

THE SIGNIFICANCE OF DIRECTIVE 2019/1151 IN THE DIGITALIZATION OF EUROPEAN UNION COMPANY LAW

ABSTRACT: With the rapid development of information and communication technologies in the EU, the establishment of the digital single market through the EU's strategy has allowed for fair market competition using the internet by both individuals (natural persons) and legal entities. However, regulatory disparities among EU member states have posed challenges for businesses engaged in cross-border activities within the EU's single market. There are big differences among member states in terms of the availability of internet tools that enable entrepreneurs and companies to communicate with competent bodies regarding issues related to their business. Furthermore, e-government services differ among member states. Some member states offer comprehensive user-friendly services entirely online, while others struggle to provide digital solutions at crucial stages of a company's life cycle. In certain EU member states, the establishment of a company or the submission of document and information amendments to the register are only allowed in person, or in person or electronically, while in some member states this can only be done electronically. Digitalization was supposed to simplify the procedures for establishing business entities and enable free business establishment at the EU level. The aim of this paper is to analyze the legislative framework at the EU level, which should facilitate business operations in the digital

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world and provide security to participants in the European single market, with a special focus on EU Directive 2019/1151.

Keywords: *digitalization, company law, Directive 2019/1151.*

1. The role of the directive in EU company law

Directives are designated as the most important instrument in the formation of European company law, because they bind only the member states in terms of the goal to be achieved through harmonization, but each member state has the freedom to choose the form and method of achieving the prescribed goal (Barbic, 1999). The member states of the European Union belong to different legal traditions (Common Law, Civil Law), and that there are significant political, administrative and social differences between them. Directives allow member states to agree on general principles, without determining the precise content of a specific provision. They can be addressed to only one or only some member states. In this way, European company law acquires an indirect character, which means that it does not apply directly to companies (Barbic, 1999).

The directives that regulate the subject of the law of business companies primarily regulate the legal position of joint stock companies in EU member states. The main reason lies in the great economic power and influence that these companies have on the internal market. The directives are also applied to another legal form of business companies, the limited liability company. When adopting directives, each member state has the same right and opportunity to influence the determination of the content. Accordingly, they very often offer alternative solutions to a particular legal problem that originate from different national legal systems. Germany, France and Great Britain had a particularly strong influence on legislative activity. The influence of German company law is particularly noteworthy, both due to the fact that it is the most comprehensive, codified and modern national law of companies, but also because German lawyers were mostly present in the competent administration of the Commission (General Directorate III). English law and its approach particularly came to the fore when the viewpoint that law prevailed companies in close connection with the development of stock exchange, financial and tax law, while the General Directorate XV was dominated by English lawyers (Barbic, 1999).

The European company law is partially codified by Directive (EU) 2017/1132 with regard to certain aspects, (Directive (EU) 2017/1132) and

in the member states various laws on companies are still in force, which are amended from time to time in order to have been aligned with EU directives and regulations. In the regulation of the European law of commercial companies, the institutions of the Union have rarely resorted to regulations, because they are directly applied in all member states. They are applied when introducing some new legal institutes, e.g. European Economic Interest Grouping (EEIG) and European Society (Societas Europae – SE). In this way, the recognition of these new forms of business companies is ensured in all member states, and their intervention in the regulation of the characteristics, rights and advantages of these companies is prevented.

Accordingly, the Council Regulation on the European Economic Interest Grouping – EEIG from 1985 (Council Regulation (EEC) No 2137/85); Council Regulation on the Statute for a European company (SE) from 2001; (Council Regulation (EC) No 2157/2001), Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. It introduces common rules on which court is competent to initiate proceedings in case of insolvency, on the applicable law and on the recognition of court decisions in order to prevent the transfer of property or court proceedings from one member state to another.

Recommendations do not have a greater meaning in the area of harmonization of European corporate law, primarily due to their non-binding nature. They play a greater role in the harmonization of securities law and stock exchange law. The Commission's existing recommendations that apply to companies relate mainly to accounting law and audit of balance sheets.

2. Digitalization in the European Union

Since 1995, information and communication technologies have had a positive impact on productivity growth in the European Union. In 2015, the European Commission launched the Digital Single Market, in order to be able to implement the main legislative proposals: the development of e-commerce, copyright, e-privacy, harmonization of digital rights and cybersecurity. The founding treaties do not contain special provisions on information and communication technologies; therefore, the European Union can take the necessary measures within the policies key to "digital" Europe, such as: industrial policy (Art. 173. TFEU) competition policy (Art. 101. – 109.) trade policy (Art. 206 and 207) of the trans-European network (Art. 170 – 172);

research and technological development (Art. 179 – 190) harmonization of legislation to improve the functioning of the internal market (Art. 114) free movement of goods, services, people and capital (Art. 28-66).

After the Lisbon Treaty in March 2010, the Strategy for Smart, Sustainable and Inclusive Development – Europe 2020 Strategy was adopted, in which the vision for the year 2020 was defined. The vision includes achieving high levels of employment, a low carbon economy, productivity and social cohesion. ICT has been identified as key to achieving the 2020 goals.

The European Commission defined several key initiatives: “Innovation Union”, “Youth on the move”, “Europe that uses resources efficiently, “Industrial policy for the era of globalization” with the aim of improving the quality of educational systems and easier entry of young people into the labor market”. “Agenda for new skills and new jobs”, “European platform for the fight against poverty, as well as the most important initiative in the field of digitalization “Digital agenda for Europe – DAE”, with the aim of faster expansion of broadband internet so that households and businesses take advantage of the Digital Single Market. The Digital Single Market is the first pillar of the Digital Agenda for Europe, which contains 21 measures aimed at encouraging traffic in internet content, as well as establishing a single framework for electronic payments and consumer protection in the digital environment. The basic task of the Digital Agenda is to maximize the growth potential of the digital economy through the development of digital skills, the digitization of industry and services, the development of artificial intelligence and the modernization of public services. A European Union fit for the digital age is a key priority of the EU.

In the first half of 2020, the European Commission presented a digital strategy that would make Europe a global actor in the digital domain and the Digital Europe program for the period 2021-2027, aimed at building the EU's strategic digital capacities and facilitating the wide application of digital technologies. The “Digital Europe” program should provide funding for projects in five key areas: super-computing, artificial intelligence, cyber-security, advanced digital skills and ensuring the wide use of digital technologies throughout the economy and society. The program should overcome the gap that exists between the research of digital technologies and their application, and the results of the research should be put on the market for the benefit of European citizens and businesses, especially small and medium-sized ones. Furthermore, this program should help European companies, especially SMEs, in the introduction of advanced technologies, and in their expansion and exploitation of the possibilities of digital transformation.

Digital transformation should contribute to overcoming the current health crisis, and become a key driver of economic recovery, green growth and strategic autonomy of the EU.

3. Development of digitalization in the regulatory framework of EU company law

Ten years after “winter” report (2002) and Action Plan (2003), the EU Action Plan for e-Government 2016-2020 was adopted: where the importance of the improved use of digital tools in meeting the requirements related to businesses was particularly recognized. The connection of central registers, commercial registers and registers of companies of member states started in 2017, it greatly facilitated cross-border access to information about a company in the Union and enables registries in member states to communicate electronically with each other in connection with certain cross-border activities related to on economic companies (Accelerating the digital transformation of governments in the EU – 2016-2020 action plan)

Regulation (EU) 2018/1724 provides general rules, important for the functioning of the internal market, which relate to the electronic provision of information, e-procedures and assistance services. It foresees the online establishment of capital companies, registration of subsidiaries in the register, submission of documents and information by companies and subsidiaries. According to this directive, the member states are obliged to provide specific information about the planned online procedures as well as an adequate electronic form, all through a single entry point – European single entry point Single Digital Gateway. Also, in order to reduce the costs or the administrative burden on companies, member states should apply the “once only” principle in the area of company law. This principle provides that companies are not required to submit the same information to public bodies more than once. (e.g. in the case when a company is established in one member state and wants to enter a subsidiary in the register in another member state, the company should be allowed to use documents or information that have already been submitted to the register. Furthermore, in the case where the company is company established in one member state, but has a subsidiary in another member state, the company should be able to submit certain changes to information only in the register in which it is registered, without the need to submit the same information in the register in which the subsidiary is registered. (Regulation (EU) 2018/1724 of the european parliament and of the council of 2 october 2018).

Furthermore, it is necessary to point out that this regulation is a key element of The Single Market Strategy, established by the Commission's Communication of October 28, 2015 entitled "Improving the Single Market: more opportunities for people and companies" (Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions Upgrading the Single Market: more opportunities for people and business).

This strategy strives to realize the full potential of the internal market by making it easier for citizens and companies to move within the Union and trade, business settlement and business expansion across borders. In fact, the Single Digital Gateway (SDGP) was established with the aim of facilitating, that is, online access to information, administrative procedures and assistance services that citizens and companies need to activate in another European Union country. By the end of 2023 at the latest, citizens and companies will be able to perform numerous procedures in all member states of the European Union without any physical papers. At the level of the European Union, the Your Europe page is active in order to facilitate cross-border activities for both companies and citizens. The planned system provides all business entities with the exchange of all necessary information, with a high degree of security and low costs. In the context of digitization and modernization of company law, the SDGP is important from two aspects, because it contains principles that are compatible, and we can freely say that they were a guide for those contained in Directive 2019/1151, and contain a series of rules that, even if they are not directly applicable to companies, to a large extent still relate to and are part of the entire business environment.

4. EU directive on the use of digital tools and processes in company law

EU Directive 2019/1151 is often referred to as the CorpTechDirective. This directive was adopted by the European Parliament on June 20, 2019, and entered into force on July 31, 2019, and represents the first of two directives within the so-called company law package. The member states had the obligation to transpose it into the national legal system by August 1, 2021, exceptionally by August 1, 2022 (Directive (EU) 2019/1151).

It provides that the establishment of business companies can be carried out entirely via the Internet without the need for the applicant to appear in person before any competent body or including the drafting of the deed on the establishment of a business company (Article 13.b). Only in cases that

would be justified by reasons for the protection of the public interest, member states may require the physical presence of the applicant. The member states establish detailed rules for the establishment of business companies via the Internet, including rules on the use of forms (Article 13 of the Directive), that is, documents and information necessary for the establishment of a business company (Article 13.g paragraph 2). These rules provide: (Directive (EU) 2019/1151):

- Procedures guaranteeing that applicants have the legal capacity and authority to represent the company;
- Requirements in accordance with which applicants must use trust services from Regulation (EU) no. 910/2014;
- Procedures for checking the legality of the company's activities and the appointment of directors.

In order to achieve a high level of trust in cross-border business, only means of electronic identification that comply with Article 6 of Regulation (EU) no. 910/2014 (Gongeta, 2020). Furthermore, it should be pointed out that in many articles of Directive 2019/1151 the term "electronic" is present, which refers to electronic equipment for processing, digital compression and data storage, through which information is sent and received in a manner determined by the states members (Bartoceli, 2018). This term reflects the direction of both the current and future action of the European Union in the area of company law, which is actually an essential part of the new regulation related to digitalization.

In order to facilitate electronic procedures for companies, member state registries should ensure transparent rules on fees and apply them without discrimination. Transparency in business, according to this directive, also means simpler access to other information about the company (status of the company, its branches, as well as persons authorized to represent).

EU Directive 2019/1151 adapted the law of European Union companies to digitalage, based on the following rules that enable:

1. Fully, online register a limited liability company, establish new branches and submit documents for companies and their branches to the business register;
2. National proposals for forms and information on national requirements are made available via the Internet in a language understood by the largest number of cross-border users;
3. Rules on fees for online formalities are transparent and applied in a non-discriminatory manner;

4. The fees provided for the registration of companies via the Internet must not exceed the total costs incurred by a specific member state;
5. The “only once” principle, according to which the company should submit the same information to public bodies only once;
6. Documents submitted by companies are stored in national registers and exchanged among them in a readable and searchable format;
7. More information about companies is made available free of charge to all interested parties through business registers (Gongeta, 2020).

Member States are allowed to be able to limit online incorporation only to certain types of capital companies, as specified in the Directive, due to the complexity of establishing other types of companies in national law. The establishment of a business company via the Internet should be possible by submitting documents or information in electronic form, without prejudice to the substantive and procedural requirements of the member states, including those related to legal procedures for the drafting of articles of incorporation, and to authenticity, accuracy, reliability, credibility and appropriate legal form of submitted documents or information. In order to ensure the efficient establishment of a business company via the Internet or the entry of branches in the register via the Internet, Member States should not make such establishment or entry in the register conditional on obtaining any permit or approval prior to the completion of the establishment or entry in the register, unless this is provided for by national law in order to ensure proper supervision of certain activities. After establishment or registration in the register, national law should specifically regulate cases in which companies or branches may not perform certain activities without obtaining a permit or approval (Mahmutčehajić & Silajdžić, 2021).

The registration period should not be longer than five days, exceptionally up to ten days, counting from the day when the request was submitted. According to the directive, it is the discretionary right of the member states whether notaries are included in the establishment process or not. The directive therefore offers the legislator the necessary flexibility to include notaries in the online system of company incorporation, branch registrations and submission of documents and information. According to the Directive, the physical presence of the founder before any public body may be required only in certain cases if it is justified by reasons of public interest. This is the case, for example, when there are reasons to suspect identity falsification or non-compliance with the rules on business capacity and the authority of the founders to represent the company. These reasons of public interest must be

assessed on a case-by-case basis. Therefore, the obligation to visit a notary or any other authority may not be required under this Directive.

The planned connection of all European business registers through the Business Registers Interconnection System (BRIS) should also be seen as a further positive innovation in terms of uniform digitization across Europe. In the future, all companies operating on the territory of the EU will be assigned a European identification number, or EU-ID, together with a national commercial register number. This level of transparency increases the legal security of creditors, business partners, and consumers in doing business with companies that belong to another EU member state (or countries that are part of the system and that are part of the European Free Trade Association – EFTA). However, the high level of transparency raises fears of misuse of widely available information and violations of special data protection regulations. The basic principle that should be applied when it comes to the interconnection of business registers from the territories of different countries is that all information that is available in the home country should also be available to interested persons in foreign countries (Vusijić, 2019).

It is important to emphasize that EU member states in the context of positive legislation agree on the most important issues of corporate law, which are considered to be covered by the *lex societatis*. It refers to issues of establishment of a company, name, legal and business capacity, capital structure, rights and obligations of company members, and issues of corporate governance. Provisions on electronic procedures should include control of the identity and legal capacity of persons who wish to establish a business company or enter a branch in the register or submit documents or information with the aim of combating fraud and hijacking of a business company, as well as providing protective mechanisms for the reliability and credibility of the documents and information they contain national registries. These controls could be part of the legality check required by some Member States. The means and methods for implementing such controls should be developed and adopted by member states. For this purpose, Member States should require the involvement of notaries public/notaries or lawyers in any part of online procedures. However, their inclusion in the procedure should not make it impossible to conduct the entire procedure online. When establishing companies and registering branches in the register via the Internet, in order to reduce costs and burdens for companies, it should be possible to submit documents and information to the national registers entirely via the Internet during the entire life cycle of the company (Mahmutčehajić & Silajdžić, 2021).

5. Conclusions

Digitization in the law of companies implies the daily use of modern technologies, i.e. electronic documents, primarily in the process of establishment and registration of business entities, the business life of business entities, as well as in the process of registering business changes that are subject to mandatory registration. Digitization refers to communication within the company itself and the work of its bodies (meetings of the company's bodies through means of audio and visual communication).

The application of ICT in the operations of a business company should reduce the use of classic written documents to the minimum possible extent, and business entities should be enabled to communicate with each other and with the competent state authorities electronically. It was stated above that digitization and digital transformation are the main directions of the future development of the EU.

In the end, it can be concluded that the law of commercial companies is continuously changing either as a response to the current COVID-19 pandemic or due to the general need for more flexible and digital everyday solutions. With Directive 2019/1151, which entered into force on July 31, 2019, the EU is taking further steps towards the digitization and modernization of corporate law in its member states. The most important innovation relates to the obligation of member states to enable online establishment of at least certain types of companies, online archiving and access to information about the company, online registration of branches, without the founder or interested person having to leave the computer screen.

Passing this regulation represents a challenge for every member state that needs to provide citizens and consumers with legal certainty, while at the same time creating conditions that allow companies to be more efficient and compete and be more innovative in a very competitive global environment. At the level of the European Union, the establishment of business companies, the entry of branches in the register, and the submission of documents and information will be completely electronic no later than August 1, 2022. With the aim of strengthening trust, states should provide the possibility of secure electronic identification and use of trust services for both national and cross-border users. The very fact that electronic establishment is of great importance in the modern economy that strives for efficiency and economy, in which natural and legal persons are increasingly establishing companies on the territories of foreign countries, they must not be at the expense of legal security, so it is necessary to pay great attention to ensuring the means of determining the identity of the founder.

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ZNAČAJ DIREKTIVE 2019/1151 U PROCESU DIGITALIZACIJE KOMPANIJSKOG PRAVA EVROPSKE UNIJE

REZIME: Sa ubrzanim razvojem infomaciono-komunikacionih tehnologija u EU Strategijom je uspostavljeno jedinstveno digitalno tržište, koje je fizičkim i pravnim licima omogućilo pošteno tržišno nadmetanje upotrebljom interneta. Međutim, neujednačenost regulative u državama članicama EU predstavljala je problem privrednim subjektima u prekograničnom poslovanju u okvirima jedinstvenog tržišta EU. Velike su razlike među državama članicama u pogledu dostupnosti internet alata koji preduzetnicima i privrednim društvima omogućuju komuniciranje sa nadležnim telima u vezi sa pitanjima koja se odnose na njihovo poslovanje. Dalje, usluge e-uprave razlikuju se među državama članicama. U nekim državama članicama dostupne su sveobuhvatne usluge, prilagođene korisnicima koje se u potpunosti pružaju online, dok druge ne mogu pružiti digitalna rešenja u određenim glavnim fazama životnog ciklusa privrednog društva. U određenim državama članicama EU, osnivanje privrednog društva ili podnošenje izmena dokumenata i informacija u registar dopušteno je samo lično, ili lično ili elektronski, dok se u nekim državama članicama to može učiniti samo elektronski. Upravo je digitalizacija trebala da pojednostavi procedure osnivanje privrednih društava i omogući slobodnu poslovnog nastanjivanja na nivou EU. Cilj ovog rada je analiza zakonodavnog okvira na nivou EU koji treba da olakša poslovanje u digitalnom svetu i pruža sigurnost učesnicima na evropskom jedinstvenom tržištu, sa posebnim fokusom na Direktivu EU 2019/1151.

Ključne reči: digitalizacija, pravo privrednih društva, Direktiva 2019/1151.

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