LESSON 2 IBL: INTERNATIONAL COMPANY LAW – EUROPEAN UNION FRAMEWORK

2. Companies within the European Internal Market: Harmonized and Unified aspects.

- **The European Union has competencies related to Company Law, mostly in the realm of achieving a fully integrated Internal Market. The EU Freedoms involved in Company Law are mainly the freedom to provide services** (both cross-border and with a permanent establishment) **and the Free Movement of Capital**. Free movement of Workers/Persons and Free movement of Goods are also involved to a lesser degree).
- The purpose of EU rules in this area is to enable businesses to be set up anywhere in the EU enjoying the freedom of movement of persons, services and capital, to provide protection for shareholders and other parties with a particular interest in companies, to make businesses more competitive, and to encourage businesses to cooperate over borders.
- The EU Company Law is embodied in Treaties, Directives and Regulations
  - **TFUE,** to create the basic framework for legal persons in the UE (as regulated in Articles 49, 50(1) and (2)(g), and 54, second paragraph) :
    - **Article 49, second paragraph TFEU** guarantees the right to take up and pursue activities in a self-employed **capacity and to set up and manage undertakings, in particular companies or firms**
  - **Directives** to harmonize EU Company Law
    - **The first/older harmonization Directives** developed the main aspects of EU Company Law (publicity, branches, accounts among others)
    - **Following earlier legislative works the Consolidation Directive unifies older harmonization Directives. The Consolidation Directive is** Directive (EU) 2017/1132 that codifies certain aspects of Company Law concerning limited liability companies Thus, it repealed some older Directives and replaced them without changing their content. **Specifically, it deals with specific issues related to the protection of members (such as shareholders) and creditors**
      - The **Consolidation Directive has already been modified, as with**

Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019amending Directive (EU) 2017/1132 as **regards the use of digital tools and processes in Company law.**

- **Furthermore, and harmonising specific Company law issues, Directive (EU) 2019/2121** of 27 November 2019 lays down new rules on cross-border conversions and divisions and amends the rules on cross-border mergers.

- **Regulations** unify specific aspects of Company law in the EU. They are especially relevant in the field of accounts and in the creation of instruments and new types of companies (such as the Societas Europae, and the EU Cooperative).

2.1 Incorporation, Registries and official transparency, shareholders and third parties (creditors) protection, branches.

- **Incorporation or formation** (Now regulated by Directive 2017/1132, «the Consolidation Directive»). EU Law harmonises as it follows:.
  - The **statutes or instrument of incorporation of a public limited liability company** PLC, (in Spain S.A.) must make it possible for any interested person to acquaint oneself with 1) the type, name, and objects of the company. 2) the basic particulars of the company, including the exact composition of its capital, 3)the rules to appoint its Directors and Board Members 4) the number of shares 5) the nominal value of its issued shares 6) Its registered office (*domicilio social*) 7) Any special conditions for the transfer of shares 8) Paid-up capital upon incorporation 9) Procedure to convert bearer shares into nominal shares and vice versa 10)etc
- **Registries**
  - **The incorporation and other acts of companies must be filed within a National Public Registry** (in Spain, Registro Mercantil).

- National Registries are, now, interconnected as **Directive 2012/17/EU** and **Commission Implementing Regulation (EU) 2015/884** set out rules on the **system of interconnection of business registers ('BRIS').** t
    - BRIS has been operational since 8 June 2017, although some of its desired features are still to be completed.
    - The BRIS allows EU-wide electronic access to company information and documents stored in Member States' business registers via the **European e-Justice Portal**. BRIS also enables EU Commercial Registers to exchange between themselves, (including but not limited to notifications on cross-border operations and on branches).
- **Single Member Companies**
    - Since 2019, Member States must ensure that at least some companies (limited companies such as, in Spain, the SL) can be fully incorporated by digital means and that their incorporation documents can be electronically filled (in the National Registry) online
- **Official transparency**
    - *Filling incorporation and other documents into the Commercial Registry* is a means of official transparency as it serves to disclose information.
    - The duty to draw up *annual accounts* and to deposit them in the commercial register, where they can be consulted, is also an instrument of transparency
    - There are also other instruments.
        - For example, certain entities (such as the SAE or the European Economic Interest Grouping) have their *incorporation and dissolution* published in the OJEU.
        - And there are special transparency measures for **listed companies** that must report data to their market supervisor (in Spain the CNMV): Under EU rules, issuers of securities on regulated markets must disclose (to the market supervisor and to the public) certain key information to ensure transparency for investors. The Transparency Directive (2004/109/EC) requires issuers of securities listed on EU-regulated markets to make their activities transparent by regularly publishing certain information, that

includes:

- *Yearly and half-yearly financial reports*
- *Major changes in the holding of voting rights*
- *ad hoc inside information which could affect the price of securities*

This information must be disclosed in a way that benefits all investors equally across Europe.

The EU Commission launched a pilot project to evaluate distributed general ledger technologies as a back-up solution to implement the EU's central access point to regulated information of listed companies (EEAP) (European Financial Transparency Portal; EFTG).

- **Shareholders' and creditors protection**
  - Today, the Consolidation Directive unifies older harmonization Directives that include several aspects for the protection of shareholders and creditors. For instance, it deals with transparency measures, as above, as well as with rules on capital.
  - Please note that this Consolidation Directive, Directive (EU) 2017/1132 that codifies certain aspects of Company Law concerning limited liability companies repeals some older Directives and replaces them. Here are some of its contents that are useful for the protection of shareholders and creditors
    - It defines a p**ublic liability company(PLC)** as one which *has offered shares to the general public and whose shareholders have limited liability,* usually only concerning the amount paid for their shares and securities. (SA in Spain).
      - Please note that *Securities are transferable shares which give the owner voting rights in a company,* Sometimes those shares are «quoted», **or admitted to a Regulated Market,** for example, The

London Stock Exchange, la Bolsa de Valores de Madrid, and similar marketplaces. Not all PLCs are listed companies. But PLC-listed companies are subject to some special rules and Directives as we are studying in this lesson.

- It also coordinates national rules for **creating and running companies and increasing or reducing their capital**: It mandates that the **minimum capital** required in the EU to register a public limited company (PLC) is of **25 000EUR**. (in Spain, our Ley de Sociedades de Capital raises such minimum as it requires 60,000€ of issued capital for the formation of a Spanish PLC: a Sociedad Anónima or SA)
- It further sets **minimum information requirements for companies, upon their incorporation and whenever the incorporation documents are modified.**
    - The instrument of incorporation (constitución) and the statutes (estatutos) or bye-laws (reglamentos internos) of EU PLCs must contain (at least) the following information:
    - the type and name of the company; the objectives of the company; the rules governing appointing Directors responsible for managing, running and supervising the company; and the duration of the company.
    - the registered office; the value, number and form of the subscribed (company-issued) shares;
    - the amount of subscribed (company-issued) capital; the identity of those who sign the instrument of incorporation or the bylaws.
    - *The mandatory disclosure of the information is implemented by filling it in the national business registers* (for example Registro Mercantil in Spain, Companies House in UK, etc).;
    - Concerning the validity of the obligations entered into by the company, and regarding liabilities derived thereof the Consolidation Directive makes mandatory that, if an action has been carried out on

behalf of a Company before it has acquired legal personality, *the persons who acted shall be deemed liable therefor and not the company itself.* However, *once a company has acquired legal personality, acts performed by the organs of the company shall be binding upon it, its members and third parties, including such acts that go beyond the limitations of the objects of the company (ultra vires).*

- **Regarding the nullity of the company (very important for creditors, for shareholders, and other parties), the Member States shall provide for the nullity of companies *only by decision of a court of law. The nullity of a company may only be ordered in the cases established in the Directive***

- **Branches**
  - **About branches of Companies from other Member States, this Directive harmonizes compulsory disclosure requirements.**
  - Such Branches must be registered in the Host Country Commercial Registry and must make publicly available, through the interconnection system of central, commercial and company registers, at least the following information:
    - Address, activity, name (if different from the Company), particulars, appointment and discharge of the person or persons representing and managing the Branch.
    - Company's place of registration and registration number; name and legal form of the company; winding-up of the company, appointment and particulars of liquidators; accounting documents;
    - Closing of the branch.
    - The Directive allows the Member States to require additional disclosures.

2.2 Specialities of single-member limited liability companies

Those specialities are now codified in Directive 2009/102/EC — company law on single-member private limited liability companies:

- A company may have a single member by its being formed, or by all its shares/non-share participations coming to be held, by a single person (single-member company). This is compulsory for some companies (in Spain for the SL which is the Spanish limited liability form whose capital is made up of non-share participations)
- Where a company *becomes a single-member company because all its shares have come to be held by a single person, that fact, together with the identity of the single member, must either be entered in a register kept by the company and accessible to the public or be recorded in the file or entered in the central national commercial register or the register of companies.*
- The *single-member exercises the powers of a general meeting of the company.*
- All decisions taken by the single member and contracts between that person and the company as represented by him or her must be *recorded in the minutes or drawn up in writing.*
- Where an EU country allows single-member companies in the case of public limited companies as well, the rules in this directive apply. This is the situation in Spain where SA can be single-member companies by incorporation or at a later stage (derivative single-member company).

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2.3 Specialities to promote shareholders' long-time involvement in listed companies

We now look at measures **that promote the long-term involvement of shareholders** in the projects of the companies in which they have invested, even if they are located in another EU Member State. To such aims, the cross-border exercise of shareholders' rights is of utmost relevance: Directive 2007/36/EC (amended by Directives 2014/59/EU and (EU) 2017/828) on the exercise of certain rights of shareholders in listed companies abolishes the main obstacles to a cross-border vote in listed companies that have their registered office in a Member State. Here are some issues regulated in these Directives:

- **Identification of shareholders.** They made it mandatory that adequate instruments (and intermediaries) exist so that listed companies can identify their shareholders. The end aim is to facilitate the exercise of shareholders' rights and their involvement in the company. **(Member States may stipulate that companies located within their territory are only authorised to request identification regarding shareholders holding more than a certain percentage of shares or voting rights, not exceeding 0.5%).**
- **Rights of shareholders to monitor Directors remunerations**. It establishes

shareholders' right to vote on the remuneration of directors and it mandates that the remuneration policy must be published. Also, it regulates the performance of directors, which should be evaluated using financial and non-financial performance criteria, including, where appropriate, environmental, social, and management factors.

- **Transparency of institutional investors, asset managers and voting advisors** in particular to facilitate the exercise of shareholders' voting rights:
  - Intermediaries will have to facilitate the exercise of shareholders' rights, including the right to participate and vote at general meetings.
  - They will also have an obligation to provide shareholders, in a standardised format and in due time, with all company information that enables them to exercise their rights properly.
  - In addition, they will have to publish all costs related to the new rules.
- **Transactions with related parties**
  - Transactions with related parties may be detrimental to companies and their shareholders, as they may give the related party the possibility of appropriating value belonging to the company. For this reason, the new Directive provides that:
    - **a) significant transactions with related parties have to be submitted for approval by the shareholders or the administrative or supervisory body to protect adequately the interests of the company.**
    - b) and, Companies will have **to publicly disclose (to the market supervisors (ie, in Spain the CNMV) relevant transactions with all information necessary to assess the fairness of the transaction.**

2.4 Take over bids, mergers, acquisitions, divisions

- **Take Over Bids, Directive 2004/25/EC.**
  - It applies to companies **whose shares are admitted to a regulated market (listed companies**, this is: listed PLC)
  - A takeover bid is a public offer to acquire all or part of the securities of a company.
  - to protect minority shareholders of listed

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companies, the legal regime in the EU following Directive 2004/25/EC, mandates that *anyone gaining control of a company (30/-35% of its securities) must make a bid at an equitable price at the earliest opportunity to all holders of securities.*

- The equitable price is the *highest price the offeror paid for the securities during a 6- to 12-month period before the bid.* In specific circumstances, *national supervisory authorities may adjust this price.*
- A decision to launch a bid should be made public as soon as possible and ensure market transparency and integrity of offeree company securities.
    - The Board of Directors of the bidding Company is competent to approve the decision to launch the bid and is responsible for the documents and procedures involved therein.
- National authorities determine the time allowed to accept a bid. This runs between 2 and 10 weeks.
- Before engaging in actions that could block the bid, the board of the offeree company must (subject to an EU country opt-out) obtain prior authorisation from a general shareholders' meeting.
- Employee representatives must be informed of any takeover bid.
- National rules exist for issues such as the

lapsing or revision of bids or disclosure of the result of a planned takeover.
- Please note that this EU regime for taking control over a Stock market listed Company (Mandatory Bid Rule) is different to the USA system where the bid is not mandated and where controls take place, mainly, after the deal.

- **Mergers and acquisitions (M&A)**. Directive (EU) 2017/1132 that codifies certain aspects of Company Law concerning limited liability companies (the consolidation Directive) addresses different types of mergers ie, *by acquisition, merger by the formation of a new company. It also differentiates domestic mergers and cross-border mergers.* In Spain, it applies to SA

    - A merger is an operation whereby:
        - **Merger by acquisition**. One or more companies, *being dissolved without going into liquidation*, transfer all their assets and liabilities to another existing company, the **acquiring company**, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment (within the limits of the Directive)
        - **Merger by the creation of a «newco»**. Two or more companies, being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the "new company", in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment (within the limits of the Directive)
        - **Merger by transferring shares to the parent co**. A company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares

representing its capital, this is, to its parent company

- In all 3 cases, *the draft terms of the merger must be drawn up by the administrative or management board and must contain specific information* including:
    - the type, name and registered office of the companies;
    - the share exchange ratio (that is, the relative number of new shares that will be given to existing shareholders of a company that has been acquired or merged with another);
    - terms relating to the allotment of shares in the acquiring company (and or in the new company to be formed);
    - the rights granted by the acquiring (or the new) company.
- In all 3 cases, *workers councils of the merging companies must be informed*. And *the final deal is approved by the shareholders of both companies*. Please note that M&A operations as well as takeovers may in some cases fall within the realm of Free Competition legislation. Therefore, companies must also make sure that they follow Free Competition procedures. In this course, we analyse such procedures in lesson 3, «concentrations«.

- **Divisions of public limited liability companies**
    - Directive (EU) 2017/1132 that codifies certain aspects of Company Law concerning limited liability companies (the consolidation Directive) addresses also Divisions
        - **'division by acquisition'** is the operation whereby, *after being wound up without going into liquidation*, a company transfers to more than one company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the companies receiving contributions as a result of the division ('recipient companies') and possibly a cash payment. The directive sets a maximum cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value. This 10% limit relates to the directive main regime for divisions but it admits exceptions

- **‘division by the formation of new companies’** is the operation whereby, after being wound up without going into liquidation, a company transfers to more than one newly-formed company all its assets and liabilities in exchange for the allocation to the shareholders of the company being divided of shares in the recipient companies, and possibly a cash payment not exceeding 10 % of the nominal value of the shares allocated or, where they have no nominal value, of their accounting par value. This 10% limit relates to the directive main regime for divisions but it admits exceptions

- **There are also provisions for divisions with cash payment exceeding 10% and divisions where the company does not cease to exist**

2.5 Special legal forms for cross-border business in the UE

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- **Regulation 2157/2001** sets out a statute for a **European Company (Societas Europea or ‘SE’)**, i.e. an EU legal form for public limited liability companies, and allows companies coming from different Member States to run their business in the EU under a single European brand name.
  - **Societas Europea / Sociedad Anónima Europea , see here**
- **Regulation 2137/85** sets out a statute for a **European Economic Interest Grouping (EEIG)**, i.e. an EU legal form for a grouping formed by companies or legal bodies and/or natural persons carrying out economic activity coming from different Member States; the purpose of such a grouping is to facilitate or develop the cross-border economic activities of its members.
- Regulation (EC) No 1435/2003 on the Statute for a **European Cooperative Society** (SCE). It aims to

facilitate cooperatives' cross-border and trans-national activities. The members of an SCE cannot all be based in one country. The regulation of the Statute for a European Cooperative Society (2003) aims to facilitate cooperatives' cross-border and trans-national activities. The statute also provides a legal instrument for other companies wishing to group together to access markets, achieve economies of scale, or undertake research and development activities. *The Statute also enables 5 or more European citizens from more than one EU country to create a European Cooperative Society*. This is the first and only form of a European company that can be established from the beginning and with limited liability (ie: it does not need to be formed by companies of different Member States or as a subsidiary as it is the case with the SE. The SCE allows its members to carry out common activities while preserving their independence; its principal object is to satisfy its members' needs and not the return on capital investment; its members benefit proportionally to their profit and not to their capital contribution.