authority or person or body mandated under national law to deal with any aspect of online procedures, of the Member State in which the company is to be formed or a branch is to be registered. However, such physical presence should not be required systematically, but only on a case-by-case basis where there are reasons to suspect identity falsification or non-compliance with the rules on legal capacity and on applicants' authority to represent a company. Such suspicion should be based on information available to the authorities or persons or bodies mandated under national law to perform such kinds of controls. In the event that physical presence is required, Member States should ensure that any other steps of the procedure can be completed online. The concept of legal capacity should be understood to include the capacity to act.

(22) Member States should be allowed also to enable their competent authorities, persons or bodies to verify, by complementary electronic controls of identity, legal capacity and legality, whether all the conditions required for the formation of companies are met. Such controls could include, *inter alia*, video-conferences or other online means that provide a real-time audio-visual connection.