

Disclosure Requirements

Ludmiła ŻALIK

Unit F2/Company Law, Corporate Governance and Financial Crime

Screening process

Explanatory meeting with Croatia and Turkey

21 June 2006



Legal Framework

- First Company Law Directive [1st CLD] (68/151/EEC) amended in 2003 by Directive 2003/58/EC
- Eleventh Company Law Directive [11th CLD] (89/666/EC)



First Company Law Directive (68/151/EEC) amended in 2003 by Directive 2003/58/EC

The purpose

Ensure the protection of third parties' interests by:

- requiring disclosure of the basic company's documents and particulars of the persons authorised to bind the company
- Limiting the grounds on which obligations entered into in the name of the company are not valid
- Limiting the cases in which nullity of a company can arise

Scope of application

Material scope:

- The rules on disclosure of company documents
- Provisions on the validity of obligations entered into by a company
- Provisions on the nullity of the company

Personal scope:

- All limited liability companies (both private and public companies)

Rules on disclosure of company documents

- Official register for all limited liability companies
- File opened for every company entered in the register
- Compulsory disclosure of certain company documents and particulars
- Copies of the documents accessible to the public
- Publication of the documents and particulars filed in the register in the national gazette

Documents to be disclosed

The following documents must **at least** be disclosed by the companies:

- the instrument of constitution (statutes/articles of association) of the company and any amendments thereto
- the amount of the capital subscribed
- particulars of the persons empowered to represent the company in dealings with third parties and in legal proceedings and of those persons who take part in the administration, supervision or control of the company
- the annual accounts for each financial year
- any transfer of the seat of the company, the winding up of the company and any declaration of nullity of the company

The Directive establishes only **minimum standards** (Member States may require disclosure of additional information)

The effect of registration in the official register

- The documents and particulars deposited in the register may be relied on by the company as against third parties only after publication in the official gazette, unless the company proves that the third party had knowledge thereof.
- However, with regard to transactions taking place before the sixteenth day following the publication, the documents and particulars cannot be relied on by the company as against third parties who prove that it was impossible for them to have had knowledge thereof.

Other disclosure requirements

Company letters

Directive requires that letters and other forms of the company must state:

- the legal form of the company
- the location of its seat
- the register in which the company's file is kept
- the number of the company in that register

Sanctions

- Member States should provide for appropriate penalties for failure to disclose certain information (Art. 6)

Validity of obligations

Two situations:

- actions carried out in the name of the company **before** it is formed
- acts done by the company organs **after** it has been formed and has acquired legal personality

Actions carried out in the name of the company before it is formed

The persons who acted will be **jointly and severally liable** if the company does not assume the obligations arising from the action carried out in the name of the company (unless otherwise agreed)

Acts done by its organs after the company has been formed

- Binding upon the company (unless such acts exceed the powers that the law confers on those organs)
- Member States may provide that the company shall not be bound where such acts are outside the objects of the company (*ultra vires*) if it proves that the third party was in bad faith
- Limits on the powers of the organs of the company arising under the articles of association or from a decision of a competent organ, may never be relied on as against third parties, even if they have been disclosed

Nullity of companies

- Directive limits the cases in which a company may be declared null and void
- Nullity may **only** be pronounced by decision of a court of law on the following grounds:
 - failure to prepare the instrument of constitution or to comply with the rules of preventive control or the requisite legal formalities;
 - the objects of the company are unlawful or contrary to public policy;
 - failure to state in the instrument of constitution or the statutes the company's name or objects or the amount of the individual and total capital subscriptions;
 - failure to comply with the requirements concerning the minimum amount of capital to be paid up;
 - incapacity of all founder members;
 - reduction of the number of founder members to less than two (if contrary to national law)

2003 Amendment: Directive 2003/58/EC

(implementation deadline: 31 December 2006)

Allows the use of modern technology:

- will enable companies to file their documents and particulars either by paper means or by electronic means;
- interested parties could obtain copies by either means;
- the national gazette could be kept in electronic form;
- companies would continue to file their documents and particulars in the language(s) of their Member State but will have the right to voluntarily file the same information in other EU languages (important in the context of cross-border operations)



Eleventh Company Law Directive (89/666/EC)

The purpose

Ensure the protection of third parties' interests when dealing with branches of the foreign companies by subjecting branches to certain disclosure requirements

Scope of application

Disclosure requirements for:

- companies from a Member State which have set up a branch operation in another Member State
- companies from third countries (set up in a legal form comparable with that of a limited liability company) which have set up a branch operation in a Member State

Branches of companies from other Member States

Compulsory disclosure

The compulsory disclosure covers **only** the following documents and particulars (and amendments made thereto):

- address and activities of the branch;
- the register in which the company file is kept and the registration number;
- name and legal form of the company and the name of the branch if different;
- particulars of the persons authorised to represent the company as a company organ or member thereof or as permanent representative of the company for the activities of the branch;
- winding-up of the company and the appointment of liquidators;
- the company's accounts as drawn up, audited and disclosed pursuant to the law of its Member State. Member States may no longer impose the disclosure of accounting documents relating to the activities of the branch;
- the closure of the branch

Branches of companies from other Member States

Voluntary disclosure

Member States **may** require certain additional documents or particular to be disclosed [listed in art. 2(2)]:

- the signature of the persons authorised to represent the company
- the company's statutes
- an attestation of the existence of the company
- an indication of the securities on the company's property situated in that Member State

Where disclosure requirements in respect of the branch differ from those in respect of the company, the branch's disclosure requirements take precedence with regard to transactions carried out with and by the branch.

Other disclosure requirements

- Letters and order forms used by a branch must:
 - contain at least the same information as letters and order forms used by the company
 - state the register in which the file in respect of the branch is kept and the number of the branch in that register.
- Requirement to indicate in the company's annual report of the existence of branches (the amendment to the Fourth Company Law Directive)

Sanctions

- Member States should provide for appropriate penalties for failure to disclose certain information (Art. 12)

Branches of companies from third countries

Compulsory disclosure

Difference compared to treatment of branches of EU companies:

The Directive contains the only **minimum standards** (i.e. Member States may require the disclosure of additional information):

- disclosure requirements include those in respect of branches of EU companies,
- in addition the following disclosures are required:
 - identification of the law of the State by which the company is governed
 - the statutes of the company and any amendments thereto
 - the company's principal place of business and the object of the company
 - the amount of subscribed capital if that is not apparent from the company's statutes
 - whether those authorised to represent the company may do so alone or must act jointly
- Member States may require that accounting documents relating to the activities of the branch must be drawn up and disclosed, if the accounting documents of the company are not drawn up in a manner equivalent to the requirements of the EU Accounting Directives

Thank you for your attention!

Questions?

Ludmila.ZALIK@ec.europa.eu

