

# Coming Soon: ‘Company Law Package Part 2 – Implementation’

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If the Company Law Package was a feature film, ‘The End’ would be in sight: The Digital Directive has been published in the Official Journal and is in force (deadline for implementation: 1 August 2021); the Mobility Directive is currently being finalized.

Ultimately, the Company Law Package has not turned out to be a flop, but a real hit – and one with a happy ending. In fact, it had all the ingredients for a real Hollywood blockbuster: A ragtag bunch of heroes (the Commission, the Member States and the European Parliament) embarks on a ‘Mission: Impossible’ (the online formation had been the ‘Sudden Death’ for the SUP and the cross-border transfer of seat seemed more likely to develop into the ‘NeverEnding Story’) while being under extreme time pressure (in view of the upcoming European elections, it was essentially a ‘Now or Never’). On their adventurous journey, our heroes had to overcome many challenges and even had to defeat an ‘illusory giant’ (the dreadful ‘artificial arrangements’). But in the end – like in any good Hollywood movie – our heroes (despite some scratches and unavoidable ‘Collateral Damage’) mastered all this with flying colours and out of ‘The Good, the Bad and the Ugly’, the ‘Good’ ultimately triumphed.

However, like in case of many Hollywood blockbusters, even before the credits start rolling, we already know that a sequel will be coming soon: ‘Company Law Package Part 2 – Implementation’. We are already familiar with the heroes – the Member States – from the first part. This time, however, they are lone warriors who have to master a completely new and formidable challenge: to implement

the complex provisions of the directives effectively into their national laws.

The centrepiece of the Digitalization Directive – the online formation of companies and the online filing – may already be daily routine in some Member States (e.g. Estonia), but for others, especially Germany, it is a big novelty. At least though, Germans can breathe a little sigh of relief because the directive explicitly allows to involve notaries into the formation process. The big challenge now will be to make the tried-and-tested systems fit for the ‘digital future’ in line with the requirements of the directive and to ensure not only fast, but above all also secure online formation of companies and online filing of documents. Especially for ‘digital novices’ (like Germany) it may be advisable to start slowly by initially limiting digital formation to private limited liability companies and formations where the contribution is paid in cash (in accordance with the Member State options in Article 13g (1) subparagraph 2, (4)(d) CLD); digital formation of public limited liability companies and non-cash contributions may then be added later once sufficient experience has been gained and the systems have been optimized.

A major overhaul is also on the way for commercial registers and publicity, as the Digitalization Directive envisages the abolition of the mandatory additional publication and a move to a ‘register only’-system. Since both the register and the publication have been easily accessible online for some years (since 2017 also via the BRIS), this reform – which does away with the current superfluous and redundant ‘dual disclosure’ – has long been overdue. Hence, Member States should not make use of the option to continue to require an additional publication. Besides, the new ‘register only’-system also has important consequences for the disclosure effects which will have to be implemented into national law (in this context, it should be noted that – despite the somewhat flawed rule on positive publicity in Article 16(4) subparagraph 3 CLD – one may assume that bona fide third parties will be able to rely on incorrect register entries, see in detail *Bayer/J. Schmidt* BB 2019, 1922, 1925).

Moreover, most Member States will also have to undertake a major reform of their national company transformation legislation,

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as the Mobility Directive not only entails an ‘upgrade’ of the EU legal framework for cross-border mergers, but – for the first time – also special EU legal frameworks for cross-border divisions and cross-border conversions. This will, in and of itself, be a huge task. Nonetheless, national legislators should be courageous and go even further by implementing the new rules (which are, unfortunately still restricted to limited liability companies) for all legal entities within the meaning of Article 54(2) TFEU. After all, all these legal entities enjoy freedom of establishment and thus the freedom to merge, divide and convert according to the jurisprudence of the CJEU (*Sevic*, *Cartesio*, *VALE*, *Polbud*). So even those not covered by the directive would be able to execute cross-border mergers, divisions and conversions based on Articles 49, 54 TFEU anyway – hence, national legislators should make sure that this can be done on the basis of a clear procedural framework and protection mechanisms for minority shareholders, creditors and employees in line with those of the directive. Moreover, although the directive unfortunately only covers divisions by formation of a new company, national legislators should be bold and extend their national implementation legislation also to cross-border divisions by acquisition.

In addition to these rather fundamental questions, a huge number of complex aspects of procedural and substantive law will have to be dealt with in the course of implementation, especially with

respect to the protection of creditors and minority shareholders. For some Member States, like e.g. Belgium and Luxembourg, an exit right against cash compensation and the right to get additional compensation in case of an inadequate share exchange ratio are completely new. For other Member States, these are generally well-known protection instruments, but the directive will bring some new ‘twists’. In Germany, for example, the implementation of the directive would be an excellent opportunity to finally embark on the long called-for general reform of the minority protection regime for company transformation operations (and – like the directive – provide for equal treatment of the shareholders of transferring and acquiring undertakings with respect to the additional cash compensation in case of an inadequate share exchange ratio as well as the possibility to provide shares instead of a cash payment).

Considering all of this, ‘Company Law Package Part 2 – Implementation’ undoubtedly also promises to be a suspense-packed blockbuster.

Yet, Hollywood tends to turn successful franchises straight into a trilogy. For a ‘Company Law Package Part 3’ there would indeed be more than enough material: The extension to partnerships, the addition of divisions by acquisition, the harmonization of the conflict of laws rules in the area of company law and the further digitalization. In this spirit, let’s hope for a ‘Back to the Future’!