

Harmonisation of the new proposed Macedonian Company Law with the First to Twelfth EU Directives currently in force

One of the principal achievements sought and contributed by the drafting of the new proposed Macedonian Company Law (hereinafter referred to as the “Company Law”) was to respectively take into account and transpose the objectives and requirements set out by the EU Directives currently in force regarding company law.

These EU Directives mainly relate to disclosure requirements and the safeguard of members and third party rights by promoting transparency and protective measures to be implemented by the respective Member States. Each directive is applicable to different company vehicles and seeks to ensure a different set of particular safeguards however and for ease of reference, this Article will set out the scope and purpose of each directive in turn (IA) with the general objectives sought by such legislation being looked at in a later section (IB).

Part II will set out how the EU Directives, referred to in the first part of this Article, have been transposed by the Company Law considering each directive in turn (IIA) and the results and effects this will have on the business community and interested parties concerned, achieved by the concretisation of those objectives sought by the directives (IIB).

I EU Company Law Directives considered within the Company Law

The principle EU Directives applicable to the Company Law are those Directives referred to by their numbering, i.e.: the First through to the Twelfth Directives (hereinafter collectively referred to as the “Directives”). It should be noted however that the Fifth, Ninth and Tenth Directives are still in a draft stage.

The remaining directives which have been drafted in their final form and implemented by Member States shall accordingly be looked at briefly in turn as regards both their scope of application and purpose.

A. Scope and purpose of each directive

1. *First Council Directive (EEC) 68/151 of 9th March 1968 (the “First Directive”)*

a. Scope:

The First Directive applies to “*companies limited by shares or otherwise having limited liability, since the activities of such companies often extend beyond the frontiers of national territories... [and] since the only safeguards they offer to third parties are their assets*”.¹

¹ 1st and 3rd recitals in the preamble

The types of vehicles consequently concerned by the First Directive under the Company Law are the joint stock companies, the limited liability companies and the partnerships limited by stock.

b. Purpose:

The First Directive seeks to:

- set out the publicity requirements applicable to the afore-mentioned companies;
- restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid;
- limit the cases in which nullity can arise.

2. *Second Council Directive (EEC) 77/91 of 13th December 1976 (the “Second Directive”)*

a. Scope:

The Second Directive is applicable to public limited companies and consequently concerns the joint stock company vehicle under the Company Law.

b. Purpose:

The Second Directive principally sets out rules relating to the formation of public limited companies and the maintenance, distribution and alteration of their capital as well as the acquisition of its own shares and redeemable shares.

3. *Third Council Directive (EEC) 78/855 of 9th October 1978 (the “Third Directive”) and Sixth Council Directive (EEC) 82/891 of 17th December 1982 (the “Sixth Directive”)*

The Third and Sixth Directives have been dealt with together as they respectively deal with mergers and divisions of public companies and are derived from a single proposal originally intended to regulate both types of operation.

a. Scope:

The Third and Sixth Directives apply to public limited companies, i.e.: to the joint stock company vehicles under the Company Law.

b. Purpose:

The Third and Sixth Directives set out requirements to be observed relating to mergers and divisions respectively.

The principal aim of the Third Directive was to harmonise national laws relating to domestic mergers and in particular to require Member States, which did not provide for mergers as defined to introduce the concept into their legislation².

² 3rd recital in the preamble

As regards the Sixth Directive, this does not seek to impose on all Member States the concept of division as defined; instead it states that “*the protection of the interests of members and third parties requires that the laws of the Member States relating to divisions of public limited liability companies be coordinated where the Member States permit such operations*”³. The objective is thus to ensure that the Directive’s safeguards are observed where divisions are permitted.

4. *Fourth Council Directive (EEC) 78/660 of 25th July 1978 (the “Fourth Directive”)*

a. Scope:

The Fourth Directive applies to public and limited liability companies of the same types as are covered by the First Directive, with the exception of banks and other financial institutions and insurance companies, which are covered by separate directives. The Fourth Directive accordingly concerns the joint stock company, the limited liability company and the partnership limited by stock vehicles under the Company Law.

b. Purpose:

The Fourth Directive seeks to achieve the “*coordination of national provisions concerning the presentation and content of annual accounts and annual reports, the valuation methods used therein and their publication in respect of certain companies with limited liability*”, this being “*of special importance for the protection of members and third parties*”⁴.

5. *Seventh Council Directive (EEC) 83/349 of 13th June 1983 (the “Seventh Directive”)*

a. Scope:

The Seventh Directive is applicable to undertakings, which have controlling interests in other undertakings, subject to certain exemptions as defined by the Directive.

b. Purpose:

The Seventh Directive sets out requirements relating to the drawing up of consolidated accounts, stipulating that: “*consolidated accounts must be drawn up so that financial information concerning... bodies of undertakings may be conveyed to members and third parties*” and that “*the aim of coordinating the legislation governing consolidated accounts is to protect the interests subsisting in companies with share capital*”⁵.

³ 5th recital in the preamble

⁴ 1st recital in the preamble

⁵ 1st and 3rd recitals in the preamble

6. *Eighth Council Directive (EEC) 84/253 of 10th April 1984 (the “Eighth Directive”)*

a. Scope:

Article 1 provides that the measures prescribed in the Directive shall apply to the laws, regulations and administrative provisions of the Member States concerning persons responsible for carrying out the statutory audits of the annual accounts of companies and firms or the consolidated accounts of bodies of undertakings and verifying that the annual reports are consistent with those accounts insofar as such audits and such verification are required by Community law (i.e. auditors under the Company Law).

b. Purpose:

The Eighth Directive seeks to ensure that auditors in all Member States have equivalent minimum qualifications.

7. *Eleventh Council Directive (EEC) 89/666 of 21st December 1989 (the “Eleventh Directive”)*

a. Scope:

The Eleventh Directive concerns (a) branches opened in a Member State by a company which is governed by the law of another Member State and to which the First Directive applies and (b) branches opened in a Member State by a company which is not governed by the law of another Member State but which is of a legal form comparable with the types of company to which the First Directive applies.⁶

b. Purpose:

The Eleventh Directive sets out disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State and seeks to stop a lacuna in the system of protection of third parties by the mandatory disclosure of certain information relating to companies and branches.

8. *Twelfth Council Directive (EEC) 89/667 of 21st December 1989 (the “Twelfth Directive”)*

a. Scope:

The Twelfth Directive concerns single-member private limited companies.

b. Purpose:

The Twelfth Directive seeks to ensure third party protection, whilst intending to complement Community initiatives to encourage the creation and development of small and medium sized enterprises.

⁶ Articles 1 and 7

B. Objectives sought by the Directives

1. Safeguard of interests of members and third parties

Having briefly set out the scope and purpose of each of the Directives, it can be seen that the fundamental objective underlying all of the Directives is the necessity to ensure the protection of the interests not only of members of the company vehicle concerned but also the interests of third parties including creditors, employees and interested members of the public.

This fundamental objective can clearly be ascertained by *inter alia*:

- the publicity and transparency requirements set out by the Directives (in particular the First, Second and Eleventh Directives) benefiting both shareholders and third parties;
- the increase in the legal certainty of the actions undertaken by company vehicles as regards third parties as well as of their very existence (for example the requirements set out by the First Directive relating to the limitation of the grounds on which obligations entered into in the name of the company are not valid and of the cases in which nullity can arise);
- the requirements (for example relating to shareholder approval) which must be observed when increasing or decreasing the share capital as regards public limited companies as well as in its formation (set out by the Second Directive);
- the derogations in favour of employee interests allowed by the Second Directive “*to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees or other groups of persons defined by national law, in the capital of undertakings*”⁷;
- the requirements which must be observed (for example relating to information and opposition rights and the safeguard of member, creditor and employee interests) when merging or dividing public limited companies (set out by the Third and Sixth Directives);
- the necessity of obtaining a clear and accurate view of the company’s financial situation by annual and consolidated accounts drawn up in accordance with the Fourth and Seventh Directives respectively as well as ensuring that these are audited by adequately qualified persons (as set out by the Eighth Directive).

Such an objective of ensuring the protection of interests of members and third parties is therefore a principal aim, enshrined in the founding treaty itself, which seeks: “*to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required (...) of companies or firms....*”⁸

⁷ Second Directive, Article 41

⁸ Treaty establishing the European Community (Treaty of Rome, 25th March 1957) Article 44(2)(g)

2. Promotion of efficient functioning of companies due to their accountability

A secondary aim of the Directives can be seen in the latter's attempt to promote the efficient functioning of companies by the observance of certain requirements set out by the Directives. Examples of this are set out below:

- the observance of the deadlines set out by the publicity and transparency requirements referred to at point 1 above ensure that companies formulate documents and carry out actions more efficiently and speedily;
- the increased legal certainty as regards third parties referred to at point 1 above leads companies to increase their verification of the necessity and efficiency and effectiveness of documents and actions carried out by them;
- the necessity of production of annual and consolidated accounts audited by duly qualified persons (in line with the Fourth, Seventh and Eighth Directives respectively) ensure that companies are fully aware of their financial situation with a better foresight into the solution of any difficulties.

3. Encouragement of the creation and development of small and medium sized enterprises

A third aim of the Directives may be seen in the encouragement of the creation and development of small and medium sized enterprises principally by:

- the imposition of stricter requirements as regards public limited companies pursuant to the Second, Third and Sixth Directives (which may be considered as passive promotion);
- derogations applicable to small and medium sized enterprises regarding accounting and auditing requirements as set out by the Fourth Directive (which may be considered as positive promotion);
- complementing Community initiatives to encourage the creation and development of small and medium sized enterprises in the form of the Twelfth Directive.

Another unexpressed but underlying aim of all the Directives is the practical workability of the requirements and the proposed harmonisation set out within them. Although this may seem logically necessary and of an evident nature, it should be noted that members of the drafting committees of the Directives themselves are occasionally at odds with their conceived workability⁹.

This is obviously an inevitable drawback resulting from the fact that EU legislation stems from each Member State proposing its own solutions and the harmonisation of such solutions (albeit considered the most efficient) in one text. Consequently, although the directives seek as far as possible to ensure workable implementation, a

⁹ An amusing example of this regarding the validity of obligations entered into by companies with regard to third parties, related by E Stein in *Harmonisation of European Company Laws* (1971), is of an Italian deputy who cast the only negative vote in the European Parliament against the First Directive in question, querying its workability in that area calling the approved text "a beast with a Latin head and a German body and tail"!

certain onus is placed on the contracting states by the very nature of the directives to ensure the most effective practicable methods of transposition and adhesion to the requirements set out within them.

The necessity of effective workable transposition is therefore of paramount importance as regards the practicable workability of the EU directives and the concretisation of their objectives.

Taking into account the above scope, purpose and objectives of the Directives as well as the difficulties referred to sometimes encountered regarding their conceived workability, attention should now be given to the transposition solutions set out within the Company Law itself both in the methods of transposition of the contents of the Directives and the effect and results achieved as regards the concretisation of the objectives sought by them.

II Transposition of the EU Directives within the Company Law¹⁰

A. Method of transposition of EU Directives within the Company Law

As set out above and for ease of reference, each of the Directives referred to at point IA and the manner in which its requirements have been transposed within the Company Law will be looked at in turn.

1. Transposition of the First Directive within the Company Law

a. Publicity and disclosure requirements:

The publicity and disclosure requirements applicable to the joint stock company, the limited liability company and the partnership limited by stocks vehicles have been largely transposed within the general provisions section (for example within the “*publication of entries*” article and the “*commercial register and registration procedure*” section) and more particularly the sections on the limited liability company and the joint stock company, which set out a list of documents and particulars to which the compulsory publicity and disclosure requirements as set out by the First Directive apply.

¹⁰ Please note that as regards the comments on the transposition of the Directives within the Company Law, these have been based on the text of a working version as well as on discussions held within the drafting committee meetings and remain subject to verification of the final translation of the text to ensure that all recommendations given by the EU experts of the “Technical Assistance to Draft Trade Laws” project (an EU-funded project managed by the European Agency for Reconstruction) have been duly taken into account. Furthermore, in view of the fact that the final translation of the text of the Company Law has not yet been completed and that the layout of the articles may have been changed, comments regarding the actual location of the text transposing the Directives has been kept to a more general level, with principle transposition examples referred to. Specific comments regarding the exact section of the Company Law corresponding to each article of each Directive, where applicable, will be later set out in a table of correspondence to be drafted by the EU experts and it is this document which should be referred to as regards a more detailed account of the status of transposition.

- b. Restriction of grounds on which obligations entered into in the name of the company are not valid:

The applicable transposition of these restrictions set out by the First Directive can be found in the sections of the Company Law, which deal with the effect of pre-incorporation and ultra vires transactions and those entered into by irregularly appointed or insufficiently authorised representatives (more particularly the liability for damages caused during the incorporation of the company, the scope of operations and the representation sections) as well as within the particular company sections regarding joint stock and limited liability companies.

- c. Limitation of cases in which nullity can arise:

The rules relating to the cases in which nullity may arise are set out within the general provisions section (“*Annulment of a Company*”).

2. Transposition of the Second Directive within the Company Law

- a. Requirements relating to the formation of public limited companies

Rules relating to the formation of joint stock companies can be found in the general provisions applicable to the joint stock company and the “*Founding and Entry of the Joint Stock Company*” section, which set out *inter alia* the information which must appear in the company charter, the minimum capital requirements and provisions applicable to shares, including for instance the requirements relating to non-cash consideration as payment of the shares.

- b. Requirements relating to the maintenance distribution and alteration of the capital and acquisition of own shares and redeemable shares of public limited companies

Requirements relating to the maintenance distribution and alteration of share capital and acquisition of own shares and redeemable shares are principally taken into account within the “*Increase of Charter Capital*” and “*Reduction of Charter Capital*” sections and the sections on “*Dividends*”, “*Acquisition of Treasury Shares*” and “*Shares with a Right of Repurchase*” sections.

3. Transposition of the Third and Sixth Directives within the Company Law

Most of the requirements relating to mergers and divisions, pursuant to the drafting committee discussions have been transposed within the “*Accession, Merger and Division of Companies*” section, safeguarding interests of members and others for example by setting out the documents and information to be disclosed within shareholder meetings as well as to interested parties of companies subject to merger or division (including creditors). As regards specific safeguards of employees’ rights, referred to by the Directives, the Company Law provides that the draft merger or division agreement will set out the terms and conditions under which the employment of the employees shall be continued, thereby providing some opportunity for opposition by shareholders, through the acceptance of the agreement procedure. Please note however, that according to information obtained from the local

Macedonian legal experts, it has not been possible to fully comply with the specific provisions referred to by the Directive (i.e. the provisions as set out in Directive 77/187/EEC) as “these would not be appropriate for such a transitional economy”. Please also note that according to information obtained from the local Macedonian legal experts, special employment rights exist under Macedonian employment law as regards employees over the age of 55.

Requirements relating to the contents of the draft terms of a merger or division to be approved by a general meeting, subject to certain exceptions, as well as the determination of liability for damage of the members of the bodies of the companies subject to merger or division are also set out within this section.

4. Transposition of the Fourth and Seventh Directives within the Company Law

It should be noted that the accounting requirements within the accounting section of the Company Law refer to International Financial Reporting Standards rather than a strict transposition of the Fourth and Seventh Directives.

Furthermore and as regards the format and content of the accounts prescribed by the Directives, the section on the “Obligation for Preparation of an Annual Account Statement and Financial Statements ” refers to the competence of the Ministry of Finance to prescribe such form and contents and accordingly to establish any laws relating to such requirements. Harmonisation with EU Directives should accordingly be looked into at such time when any subsequent laws regarding such accountancy requirements are drafted.

5. Transposition of the Eighth Directive within the Company Law

It should be noted that it has been stated within the drafting committee meetings that specific obligations are imposed on auditors under professional body regulations rather than being dealt with in the Company Law. These should accordingly be looked into in order to check harmonisation with the Eighth Directive.

6. Transposition of the Eleventh Directive within the Company Law

The section on “*Branch Offices and Representative Offices*” sets out the principal provisions and disclosure requirements pursuant to the Eleventh Directive.¹¹

7. Transposition of the Twelfth Directive within the Company Law

The possibility for setting up single member companies is dealt with both in the limited liability and joint stock company sections of the Company Law.

Having looked at the transposition solutions set out within the Company Law and the manner in which the latter has taken into account requirements set out by the Directives for which transposition has been sought, the effects and results achieved by such transposition and the concretisation of the objectives aimed for by the Directives

¹¹ Certain other provisions have already been recommended by the EU experts in order for this section to fully transpose the provisions set out in the Eleventh Directive however and it has been stated that these have now been taken into account (to be verified once the final translation has been submitted).

upon the business community and interested parties concerned should now be considered.

B. Effects and results achieved by the transposition of Directive requirements within the Company Law

Transposition of the Directives so far attained within the Company Law has resulted in the concretisation of certain of the objectives sought by the Directives (namely those referred to in Part IB of this Article: safeguard of interests of members and third parties; promotion of efficient functioning of companies due to their accountability; encouragement of the creation and development of small and medium sized enterprises and workability) within the proposed text whilst clearly envisaging those objectives in practice.

A few examples of these effects and results achieved and how these benefit the business community and interested parties concerned have been set out below:

1. Increased clarification on disclosure of company and documents and publicity requirements (taking into account the provisions of the First, Second, Third, Sixth and Eleventh Directives) resulting in:

- benefits regarding safeguard of shareholders interests regarding their right of access of company documents both on a permanent basis and during shareholder meetings;
- benefits regarding safeguard of third party interests, for example creditors regarding their right to obtain information *inter alia* through public access of information (publication in the Commercial Register and the Official Gazette);
- benefits relating to the increased efficiency of companies relating to the observance of deadlines set out by the publicity and transparency requirements (as referred to at point IB(2) above);
- benefits regarding the workability and effective implementation of the Company Law itself: by clearly setting out disclosure requirements, thereby preventing lacunae or legal void, which may otherwise result. A detailed establishment of disclosure requirements results in a clearer legal understanding and certainty for the addressees concerned.

2. Clearer rules regarding the legal certainty of company actions undertaken with regard to third parties (in particular taking into account the provisions of the First Directive) resulting in:

- benefits regarding safeguard of third party interests, giving them increased certainty as regards company obligations which will remain valid notwithstanding ultra vires transactions or those which are entered into by irregularly appointed or insufficiently authorised representatives;
- benefits regarding workability and effective implementation of the Company Law itself by setting out the legal solutions applicable to ultra vires transactions, which is an extremely thorny issue and which could otherwise lead to an increase in litigation if it not properly addressed by adequate company legislation.

3. Clearer rules relating to formation of joint stock companies and rules relating to their increase and decrease of capital resulting in:

- benefits regarding safeguard of shareholders interests (for example relating to increased disclosure requirements, their rights of pre-emption and rights attributable to them in the event of a serious loss of the company's capital or the acquisition by the company of its own (treasury) shares);
- benefits regarding safeguard of third party and prospective shareholder interests (for example by increased disclosure requirements);
- benefits regarding increased company efficiency (for example in the imposition of minimum capital requirements and clear rules to be followed regarding the increase and decrease of share capital);
- benefits regarding passive promotion of SMEs due to the more stringent requirements placed on joint stock companies;
- benefits regarding the workability and effective implementation of the Company Law itself, as referred to above.

4. Clearer rules and requirements to be observed relating to mergers and divisions resulting in:

- benefits regarding the safeguard of interests of shareholders and third parties (in particular creditors) by providing them with adequate notification and details of the proposed merger or division and the setting out of the liability for damage of the members of bodies of the companies subject to the merger or division;
- benefits regarding the increased efficiency of the companies by the provision of clear rules, which must be observed in the event of a merger and division and allowing for increased competitiveness by allowing such transactions to take place;
- benefits regarding the workability and effective implementation of the Company Law itself, by providing for increased legal certainty in the carrying out of merger and division transactions.

Having set out above the scope, purpose and objectives of the Directives as well as the transposition solutions set out within the Company Law both in the methods of transposition of the contents of the Directives and the effect and results achieved as regards the concretisation of the objectives sought by them, it can be stated that far from creating a burdensome situation, the transposition of the objectives sought by the Directives complements those set out in other areas of the Company Law.

Indeed, the material application within the Company Law of the principal objectives sought by the Directives, (in particular the safeguard of interests not only of shareholders but also of third parties as well as the promotion of the efficiency of companies and the encouragement of the creation and development of small and medium sized enterprises), has resulted in making a real contribution to the advancement of certain of the company law's expectations and ultimate goals, thereby facilitating those objectives and providing a more effective framework overall for the purposes of setting forth favourable market conditions, which will prove all the more attractive to new investors and businesses. A recognition of the aim of achieving such

mutual goals is paramount to the understanding of the fundamental purposes of the EU legislation and to grasping a true comprehension of the common motivational thread, which seeks to underlie the whole of the process of harmonisation.

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