Obywatel w centrum działań e-administracji w Unii Europejskiej

Citizen-centric e-Government in the European Union

REDAKCJA / EDITED BY

Sławomir Dudzik · Inga Kawka · Renata Śliwa

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Alessio Bartolacelli[1]

Observations on the European Requirements for the Constitution of a Company (Art. 10 Codified Directive)

Abstract: In this essay, I consider some specific aspects of Art. 10 of Directive (EU) 2017/1132. I focus, in particular, on the different linguistic versions of the norm, and the fact that they set down different requirements in each Member State, determining in this way the impossibility of defining common standards to be used when it comes to the control of the founding documents of the company. As a conclusion, I argue that even if the area is not harmonised by the EU legislation, some sort of spontaneous harmonisation has anyway taken place among the Member States, and not one of them has developed radically deregulated normative solutions.

Keywords: company law in the EU, Directive 2017/1132, constitution of a company, spontaneous harmonisation

Uwagi dotyczące europejskich wymogów dotyczących utworzenia spółki (art. 10 ujednoliconej dyrektywy)

Abstrakt: W eseju rozważam niektóre specyficzne aspekty art. 10 dyrektywy (UE) 2017/1132. Koncentruję się w szczególności na różnych wersjach językowych norm oraz na tym, że stawiają one różne wymogi w każdym państwie członkowskim, przesądzając w ten sposób o niemożności określenia wspólnych standardów, którymi należy się kierować w przypadku kontroli dokumentów

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założycielskich firmy. Konkludując, twierdzę, że nawet jeśli obszar ten nie jest zharmonizowany przez ustawodawstwo UE, to i tak doszło do pewnego rodzaju spontanicznej harmonizacji między państwami członkowskimi, a żadne z nich nie wypracowało radykalnie zderegulowanych rozwiązań normatywnych.

Słowa kluczowe: prawo spółek w UE, dyrektywa 2017/1132, założenie spółki, spontaniczna harmonizacja

1. Introduction: the formation of companies as a (mainly) domestic law issue

The relatively new Directive (EU) 2019/1151,[2] amending the so-called Codified Directive (EU) 2017/1132 (hereinafter: C.D.)[3] by introducing norms – among other things – on the online establishment of companies throughout the entire Union provides an opportunity to reflect briefly on the European minimum requirements for the establishment of public and private companies. In reality, even if it has a long history,[4] this topic does not seem to be investigated in depth in the literature. Nevertheless, there are some critical features that need highlighting.

The first issue we must consider is the fact that, when we discuss a company's constitution, this counterintuitively does not refer either solely, or even principally, to company law. The constitution of a company, insofar as it implies one of the key features of that organisation, i.e., its members' limited liability,[5] requires the acceptance of the liability limitation by the Country that allows the constitution of the company. In fact, as is well known, the general rule regarding the obligations is that the debtor is liable for the full debt, and not in a limited way.[6] The liability limitation has there-

[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.

[3] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), of which the current (September 2022) consolidated text is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017L1132-20220812&qid=1662189185348.

[4] The issue under discussion here has in fact been present since the original version of the so-called First Council Directive 68/151/EEC, as of 1968, whose content is now included, as far as we are here concerned in a substantively identical way, in the C.D., in Art. 10 in both Directives.

[5] Cf. J. Armour, H. Hansmann, R. Kraakman, M. Pargender, *What Is Corporate Law?* [in:] Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 3rd edition, Oxford 2017, p. 8.

[6] See, for instance, Art. 2740 Italian Civil Code which is very clear on this point: "The debtor is liable for the performance of obligations with all his present and future assets."

fore a specific pro-entrepreneurial function, very well known since the Middle Ages,[7] but is to be seen as an exception in the un-limited liability system. The only body that has the power, in the legal system, to grant the limited liability is the State; the act of granting the limitation, therefore, is an *administrative* act. This is why, in our opinion, the formal requirements for the creation of a new company deal much more with administrative law than with company law; and this is true, naturally, also when it comes to the online constitution of companies.[8]

The preliminary observation makes it clear from the very beginning of this essay that, according to a general theory, it is up to each country to define the formal requirements for the establishment of a new company, as well as the relevant administrative procedures for doing so, and have company members automatically benefit from limited liability. This is explicitly made true, for the European Union, by the Treaty on the Functioning of the European Union, and by several decisions by the European Court of Justice.

The key legal provision is Art. 54 TFEU: 'Company or firms *formed in accordance with the law of a Member State* (…)' in line 1 and the mention, in line 2, of "companies or firms" that are '*constituted under civil or commercial law*,' meaning the *relevant Member State's* civil or commercial law.

On the other hand, this principle has been restated several times by the jurisprudence of the European Court of Justice. This is very clear since one of the hallmark decisions in the field of Freedom of Establishment, i.e., the *Daily Mail* Decision, dating back to 1988,[9] in point 19 states: 'companies are creatures of the law and, in the present state of Community law, *creatures of national law*.' Again, domestic law is the king, when it comes to the definition of the rules for establishing a new company. Nevertheless, a few rules come also from European law.

2. The European rules on company formation. Art. 10 C.D.

As we have already pointed out, the C.D. includes minimal rules on the formal requirements for constituting a new company. Originally, they were laid down in

[7] See, for instance, Y. González de Lara, *Business Organization and Organizational Innovation in Late Medieval Italy* [in:] *Research Handbook on the History of Corporate and Company Law*, H. Wells (ed.), Cheltenham 2018, p. 71.

[8] A. Bartolacelli, *A New (?) Framework (?) on Digitalization (?) in European (?) Company (?) Law?*, "InterEuLawEast" 2018, vol. 5, no. 2, p. 63.

[9] Judgment of the Court of 27 September 1988. The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. Case 81/87.

Art. 10 only, which consists of the brief statement that is the main topic of this short essay; since 2019, however, new provisions have been included in Chapter III, Title I of the C.D., dealing with the online formation of companies and setting down specific IT requirements necessary for this type of formation. This means that the European legislation has rules for both the "traditional" and the "online" formation procedures. Nevertheless, we must highlight right from the start that the set of rules we are about to discuss does not have a homogenous scope of application.

In fact, according to the C.D., Art. 10 – along with all the provisions included in Title I, Section II – is, at least in theory, mandatorily applicable to the company types listed in Annex II, *i.e.,* all company forms, both private and public.

The approach is different when it comes to the rules on online formation, included in Chapter III; they are applicable in general terms to the company types listed in Annex II, but there are several – meaningful – exceptions limiting the scope of application of certain rules solely to either the company forms included in Annex I (public/joint stock companies only), or the forms included in the new Annex IIA (private companies only, also in their simplified and unipersonal variants).

The main generally applicable rule is, however, Art. 10 of the C.D., whose title is *Drawing up and certification of the instrument of constitution and the company statutes in due legal form*.

For the sake of clarity, we reproduce it here in its – short – entirety: 'In all Member States whose laws do not provide for preventive administrative or judicial control, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be drawn up and certified in due legal form.'

This means that, in each and every Member State, in order to establish a new company, the formation process *must* imply the presence of, either,

- A preventive administrative or judicial control at the time of formation; or
- The drawing-up and certification in *due legal form*.

The key idea seems to be the fact that the system based on the alternative between a judicial or administrative control and a due legal form should make it possible to have a sufficient degree of reliability about the lawfulness of the foundational profiles of the company. Not by chance, the issue regarding the lack of the legal form and the rules of preventive controls is also taken into consideration among the possible – but not mandatory – grounds for the declaration of the nullity of the company, according

to the following Art. 11 C.D.[10] The fact that the company's instrument of formation had been controlled by a judge or an administrative officer before the formation of the company[11] is seen as equivalent to the fact that the instrument of formation and company's statutes have been drawn up and certified in that due legal form that the Member State sets down as appropriate. However, this statement creates a series of issues.

In fact, if we consider carefully the meaning of "due legal form," such wording is not per se any guarantee whatsoever that certain standards are to be met regarding a company's constitution. The phrase simply means that the instrument of constitution of the company, if there is not a *preventive* administrative or judicial control, *must* (hence, the form is "*due*") be drawn-up and certified in a *form* that has been established *by the law* ("*legal*"). As companies are creatures of domestic law, as we have just observed, this means that the relevant law is the law of the Member State, and not European Law, apart from a few features that we are about to discuss.[12]

By reasoning this way, the meaning of the entire statement would be, therefore, that Member States are free to leave the form for the establishment of a company basically free; if they do so, however, a preventive judiciary or administrative control of the instrument of constitution is needed. On the contrary, if a Member State opts for a specific form for the drawing-up of the instrument of constitution, then no obligation arises, pursuant to European "Company" Law, regarding the need for the Member State to establish a further administrative or judicial check. The legal form chosen by the Member State is by European Law itself held sufficient to provide the same guarantees that the administrative or judicial control would supply.

This being said, we can now move on to investigate the meaning of the expressions that we can find in Art. 10 C.D.

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[10] Art. 11, line 1, letter (b)(i): 'nullity may be ordered only on the grounds: (i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with.'

[11] This is the meaning to be given to the adjective "preventive," in our opinion, as this would prevent the coming into existence of the company as a company, which occurs, in general terms, when the company is filed in the relevant Business Register.

[12] In addition, a further exegetical observation might be made: the stress, in the text, on the due *legal* form is to be interpreted as the requirement that the Member States adopt the rules on the form for establishing a company by means of a legislative instrument having the force of law, thus excluding "simple" administrative provisions from being sufficient for due compliance with the rule.

3. The bodies in charge of the preventive administrative or judicial control at the time of formation

We have already pointed out that the adjective 'preventive' must be read with respect to the coming into existence of the company, and so it means before the filing of the instrument of constitution in the relevant Business Register. The wording and the proposed interpretation seem perfectly compatible also with those legal systems that recognise the company "under formation," as happens in Germany with the *Vorgesellschaft*, before the registration: in the event that no due legal form has been set down by the Member State, the administrative or judicial control shall take place before the end of the process of formation, and thus after the drawing-up of the document, but before the filing of the instrument of constitution in the relevant Register.

The main issues, however, are related to the identification of the administrative or judicial body in charge of the control, and to the matters to be actually controlled by such bodies.

We are leaving the latter issue for the next paragraphs while we deal with the former one, even though there is no rock-solid certainty about this, either.

In general, the constitution of companies in the different Member States of the European Union involves the presence of different offices, whose features identify them as "administrative or judicial" bodies. For instance, public notaries might fall into the category of administrative bodies. And we must also consider administrative bodies, at least as far as the issue under examination is concerned, the points of contact that some Member States have established in order to make it easier for prospective entrepreneurs to establish a new company.[13] The bodies in charge of the Business Register are more complex, as their nature can vary considerably. In some Member States, they are mainly administrative,[14] while other Member States have opted for having a judicial body in charge of the Register.[15]

In any case, all these bodies might be, at least theoretically speaking, in charge of a "preventive administrative or judicial control" over the instrument of constitution. In order to understand the actual extent needed for such a control, however, we must first take into consideration the notion of *due legal form* in more depth.

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13 This is the case, incidentally, of the Spanish *Puntos de Atención al Emprendedor* or the Portuguese *Postos de atendimento*.

14 See, for instance, Italy, where in any case a judge in charge of controversies superintends the filing in the register.

15 This is what happens in the French Register (*Greffe*), or in Germany with the *Handelsregister*.

4. The due legal form for the drawing up and certification of the instrument of constitution

As we have already pointed out, the notion of *due legal form* is rather open, and left to the domestic lawmaker for its implementation, which at least theoretically speaking is optional. This is the direct fallout of the fact that the company is – in the wording of the Daily Mail's decision recalled above – a creature of national law: each Member State is free to set the rules they consider most appropriate, including those related to the form of the instrument of constitution. As we are going to observe, this has to do with regulatory competition.

The second profile that seems extremely interesting concerns a pseudo-European rule. As is well known, European legislation is issued in all the official languages of the Union, and each different linguistic version is held as official. This circumstance has a very specific interest in the case under discussion. In fact, if we examine the different linguistic versions of Art. 10 C.D., we can observe a curious twofold approach.[16]

On the one hand, some translations follow the generic English provision, with a reference to a rather general concept of *due legal form*, in the sense of a form of establishment held as appropriate by (domestic) law. This seems to be the case of the Bulgarian reference to "надлежната форма" (adequate form); the Estonian wording "juriidiliselt nõuetekohases vormis" (juridically appropriate form); the Gaelic "bhfoirm chuí dlí" (adequate juridical form); the Croatian "u odgovarajućem pravnom obliku" (appropriate legal form); the Latvian "aktos noteiktā kārtībā" (according to the procedure specified in the law); the Lithuanian "laikantis reikiamos teisinės formos" (according to the required legal form); the Maltese "fil-forma legali xierqa" (in the appropriate legal form); the Polish "we właściwej formie prawnej" (in the correct legal form); the Slovenian "v pravilni pravni obliki" (in the correct legal form).

On the other hand, conversely, the majority of linguistic versions actually refer to a much more specific concept, which can be in general traced back to the tradition of the French "*acte authentique*," i.e., a document that has been drawn-up by a public officer. Besides France ("*acte authentique*"), this is the case in Spain ("escritura pública"); Czech Republic ("úředně ověřeny": officially verified); Denmark ("officielt bekræftet document," literally a document officially certified, with a subsequent explicit reference, in French despite the Danish text, to the *acte authentique*); Germany ("Akte öffentlich

[16] This matter has been investigated with reference to different issues by F. M. Mucciarelli, *E pluribus unum? Language diversity and the harmonization of company law in the European Union*, "Maastricht Journal of European and Comparative Law" 2019, p. 1.

beurkundet"); Greece ("δημόσιο έγγραφο"); Italy ("atto pubblico"); Hungary ("közokiratba"); The Netherlands ("authentieke akte"); Portugal ("documento autêntico"); Romania ("formă autentică"); Slovakia ("úradne overené"); Finland ("oikeiksi vahvistettuja asiakirjoja," documents officially assessed, again with an explicit subsequent reference in French to the *acte authentique*); and Sweden ("officiellt bestyrkta handlingar").

We are thus facing a rather curious situation. The very same official piece of legislation, issued by the European Union, is somehow differentiated in the official translations cross-referencing – where available – domestic legal forms for the drafting of the instrument of constitution of the company. This implies that the preliminary conclusion that we reached above, i.e., that the reference to the "due legal form" allows the Member State to impose any formality it wishes on the founding parties as far as the drawing-up of the instrument of constitution is concerned, is to be held as valid only for those Member States whose national translation does not refer to the more specific – and reliable – form comparable to the French *acte authentique*.

Naturally, this situation creates the possibility for unequal treatment, as in some Member States the legal form for the instrument of constitution is mandatory in the form of the local equivalent of the *acte authentique*, at least apparently under European Law, while other Member States are free to change it, maintaining its nature of *due legal form*, with no need to intervene in European Law.[17]

From a more general perspective, it seems at least questionable whether a European piece of legislation should explicitly refer to domestic formalities that are not based on the European Law itself. The first reason is that, intuitively and as we have already pointed out, a specific equivalent form is not always present in the same terms in the entire territory of the Union. We can easily assume that the different versions of Art. 10 referenced the national version of the *acte authentique* in those Member States where such a form was present,[18] and opted for the far less specific mention of a generic due legal form in the other Countries.

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[17] For the sake of clarity, this is possible also for the States belonging to the *acte authentique* group. In fact, if one of these Member States decides to discontinue the requirement of the *acte authentique* form, by passing to another, hypothetically less demanding one, with a decision that only deals with that Member State's domestic law, it is free to do so, provided that a "preventive administrative or judicial control" over such a document has been put in place. On the contrary, if the same situation occurs in one of those Member States that belong to the *due legal form* group, such a change adopted internally by the State is completely lawful, even without the need of a preventive control, as the "new" form is to be held as "due legal form," according to the State's domestic law, as was the "old" one.

[18] The fact that some national versions of a European piece of legislation refer to specific domestic forms for the drawing up of official acts seems to be seen as the outcome of a precise political choice, operated by the national governments regarding the approval of the First Directive. Perhaps, it was

But the most interesting problem is even more closely related to this unusual intrinsic interaction between European and domestic laws. In fact, by referencing legal forms that imply a specific set of features under national law, the European Law *de facto* de-potentiates the requirements. Each Member State is free to change the legal requirements and the features included in the national version of the *acte authentique*, at their sole will, and also to establish far less demanding features for their internal version of *acte authentique*. Moreover, it is also possible, especially in the current era of ever increasing digitalisation, for the Member States to hold other forms of legal drafting as legally equivalent to the domestic version of *acte authentique*. This means, therefore, that if the mention of the domestic form equivalent to the *acte authentique*, in those language versions that require it, aimed theoretically at guaranteeing an elevated standard of reliability at the time when the rule was issued, this is not necessarily true today, nor can we have such a certainty for the future. In addition, from this point of view, there is a further element to highlight, deriving from the recent rules on digital constitution. In fact, Art. 13h C.D. states that, in the event of online constitution of a company, if the founding members use the templates made available by the Member State where the company is going to be established, these templates are deemed to fulfil the requirements of the due legal form, pursuant to Art. 10 C.D. This, however, happens only if the use of the templates complies with the rules set down in Art. 13g.4(a), i.e., that the rules of the Member State for the online constitution of a company provide for "the procedures to ensure the legality of the company instruments of constitution, including verifying the correct use of templates." Nevertheless, in this case too there is no setting of minimum standards for such procedures, whose definition is left to each Member State.[19]

For this reason, it does not seem that, per se, the reference to the *acte authentique* is an assurance of a common standard of reliability throughout the Union, as many Member States do not have a comparable form, or simply do not want to have it used for the establishment of companies; and as for those States belonging to the "*acte authentique* group," their standards might differ considerably.

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intended to establish an even stronger link between the European and each domestic legal system, with a sort of interlocking reference; on the contrary, it seems to be likely to generate a short-circuit where the domestic interpretation becomes necessary for understanding a European legal provision in spite of the harmonising will behind this choice although this is not the case in all the States.

[19] In addition, the provision referred to does not necessarily imply that a public notary is required for a company to have due legal form; in fact, the provision dealing with the (possible) intervention of a public notary is Art. 13g.4(c), while Art. 13h simply cross-refers to Art. 13g.4(a).

5. The alleged functionality of Art. 10 to the nullity of a company

A common belief regarding the rule included in Art. 10 C.D. is that it is functional to the general discipline of the nullity of the company[20] and at least two circumstances seem to confirm this thesis.

First, from a systematic point of view, Art. 10 belongs to Section II of Chapter II, Title I of the C.D., and the official title of the Section is "Nullity of the limited liability company and validity of its obligations." The second proof, perhaps with even more apparent grounds, is the fact that the subsequent Art. 11 C.D., dealing specifically with the conditions for nullity of a company, explicitly references the discipline included in Art. 10, in setting down a cause for nullity. However, in reality, none of these observations is completely convincing.

On the one hand, we must point out that the systematic accommodation of a norm is not to be overestimated. It certainly signals a general idea of the European lawmakers, but in our opinion the case that we are examining simply provides for a rule to apply to companies *existing as such*. Looking at the provision from this point of view, Art. 10 simply defines the minimum requirements for the constitution of a company as a business organisation with the features a company must have according to the applicable domestic law, which is the legal prerequisite for defining the actual scope of application of the rules on nullity set down in Art. 11. The reason for the inclusion of such a provision in the abovementioned section is, therefore, to define the (very) minimum requirements for the application, among other things, of the rules regarding the nullity of a company when it comes to a company's foundational documents. The fact that all the grounds for nullity of the company listed in Art. 11(b) have to do with information to be included in the foundational documents[21] is further evidence

[20] S. Grundmann, *European Company Law*, 2nd edition, Cambridge 2012, p. 152; more recently also G. Ferri Jr, M. S. Richter Jr, *Decreto del ministro dello sviluppo economico del 17 febbraio 2016, sturt-up innovative e diritto delle società: un parere*, "Rivista del notariato" 2016, p. 609.

[21] Apart from Art. 11(b)(i) – regarding the very existence of the instrument of constitution and its compliance with the required legal formalities and preventive controls, which we are about to examine in the text – there is also Art. 11(b)(ii), on the legality of the objects of the company, to be stated in the instrument of constitution; Art. 11(b)(iii), on the inclusion in the instrument of constitution or in the company's statutes of the information on the name of the company, on the amount of the share capital and of the members' contributions to the capital, and of the social object; Art. 11(b)(iv), on the failure to comply with the domestic rules on minimum capital requirements, i.e., that the company's share capital, *to be stated in the documents*, is lower than the domestic legal capital; Art. 11(b)(v), on the incapacity of the founding members, whose names are to be stated in the documents; Art. 11(b)(vi), on the possibility, which is currently outdated, that the domestic law forbids single-member companies, and the company has just one member, *whose identity is to be stated in the founding documents*.

of this and will be discussed below. In the lack of a founding document, it would not be possible to identify in a certain company any of the grounds listed in Art. 11 C.D.

A similar reasoning must be employed with reference to the second alleged evidence i.e., that the failure, by a company to comply with the rules set down in Art. 10 would determine that company's nullity. This is only partially true since Art. 11 defines only one mandatory provision regarding nullity, in 11(a), stating very clearly that the decision on the nullity must be made by a court of law, excluding any other possibility, and more specifically that the nullity is ordered by administrative bodies. Apart from this rule, the remaining part of the article, and in particular Art. 11(b), simply provides for limits for the Member States when setting down the domestic rules on nullity, in order to minimise the number of companies that could be declared null: such domestic provisions, in establishing the grounds for having a company declared null, can only choose from the "catalogue" provided for by Art. 11(b). Any further ground present in the domestic rules is to be held as unlawful under European Company Law: this is the most commonly considered corollary that we can take from the norm. Nevertheless, in reality, another one is also possible, i.e., that Member States:

- on the one hand *are not obliged to have specific provisions on the nullity of a company*. If a Member State so decides, the discipline of nullity is not to be mandatorily present in its own domestic company law;
- on the other hand, that even if the Member State's company law provides for rules on the nullity of the company, the non-compliance of the rules laid down in Art. 10 should not mandatorily be present in this list of grounds.

In reality, Art. 11(b) is very clear in its statement: "nullity *may* be ordered only on the grounds:", and the list follows. This is to read as that in defining the domestic rules, the Member States are allowed to cherry-pick the grounds that they hold as appropriate, among those listed from Art. 11(b)(i) to 11(b)(v), but they have no obligation to include any of them, and more specifically the one stating "that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with."

This reading of the rule, that we find not easily controvertible, is sufficient to argue that Art. 10 C.D. should live its own life even in the lack of (domestic) rules on nullity that cross-reference it.

Its ultimate purpose, however, is twofold, as can be deduced by the remarks we offered in the previous paragraph. Even without considering the part of the norm referring to the preventive administrative or judicial control, the rule present in Art. 10 has what we might call "two gears." One, more demanding, applicable to the Member States that we defined as belonging to the "*acte authentique*" group; and one,

with fewer formal requirements, followed by the "due legal form" Member States. To find the very *raison d'être* of the rule, applicable throughout the Union, we must find the highest common denominator of these two approaches. Looking at it carefully, we can argue that it *consists just in the very existence for any company of an instrument of constitution*, drawn up according to the formal rules laid down by the relevant Member State. Once this document is present, we must look at its content, at least according to European Union Law.

6. The necessary content of the instrument of constitution of the company pursuant to the European rules

In order to identify the minimum content of the instrument of constitution required by the European rules we cannot limit the investigation to Arts 10 and 11 C.D. examined so far, but we must also focus on the provisions included in Arts 3 and 4 C.D.

Art. 11 provides for a list of information that must be present in the instrument of constitution, and only the lack of this information would be likely to determine the nullity of the company, if Member States so decide; therefore, including this information in the founding documents is to be considered of the utmost importance. However, the provisions regarding the minimum content of the instrument of constitution and of the company's statutes (if they are not comprised in the instrument of constitution) are included, respectively, in Arts 3 and 4 C.D.

According to these rules, in the founding documents certain information must be present. They include, among other things/information/details:

- type and name of the company, its objects, registered office and duration and information on its capital (authorised, subscribed and paid-up);
- rules of the company's internal governance, including those on the representation of the company towards third parties;
- information on the number of issued shares, their nominal value and transfer regime, and the possible limits to the transfer, also with reference to the existence of different share classes;
- information on the identity of the founding shareholders, and the possible benefits granted to those that took part in the constitution of the company;
- an estimate of the costs that were needed for constituting the company.

It is important to remember that these requirements are not set down for every company form. In fact, according to Art. 2.1 C.D., the provisions included in Section 1 of Chapter II, Title I, on the Incorporation of the public liability company

(*sic*), are applicable only to those company forms listed in Annex I C.D., i.e., to public companies only, while Member States are left basically free to define different content when it comes to private companies.[22]

The aforementioned information to be included either in the instrument of constitution or in the company's statutes, then, are to be seen, from the point of view of European Union Law, as what *must* be present in the foundational documents of the company, irrespective of whether they are to be drawn-up via an *acte authentique* – or equivalent domestic form, where required – or by means of whatever other *due legal form*. In addition to these details, Member States are free to require further information[23] – however this no longer deals with European Law, but just with national company laws.

The general picture, therefore, is as follows: we have (i) some Member States where a rather strict approach is present, and an equivalent of the French *acte authentique* is required for the constitution of a company. (ii) Other Member States, where the official linguistic version of Art. 10 C.D. does not require the use of a domestic "*acte authentique*" form, are free to adopt a more liberal or stricter approach (although the latter seems highly unlikely), by means of a statutory provision, in order to fulfil the European requirement of a "due legal form." Nevertheless, these documents must

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[22] We must recall that, when it comes to private companies, even if they have no legal obligation under EU Law (but of course they may have, and usually do have, pursuant to the applicable domestic law) to include the aforementioned information in the instrument of constitution, certain information on issues of paramount importance (e.g., identity and powers of the persons that are in charge of the management and representation of the company; the share or authorised capital; the registered office…) are to be disclosed via the Business Register, pursuant to Art. 14 C.D., which is applicable to both public and private companies, pursuant to Art. 13 C.D.

Another observation might be that, as Art. 11 C.D. is also applicable to private companies, the basic requirements whose lack is held as a possible ground for the declaration of nullity of the company according to Art. 11(b)(iii) should be regarded as implicitly necessary for them. It is reasonable that, in practice, this is how it works; however, this is not true from the normative point of view. In fact, as already pointed out, there is no mandatory provision binding the Member States to include the provision under Art. 11(b)(iii) in the national legislation. This being the situation, we cannot argue from the mere text of Art. 11(b)(iii) that it sets down minimum European requirements also applicable to private companies.

Unfortunately, the new provisions on the online establishment of companies do not help in this matter either, although this digitalised form for the establishment of companies is mandatory at least for private companies. In fact, the new Art. 13h.4 C.D., added by Directive (EU) 2019/1151, affirms that the content of the templates, to be used for the procedure of online constitution "shall be governed by national law."

[23] Art. 3 C.D., in particular, clearly states that "The statutes or the instrument of incorporation of a company shall always give at least the following information," plainly leaving the possibility open for the Member States to require further particulars.

include the information and particulars listed in Arts 3 and 4 C.D. However, these requirements are mandatory only in the case when a preventive judicial or administrative control is *not* carried out.

7. The allegedly necessary equivalence between the preventive control and the due legal form/*acte authentique* system

We can now recall that Art. 10 C.D. does not necessarily require the due legal form for the constitution of the company. The provision, that is addressed to the Member States for guiding their national implementation, plainly also allows them not to set down specific formal rules, provided that a preventive administrative or judicial control is enacted. To be more precise, the tone of the rule is that the usual procedure that Member States should – or at least are entitled to – adopt is the preventive administrative or judicial control, as the due legal form/*acte authentique* for the drafting of the foundational documents is only necessary in the case of lack of this preventive control.[24]

The reconstruction we are offering of the meaning of the dichotomy due legal form/*acte authentique*, however, gives the aforementioned provision different degrees of legal strength, depending on whether the Member State adopts the *acte authentique* approach, or not; and it must always be born in mind that the specific form – due legal form, or *acte authentique* – is required only when and insofar as a preventive administrative or judicial control is not present in the process of the constitution of the company.

According to the general scheme that we have so far depicted, what is required by the European lawmakers is just to have stated in the foundational documents of a *public* company the particulars and information listed in Arts 3 and 4 C.D., mentioned above.

The scope of the preventive administrative or judicial control, considering solely the European point of view, is to have this information checked, before the company comes into existence ("at the time of formation"). Naturally, each Member State is free to require that further information or particulars are included in the foundational documents of a company, even a private company, but the correctness of such additional data may be checked by the Member States as an obligation deriving from domestic, and not European, provisions.

[24] On the contrary, G. Ferri Jr, *Profili di responsabilità notarile*, "Rivista delle società" 2001, p. 1423, believes that there would be an implicit preference for the due legal form, at least for those Member States belonging to the "*acte authentique*" group (Ferri's observations are on the Italian version).

As to the body in charge of this control, the decision is again left by the EU to each Member State.[25] The Member State will thus be free to decide what kind of body should be entitled to perform the control, whether administrative, judicial, or even a combination of the two; and within the general category – administrative or judicial – which office in practice should perform the check.

Do the Member States encounter any limit imposed by the European provisions when it comes to defining the offices in charge of the preventive control? The answer must be negative. The European rules are clear in defining the scope of the preventive control (Arts. 3 and 4 C.D.) for public companies, at least, and the possible fallout from the omission of one or more pieces of information, like the declaration of nullity of the company for instance, if a Member State so decides (Art. 11(b)(iii) C.D.). Once this information is checked by a body pertaining to the public administration or the judicial order and identified by the Member State itself, this identification is to be held as sufficient by the EU.

From a different point of view concerning the pervasiveness of the control, one might argue that the alternative itself between the due legal form/*acte authentique* and the preventive control can be seen as a way to set minimum European standards for this preventive control.[26] However, this does not seem to be the case. In fact, the reconstruction of the situation that we have just made reveals that the "two-gear system" makes it possible to find a standard which is to a certain extent harmonised when the Member State requires the drawing-up of the foundational documents by means of an *acte authentique*, while such minimum standards are not present when the required form of the instrument of constitution and of the company's statutes is a "due legal form," which, per se, might be far less demanding – and reliable – than a *acte authentique*.

This being the panorama of the legal forms, it is clear that as it is not possible to define a minimum standard that the due legal form/*acte authentique* have in common, we cannot use these ways of drawing-up a company's foundational documents to identify the minimum requirement for the administrative or judicial control. This means that, once a Member State allows the preventive check on the elements listed – for public companies only – in Arts 3 and 4 C.D., whatever kind of judicial or administrative control required must be held perfectly compliant with the European rules; and this

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25 As we have already observed above, § 3.

26 This is the position of S. Grundmann, *European...*, p. 152, which is founded on the assumption that the requirements under discussion here are intended to prevent the nullity of a company. In the same sense also A. Schall, D. Günther, *Art. 10* [in:] P. Kindler, J. Lieder, *Corporate Law. Article-by-Article Commentary*, 2021, p. 106.

naturally happens, even if such a control is far less pervasive and reliable than the requirements needed for the drafting of an *acte authentique*.[27]

This conclusion is once again in line with the general idea, already mentioned, that companies are creatures of the national law. From the viewpoint of this essay, the way for establishing (*rectius*: for allowing the establishment of) a company is a matter of exclusive competence of each Member State.[28], besides the minimal European rules we have already taken into consideration. Having a more, or less, rigorous regulation of the process of constitution of companies is a political decision that each Member State is free to make, and the few limits imposed by European Law are those that we can infer from the aforementioned rules on public companies. In other words, we can assert that the degree of public reliability of the rules on the constitution of a company is subject to the regulatory competition we can see in many other aspects of European company law.[29] This is true mainly in private companies, but also in public ones.

8. A few possible practical consequences of this approach

This reading of the rule of Art. 10 C.D. has relevant consequences particularly when it comes to the possible change in the domestic rules applicable to the constitution of a company.

It is possible that, with a view to promoting a simplification of the constitutive process of companies, a Member State which originally required the domestic form of the *acte authentique* for the drawing up of the foundational documents later abandoned this legal form.

This is to be considered completely lawful, naturally provided that an administrative or judicial control is performed of the instrument of constitution and the company's statutes. Now one of the consequences of the reading that we have offered above is

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[27] While, of course, this problem is not present when we have a different due legal form, whose formal requirements will reasonably be less pervasive than an *acte authentique*, as we have already observed.

[28] In the same sense also S. Grundmann, *European...*, who highlights how the setting down of the rules on the acquisition of the legal personality by the company also pertains to the Member States.

[29] For instance, this situation does not differ meaningfully from what has been happening, mainly from 2008 on, in the field of private companies with reference to the minimum capital requirements that were lowered to one euro or less almost everywhere in the European Union. This trend started, according to some literature as a regulatory competition, in particular as reverse competition by Germany towards the United Kingdom. Cf. A. Bartolacelli, *Almost Capital-less Companies in Europe: Trends, Variations, Competition*, "ECFR" 2017, pp. 187 & 223.

that, if a control was already present as a further requirement for the constitution in addition to the local version of the *acte authentique*, this control alone might be seen as sufficient, insofar as it covers the matters listed in Arts. 3 and 4 C.D., for a lawful procedure of constitution of a company, from the EU Law perspective, even if the domestic *acte authentique* form is repealed. As we have argued so far, no specific requirement is needed when it comes to the standards for the control; for example, if it covers the cited subjects, including the control by the officer in charge of the Business Register – which is certainly to be considered an administrative or judicial body[30] – it should be held as sufficient for complying with the general provision of Art. 10 C.D.

Similar to this case is what happens in a Member State using the *acte authentique* system, when the same effects of those typical for an *acte authentique* can be achieved by a different legal form, which the State decides to hold as generally equivalent to the domestic form of an *acte authentique*. This is in the power of each Member State, but naturally makes it even more unlikely to identify a minimum standard of reliability which the *acte authentique* system would hypothetically guarantee. The reason for this is that there is no certainty about its existence on the horizontal stage, i.e., by comparing the formal requirements present in the different Member States, which is an extremely hard task for those belonging to the *acte authentique* system and practically impossible for those adopting the due legal form. Nor is there any certainty of its existence by looking at the vertical condition, i.e., by looking at the situation of a State itself, which in our hypothesis has as legal forms both a classic *acte authentique* and a further form whose effects are made equivalent to the *acte authentique* by law.

A third natural consequence is that the Member States belonging to the "due legal form club" are free to define the form with the utmost autonomy, theoretically without the necessity to provide for any preventive control whatsoever. A close reading of Art. 10 C.D. makes it possible to also argue the opposite; i.e., that in those States, a system with a preventive judicial or administrative control can exist without any specific form to be observed when it comes to the drawing-up of the foundational documents of a company. If both aforementioned possibilities are justifiable according to the wording of Art. 10 C.D., we must bear in mind that at least one instrument of constitution must be present in the constitution of a company, and that if it is missing, it will not be clear on what document the administrative or judicial body would perform their preventive control.

30 Cf. above, § 2.

An additional hypothesis is that a Member State might be willing to establish different procedures for the constitution of a company, either for the same company form or for different company forms. In any case, if there is a preventive control for each of the different constitution procedures, this is completely compliant with the provision laid down in Art. 10 C.D. The problem arises in the case when the different procedures are intended to actually skip the preventive control phase; this hypothesis is to be dealt with in a different way depending on whether the Member State adopts the *acte authentique* or the due legal form. In the former case, no problem arises, either formally, or – in general – substantively, as the *acte authentique* in principle shall ensure a level of reliability at least as high as the preventive control. As we have already pointed out, however, this is not necessarily the case in the latter hypothesis, as there is no obligation whatsoever pending on the Member States to develop a legal form as demanding as the preventive control. This might lead some interpreters to believe that such a due legal form might not be sufficient for "escaping" the preventive control;[31] however, this interpretation is not convincing. On the one hand, it is up to the Member State, and the Member State alone, to define – as a political decision – the standards and parameters for such a due legal form;[32] from this point of view, there is no specific obligation for public companies under EU Law apart from that on the content of the documents. On the other hand, according to the analysis we have carried out, the same remarks might be restated for the extent and pervasiveness of the preventive control which Member States are free to define at their will.

9. Final remarks

Even from the short examples above, it is quite clear that the degree of harmonisation in the field of the constitution of a company is to be intended as minimal. The obligation pending on the Member States is to ensure that a proper instrument of constitution is present, and possibly that it undergoes a preventive control before the coming into of existence of the company. Nevertheless, the definition of the standards for each one of these steps in the process is a task belonging to the Member States, and the Member States alone.

Naturally, this means that also the process of constitution of companies is to be seen as one of the factors of the regulatory competition among national company laws,

31 See above, nt. 24.

32 Not unlike the political decision that, in the Member States belonging to the *"acte authentique group,"* defines the key features of the domestic version of the *acte authentique*.

even if this aspect might be minimised by the online procedures introduced by the Directive (EU) 2019/1151, and now present in the C.D. in Arts. 13a seqq. In general terms, however, this might also lead to a race to the bottom throughout the EU when it comes to the reliability of a company's foundational information.

In fact, according to the reconstruction we have offered, a company can be lawfully established with minimal controls, with almost no check regarding the lawfulness of the social object, and even of the legal capacity of the founders at the time of the constitution of the company, where the Member State of constitution allows this in its domestic rules on the establishment of companies in implementing the provision of Art. 10 C.D.

This means that there might be a steady increase in the number of potentially unchecked companies circulating in the internal market. As the controls are truly minimal, these companies might also have profiles of irregularity, potentially dangerous for the market.

The general picture, then, is that an excessively liberal approach adopted by a certain Member State might lead it to host a higher number of companies, whose founders find the increased simplicity of the process of a company's constitution appealing. In the meantime, this would probably damage the internal market if that company has irregularities in its foundational documents that may impact third-party reliance, as such information will be disclosed via the instruments set down by the C.D.

From a general point of view, this condition might create a situation where a lack of reliability is more present in the European market when it comes to the complete lawfulness of companies, and this in spite of the efforts to have a well-developed and modernised system of disclosure.[33]

Nevertheless, this latter aspect does not seem to have been overestimated either. On the one hand, the fact that a Member State adopts an excessively loose policy regarding a company's constitution should reasonably lead to a failure in the trustworthiness of the companies coming from that very Member State. The simplified and cheap constitution procedure, therefore, besides being a bait to attract more prospective investors and company founders, in the case just observed, should turn out to be a damaging factor for the reputation of that State, and what is more important, of the companies incorporated there. In simpler words, it is a boomerang in a global market. And yet in practice, we can affirm that despite the liberal approach potentially allowed by Art. 10 C.D., no Member State has adopted any sort of radically

[33] See the new wording of Art. 16 C.D., again amended by the Directive (EU) 2019/1151, that currently considers also the system of interconnection of Business Registers.

deregulated policy in the field of the constitution of companies. However, this is not because of European harmonised rules, but on account of some sort of diffusion of good practices in the national legislations concerning this subject.

Finally, not even does the possible lack of a specific cause of nullity based on the non-compliance with the formal rules of a company's constitution in the domestic company law seem to have been overestimated. Indeed, the fact that the non-compliance with the rules on the constitution is not a ground for the declaration of the nullity of a company, for instance, because the Member State has – legitimately – no provisions on the nullity of a company, does not mean that such a failure has no penalties at all. We well know that the rules of Art. 11 C.D. on the nullity of a company are to be seen, on the one hand, as an *extrema ratio*, as nullity is the most severe consequence of irregularities in the company; and on the other hand, as a barrier to Member States' being able to legislate in that field, as only the grounds listed in Art. 11 C.D. may be valid grounds for declaring the nullity of a company, with no possibility for the Member States to add further domestic clauses.

The barrier to the Member States' legislative power deploys also under a different profile. In order to prevent Member States bypassing the latter provision by means of a sort of label fraud by laying down further grounds whose presence leads to a sanction that might be classified, under national law, as "non-existence, absolute nullity, relative nullity or declaration of nullity," Art. 11 C.D. explicitly forbids Member States from using such categories for grounds not listed under its letter (b). This naturally means that, precisely by virtue of its being an *extrema ratio*, the grounds undermining the very existence of the company from its beginning, irrespective of the legal denomination of the instrument by means of which the company is sanctioned – are elaborated by EU Law, and the Member States are free only to reduce them, not to add more. However, the features of nullity designed in European Company Law are rather atypical if we consider the traditional concept of nullity as understood in general contract law. For instance, instead of questioning the very existence of the company from its origin, the consequences of a declaration of nullity (Art. 12 C.D.) look much more like a winding-up than the acknowledgement of the original invalidity of the company, which determines its substantial inexistence from the beginning. From this point of view, therefore, we may also argue that, even if the failure to comply with the formal rules of constitution of a company does not entail its nullity, as the domestic law did not include this ground among those leading to the declaration of nullity, or even opt for not having the instrument of nullity at all, the invalidity might in any case entail,

for instance, the annulment of the company[34] or its winding up, with effects in practice very similar to those consequential to the declaration of nullity.

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[34] Which is not forbidden by the text of Art. 11, as it does not imply, substantively, the cancellation of the company from the date of its establishment.

Monografia powstała jako druga w serii dotyczącej e-administracji – *Krakow Jean Monnet Research Papers* – w ramach realizowanego przez Katedrę Prawa Europejskiego Uniwersytetu Jagiellońskiego projektu Jean Monnet Module pt. „E-administracja – europejskie wyzwania dla administracji publicznej w państwach członkowskich UE i krajach partnerskich/eGovEU+".

Książka przedstawia analizę wdrożenia i funkcjonowania e-administracji w Polsce i w Europie ze szczególnym uwzględnieniem wpływu technologii informacyjno-komunikacyjnych na działalność administracji publicznej na rzecz obywateli. Monografia ukazuje również zagrożenia związane z transformacją cyfrową administracji oraz konieczność uwzględnienia centralnego miejsca człowieka w tym procesie.

Monografia adresowana jest do badaczy zajmujących się administracją, prawem administracyjnym i europejskim oraz do praktyków. Mamy nadzieję, że publikacja poszerzy wiedzę na temat cyfryzacji administracji oraz zachęci do dalszych studiów w tej dziedzinie.

The monograph was developed as the second in a series on e-government – *Krakow Jean Monnet Research Papers* – as part of the Jean Monnet Module project, implemented by the Chair of European Law of the Jagiellonian University entitled "E-government – European challenges for public administration in EU Member States and partner countries/eGovEU+."

The book presents an analysis of the implementation and functioning of e-government in Poland and Europe, with particular emphasis on the impact of information and communication technologies on the activities of public administration done for the benefit of citizens. The monograph also shows the threats related to the digital transformation of administration and the need to acknowledge the central place of a human in this process.

The monograph addresses researchers dealing with administration, administrative and European law, and practitioners. We hope the publication will broaden the knowledge about the digitization of administration and will encourage further studies in this field.

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