

Position Paper

UEAPME¹ position on the Proposal for a Directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law (COM(2018) 239 final)

Executive Summary

The Commission's proposal on company law is an excellent one: it fits in the policy to reduce the administrative burdens for SMEs, in the digital strategy of the Commission and of the Member States and it contributes to a better enterprise environment. Member States can maintain their legal traditions. UEAPME would welcome a fast adoption of this proposal and in any case before the end of the actual term.

The Commission work programme for 2017 announced an initiative on company law to facilitate the use of digital technologies throughout a company's lifecycle and cross-border mergers and divisions. On 25th April 2018 the European Commission published the Company Law Package. UEAPME welcomes this initiative as indeed the current European company laws need to be adapted to ensure that everyone involved in the lifecycle of a company could benefit from digital technologies.

UEAPME appreciates that the proposed Directive is the result of a very positive and constructive consultation process between the interested stakeholders and the Commission services.

UEAPME has always stressed that any initiative for the use of digital processes or tools by companies in their interaction with national business registers and competent authorities should address the following issues:

- Make it possible to register, file and publish information on companies and branches fully online in a short time
- Provide for appropriate safeguards to ensure the trustworthiness of online registration, filing and publication
- Provide structured online templates and forms, in particular for the registration of companies and their instruments of constitution
- Ensure the recognition of documents/information issued by business registers, including the acceptability of electronic copies which should be accepted as 'true copies'
- Ensure that companies do not have to provide the same information more than once.

In our view the proposal of the Commission is fully in line with the expectations of SMEs in this field. Consequently UEAPME warmly welcomes this proposal and supports its adoption.

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](https://ec.europa.eu/transparency/procure-viewer/#!/id/55820581197-35).

The use of modern digital technologies is an important requirement in order to strengthen the international competitiveness of the European economy and to cut costs and expenses. Digitalisation is interlinked with simplification. But it must be clear that simplification of existing requirements is not and should not be an end in itself.

Generally, existing legal requirements aim at the protection of public interest objectives. The weighting of the individual interest of unrestricted and unlimited economic activity against public interest objectives - such as combatting fraud and ensuring fair competition by setting standards of protection in order to achieve an equal level playing field – is a delicate task.

One of our concerns has always been that when **no efficient identity check** takes place, this can lead to the setting up of corporations for fraudulent purposes. One of the forms is ‘identity theft’, i.e. disguising the true identity of company directors and shareholders. The problem is that the abuse is revealed only after the damage is done. Affected contracting partners and those whose identities have been abused are generally left alone with their damage and loss of reputation.

This example makes clear why it is of paramount importance **to set high European standards for identity checks** in the context of creation of corporations. The Commission proposal should be improved in this field and give some impulses for higher standards throughout the EU.

More generally, efficient identity verification should be compulsory on European level. A scanned copy of a passport, as foreseen in the proposal (see recital 7), is not sufficient to guarantee the reliability of identity checking. Electronic identification means as referred to in Article 13b (1) should be the minimum requirement for identification with the exception as laid out in Article 13b(2) which, nevertheless, should not allow using scanned copies of a passport as means of identification. To make that clear, UEAPME proposes the following amendment to Recital 7:

| Text Proposed by the Commission | Amendment |
|--|--|
| Recital 7 | |
| <p>[...] In order to ensure the high level of trust in cross-border situations, only electronic identification means which comply with Article 6 of Regulation (EU) No 910/2014 should be recognised. However, Member States may also recognise other identification means such as a scanned copy of a passport. In any event, this Directive should only oblige Member States to enable online registration of companies and their branches and online filing by Union citizens through the recognition of their electronic identification means.</p> | <p>[...] In order to ensure the high level of trust in cross-border situations, only electronic identification means which comply with Article 6 of Regulation (EU) No 910/2014 should be recognised. However, Member States may also recognise other identification means such as a scanned copy of a passport. In any event, this Directive should only oblige Member States to enable online registration of companies and their branches and online filing by Union citizens through the recognition of their electronic identification means.</p> |

Legal certainty of the verification of identity is a fundamental precondition not only for digital communication between companies and authorities but also between companies themselves. Everyone getting in contact with a company should have the guarantee that the digital verification is correct.

Therefore we also welcome the fact that the proposal includes the possibility for an exceptional face-to-face verification of identity in case there is a genuine suspicion of fraud.

In our view, the most important measure in the proposal is the possibility **to establish a company only with digital means** while at the same time ensuring a high level of fraud prevention by clearly identifying shareholders and company directors. At the moment this is still not possible in all the EU countries.

It is of utmost importance that the verification of the identity should take place **prior** to the registration. The risk of false registration (e.g. identity theft) can be reduced in this way.

Further on the positive side, we find many elements in the proposal which will help speeding up company formation processes, for example, the requirement for the Member States to provide detailed information on their national company law (Art. 13e) and standard templates for registration (Art. 13g). It has to be borne in mind nonetheless, that disclosure of information and standard templates for registration might only cover the most relevant aspects and are thus solely appropriate for simple company formation processes. However, it has to be stressed that templates cannot and do not substitute legal advice.

We also welcome the deadline for online-registration within **5 days**, once all information is provided and fees are paid.

The **cost of accessing information** in business registers can restrict the checking of company information. As it is the most used information it should be in principle for free and easy cross-border access should be fully guaranteed. This is as important as having cross-border access to the information about the disqualification of directors to reduce cross-border fraud.

We welcome the fact that the fees for online registration and filing should not exceed the administrative costs (article 13 c) and be transparent. Question is however how to verify this? In addition, recital 8 speaks about the “actual” administrative costs. This implicates that the actual administrative costs can be maintained, what is certainly not the case, especially when they do not correspond with the real administrative costs.

Very positive is the application of the “only once” principle according to which companies are not asked to submit the same information to public authorities more than once. UEAPME warmly welcomes the application of this rule as it is a general UEAPME request since 2005 and one of the key principles of the European Small Business Act.

Following the Commission’s proposal, online registration of companies should be integrated into the Single Digital Gateway. However, this might potentially give rise to forum shopping. Such development is not desirable, as the example of the USA illustrates, where most corporations are registered in a few smaller States with lax legal provisions (e.g. so-called Delaware-corporations). To avoid this, **a genuine link to the Member State should be required**, in which a company is to be registered.

In UEAPMEs opinion the Commission should have **gone further** in the digitalisation of the company law: Digital tools (such as e-mail, messaging applications, audio and video conferencing software, digital information exchange platforms, electronic signature, blockchain voting facilities, etc.) which have become common in commercial relations, should also be used in the field of corporate governance. Indeed, digital tools to interact with company’s shareholders could be used for:

- Communication between companies and shareholders at general meetings
- Participation and voting in general meetings
- Communication outside the general meetings (for example, relating to payments of dividends, issuance of new shares or takeover bids)
- Adoption of shareholder resolutions without a physical meeting.

Digital tools could be useful but they should not have a negative impact on the daily business of the company. Therefore we underline the necessity to ensure the proper verification of the identity of the shareholders.

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For further information on this position paper, please contact:

Luc Hendrickx
 Director Enterprise Policy and External Relations
 Email: l.hendrickx@ueapme.com