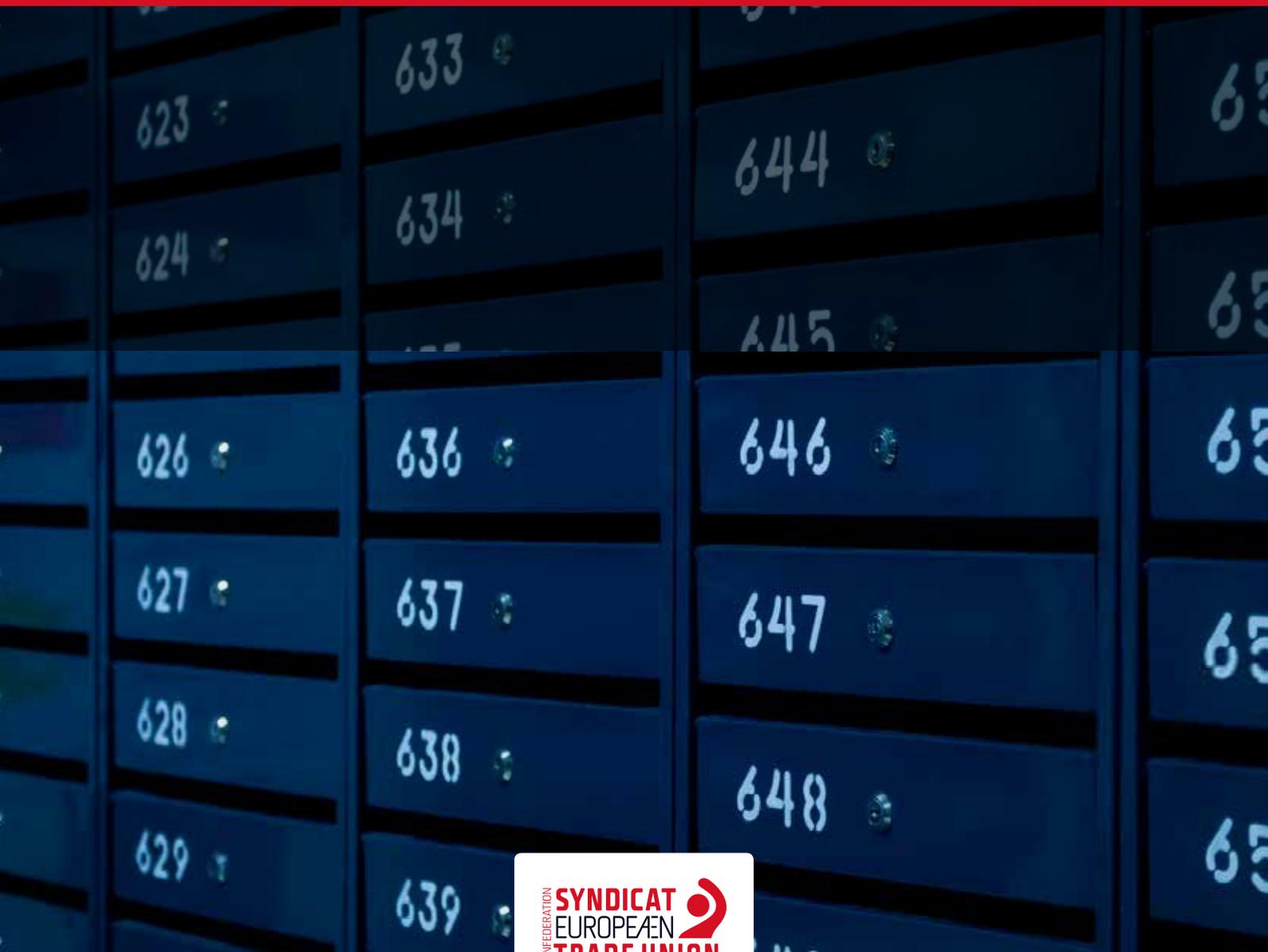


ETUC GUIDELINES

ON THE TRANSPOSITION OF THE

DIRECTIVE ON DIGITAL TOOLS AND PROCESSES IN COMPANY LAW



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ON THE TRANSPOSITION OF THE

**DIRECTIVE ON DIGITAL
TOOLS AND PROCESSES
IN COMPANY LAW**

Brussels, 2021

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I. EXECUTIVE SUMMARY

The 2019 Directive on Digital Tools and Processes in Company Law (referred to here as ‘the Directive’) is one of the two Directives which make up the EU Company Law Package. It is part of the most significant EU initiative in European company law in over a decade. This Directive requires member states (MS) to adopt the following provisions:

- > **Digital foundation:** MS must enable the fully online foundation of companies in their country by anyone in the EU
 - without being physically present at a notary, court or company registry;
 - within 5 business days (for natural persons) or 10 days (for companies).
- > **Digital reporting:** MS must enable companies to fulfil their reporting duties by submitting documents electronically.
- > **Digital registries:** MS must make their company registries fully electronic.

The transposition deadline is 1 August 2021. However, member states may request a one-year extension, and some provisions can be transposed until 1 August 2023.

The danger that this Directive will increase corporate abuse is great, particularly by making it easier to found letter-box companies across borders to avoid taxes, labour standards (e.g. through fake posted labour) and social security, or to launder money and finance terrorism. The specific risks include:

- > **Identity theft:** the Directive removes the requirement that persons must appear personally at a company registry, court, notary or other agency when founding a company, thus making it easier for a company founder to assume a fake identity.
- > **Serial corporate abuse:** online foundations across borders make it easier for a person who has been disqualified in their home country to act as a company director to found a company in another member state.
- > **Veiled ownership structures:** without adequate checks on the ultimate (‘beneficial’) owners of a company, owners may be hidden from public view or authorities.

However, the Directive includes a number of safeguards which, if properly implemented, may discourage corporate abuse:

- > **Types of companies:** MS may limit the types of companies which can be founded online.
- > **Electronic ID:** MS may require that only electronic ID systems with the ‘highest assurance level’ are used in conjunction with a video identification system.
- > **Reasons for suspicion:** Broad criteria can be used to define ‘reasons to suspect identity falsification’, in order to require the physical presence of company founders or directors.
- > **Extensive rules for online foundations:** MS may adopt a number of optional rules regulating online foundations.
- > **Enabling of an analogue alternative:** MS may allow analogue filing procedures to continue.
- > **Publication in national gazette:** MS may require the publication of company information in a national gazette for this specific purpose.
- > **Strict rules for the registration of company branches:** MS may require legal proof regarding the registration of company branches.
- > **Company transparency:** The transposition of the Directive provides an opportunity for trade unions to demand free access to all documents and information in the company registry, to expand the types of information companies must provide (including employment numbers and worker participation arrangements) and to enable easy searching for and bulk downloads of company information.

- > **Strict rules for ‘disqualified directors’:** MS are required to lay down a set of rules defining what kinds of persons are not legally allowed to be directors of companies (e.g. those with a criminal background) (transposition deadline 1 August 2023).
- > **High standards for the electronic verification of registry documents:** MS must enable the electronic verification of the origin and integrity of documents (deadline 1 August 2023).

This document provides some background to the Directive and the ETUC’s position on it. It then discusses specific ETUC recommendations on the options for MS transposition included in the Directive as well as the ability to go ‘above and beyond’ what is required in the directive.

II. DIRECTIVE (EU) 2019/1151 – THE DIRECTIVE ON DIGITAL TOOLS AND PROCESSES IN COMPANY LAW

A) WHAT IS THE DIRECTIVE ABOUT?

The Directive on Digital Tools and Processes in Company Law (referred to here as ‘the Directive’) is one of the two Directives which make up the EU Company Law Package¹. It is the most significant EU initiative in European company law in over a decade.² The Directive was unanimously adopted by the Council of the European Union, supported by a large majority in the European Parliament and passed on 13 June 2019 – 14 months after the European Commission (EC) published its proposal. This Directive was very strongly supported by the European business community. The Commission sees this Directive as an essential element of the EC’s Digital Single Market Strategy, with the aim to simplify and facilitate European company law, in particular with regards to the digitalisation of company registers (i.e. the organizations responsible for receiving and storing documents which companies are required by law to provide). All member states are supposed to transpose the bulk of the Directive’s provisions until August 2021.³

The EC aims at the full digitalisation of company foundation/registration and reporting. By means of European minimum standards the EC is seeking to harmonise national approaches to digitalisation. The directive obliges member states to ensure the possibility of online company registration. Likewise, the directive is supposed to speed up the process of registration.

B) WHAT DOES THE DIRECTIVE CHANGE?

In the future, companies will be able to register, file and update their data in the **registers fully online**, without the need of physical presence before a business registry or intermediary, unless there is a genuine suspicion of fraud. Applicants, or their representatives, will **not need to provide a licence or an authorisation to set up a company**, except for some special processes in national law. Instead, company founders will be identified digitally by means of e-ID, **digital signatures or video-conferences**. The online registration must **not take longer than five working days** from the date of payment of the fee and submission of all documents. member states are supposed to define the conditions for recognition of documents as well as the role of authorised persons, such as notaries and courts.

1 Further information: ETUI contributors. (2020, November 05). The EU company law package: how it should be improved to strengthen workers’ rights and avoid abuse through cross-border company mobility. In ETUI, The European Trade Union Institute. Retrieved 11:34, April 27, 2021, from <https://www.etui.org/publications/policy-briefs/european-economic-employment-and-social-policy/the-eu-company-law-package-how-it-should-be-improved-to-strengthen-workers-rights-and-avoid-abuse-through-cross-border-company-mobility>.

2 The formal legal name is Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law. The second part of the Company Law Package, Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, was signed six months later.

3 However, member States can ask for a one year extension, and some specific provisions can be implemented up until August 2023.

The future impact of this Directive depends very much on how it is transposed at the national level. There is clear potential for this Directive to encourage letterbox companies and corporate abuse (identity theft, avoidance of social/labour standards and worker participation, tax avoidance, etc.). However, the Directive also includes some provisions that, if properly transposed, could help combat corporate abuse. Furthermore, member states have the option of going “above and beyond” what is in the Directive in national legislation.

III. DIGITAL TOOLS OR LETTERBOX DIRECTIVE?

A) WHAT IS AT STAKE?

Labour rights and public finances in the EU are under threat by the increasing use of letterbox companies. These are companies which are registered at locations at which they have no real employment or production. They enable ‘regime shopping’ across borders for lower taxes, wages, labour standards and social contributions, as well as for different legal rights under bilateral treaties. Letterbox companies are often used for bogus posted workers, whose number is on the rise. And according to research commissioned by the European Parliament, a conservative estimate of the costs to the EU of corporate tax avoidance alone is €50-70 billion annually.⁴

There is great danger that this Directive will increase corporate abuse, particularly by making it easier to found letterbox companies across borders to avoid taxes, labour standards and social security, or to launder money and finance terrorism.

The directive may foster the possibility of corporate abuse through:

- > **Identity theft:** The Directive limits the ability of member states to require the ‘physical presence’ of founders when registering a company, thus making it easier for a company founder to assume a fake identity.
- > **Serial corporate abuse:** persons that have been disqualified to act as a company director in their country of residency can try to found a company in another member state.
- > **Veiled ownership structures:** without adequate checks on the ultimate (“beneficial”) owners of a company, owners may be hidden from public view or authorities.

However, the Directive includes a number of safeguards which, if properly implemented, may discourage corporate abuse. These safeguards and how to implement them are more thoroughly explained in section III & IV.

B) THE ETUC’S POSITION TOWARDS THE DIRECTIVE

The ETUC believes that changes in the registration and filing process for companies must be accompanied by serious measures to discourage fraud. A European digital tools framework with stricter provisions on electronic identification schemes and a stronger role for gatekeepers can help safeguard workers’ interests. The Directive takes a big step in the direction of business and the freedom of establishment but does not automatically safeguard workers’ interests. It is now up to the member states to make the most out of the possibilities given by the directive in transposition.

In the past decades the EC has substantially expanded the freedom of establishment and the freedom to provide services by business. However, the ETUC emphasizes the importance of the ‘social dimension’ and the need for mechanisms to prevent corporate fraud, for example through setting up letterbox firms. The Directive could have required stronger measures to reduce fraud and increase transparency and trust in the authenticity of company information. **Unfortunately, this has not been the case and there is a clear risk that any cost savings through digitalisation will be lost through increased costs of fraud through letterbox companies.** However, the Directive

4 Further information: https://www.europarl.europa.eu/doceo/document/A-8-2019-0170_EN.html

leaves member states with a number of options in transposition to fight corporate abuse. Furthermore, member states can legislate provisions “above and beyond” what is required by the Directive.

European institutions and member states need to understand that amendments to company law are not ‘merely a technical matter’, but rather have great social consequences for citizens and employees.

C) THE AIM OF THESE GUIDELINES

It is important for European trade unions to analyse the possible impact of the Directive for the Use of Digital Tools and Processes in Company Law on European workers’ rights as well as to clarify the scope and leeway for transposition into national law. This involves identifying key issues and hazards for the national implementation on behalf of workers. These guidelines identify the “may” clauses (i.e. provisions which are optional for member states) in the Directive and include ideas and recommendations on transposition of the directive into national law. These should help guide the transposition of the Directive for the Use of Digital Tools and Processes in Company Law into national law. They include recommendations on how to put in place an accountable system of identification to prevent fraud and the setup of letterbox companies.

A downgrading of existing legal protections and a weakening of anti-abuse standards has strictly to be avoided. This tool can be used to identify weaknesses in the Directive that can affect workers’ interests. In addition, these guidelines offer further ideas and suggestions on how to do ‘more’ than is required by the Directive. The ETUC believes that workers’ interests can be served by introducing additional provisions beyond the minimum requirements established by the directive.

IV. TYPES OF ABUSE AND POSSIBLE SOLUTIONS

As the Directive introduces major changes into company law, it is important to identify the key issues and types of corporate abuse that may be enabled.

A) IDENTITY THEFT

What is identity theft?

Identity theft is the crime of obtaining another person’s personal information and using this false identity to make transactions or do business. Although there are different types of identity theft, the most common form is financial identity theft, where someone uses another person’s identity or information to obtain credit, goods, services or benefits.

In case of the Digital Tools Directive, identity theft alludes above all to the fraudulent and deliberate misrepresentation of a person’s or company’s identity. For instance, person A obtains evidence of person B’s identity in order to impersonate B with the aim of procuring cash, goods or services from person or entity C. Identity theft could then enable Person A to obtain a new identity when his/her credit record is bad or to evade payment of debts. Moreover, the practice is used to launder money.

Identity theft is a serious crime. In connection with economic activities it can enable tax evasion, fraud and the loss of individuals’ money. It is therefore a must for the European Union to prevent such rampant practices from happening instead of enabling them. Some sectors are more prone to identity theft than others. The ETUC believes that the need for reliable identity verification is highest in sectors where fraud is widespread, such as the construction or transport sectors.

The Directive for the Use of Digital Tools and Processes in Company Law is supposed to regulate company law and to protect companies and society from identity theft instead of creating a leeway for it. Similar to the Polbud ruling⁵, a legislative vacuum on identity theft may create a situation where eventually it will be up to the member states and public authorities to face the music and pick up the broken pieces. Identity theft is neither an insignificant issue. In the UK, for instance, the “Companies House deals with around 50 to 100 cases of corporate identity theft every month.”⁶

How to avoid identity theft?

There are several anti-abuse mechanisms that can help discourage identity theft, such as strict electronic identification schemes or the requirement of physical presence by company founders before a notary, the company registry or the courts. Stronger requirements can be imposed on foundation agents which assist in the foundation of companies (especially across borders).

The Directive allows member states to require the physical presence of founders only in exceptional cases. When founding a company, the company’s founder can only be asked to appear in person before a notary or a competent authority in case of concrete suspicion of abuse. This clearly increases the risk of ‘identity theft’, as the ability of impersonating another person increases when there is no face-to-face meeting for verifying the identity.

However, the Directive gives member states the option of accepting only eID systems which fulfil high security requirements, as defined by the Electronic Identification Regulation (Nr. 910/2014). Although many national electronic ID systems exist, only a few of the systems notified at the European Commission fulfil the requirements for the highest assurance level. This means that checks are made by authorities before issuing an eID and that the person must show up in person to get the eID. Experts consider that the most reliable method of identity verification is combining an eID with a ‘high’ assurance level with a video conference or other means of real-time audio-visual connection.⁷

The Directive gives member states great leeway in deciding what electronic ID systems will be accepted for online foundations. They can refuse to accept eIDs from systems which do not meet a minimum security level. If member state A considers that the ID system of member state B does not provide a high enough level of security it can refuse the IDs recognition.

B) THE GATEKEEPERS’ ROLE

Another mechanism is to strengthen the role of so-called gatekeepers – notaries, courts and company registries – by giving them the resources and enabling them to perform anti-abuse checks. In many countries, notaries, courts and company registries play an important role in preventing or discouraging abuses in the area of company law, by deterring fraud through fake or hidden identities and fraudulent document submission. One of the ways they do this is by requiring founders to appear personally when providing identification or other documents. The Directive bypasses them significantly by stating that the founder of a company may be required to appear personally before the notary or some other responsible authority only if there is concrete grounds for suspicion of abuse.

On the other hand, member states have some flexibility in defining the role of notaries and courts in the process of registration as well as in the exchange of information with other member states. They can define the detailed rules for the online formation of companies and on the required documents and information for it. They can also define *broad grounds for suspicion* of fraud so that founders must appear personally.

Notaries should play a bigger role in the ID-verification process. For instance, the German draft transposition legislation proposes preserving the mandatory role of notaries in their e-ID scheme. If founders do not appear personally at the notary, they must use a video ID system which will be set up by the Chamber of notaries that allows for real-time identification. German e-IDs include a picture, so that double identification system by comparing the ID picture against

5 Further information: <https://corporatefinancelab.org/2017/10/25/polbud-ecj-further-facilitates-shopping-for-company-law/>

6 Further information: <https://www.gov.uk/guidance/protect-your-company-from-corporate-identity-theft>

7 Further information: <https://link.springer.com/content/pdf/10.1007/s12027-020-00607-9.pdf>

the person's face in the video protects against identity theft. Notaries could also be able to refuse online registration, for instance, if the video connection is not secure enough. Besides the ID-verification for online registration, such a verification system could also be kept in service for regular and ad-hoc reporting by the company.

C) VIDEOCONFERENCING

According to the directive, identity can be proven by video conferencing or other audiovisual methods with real-time connection. Although the ETUC welcomes the idea of videoconferencing as a digital solution of identity verification, the extent to which this is a reliable method depends precisely on how this is arranged in the cross-border context. There remains a significant risk that inferior methods of videoconferencing could enable corporate abuse and could considerably impair the quality of company registration and verifying the identity of the founder.

D) THE SHORT MAXIMUM TIME PERIOD FOR REGISTRATION

It is highly problematic that the online registration has to be completed within only five working days for natural persons or ten days for legal persons. This short time period puts a lot of pressure on the public authorities to complete any anti-abuse checks they need to do, especially when the founder resides in another country. Within this time period national authorities are supposed to carry out checks on the directors/principals and even have to coordinate with other members states' authorities in the cross-border context. This may result in company foundations being recognized as legal although the required anti-fraud checks have not been carried out. The ETUC believes that sufficient time must be allowed for the proper anti-abuse checks to be carried out before an online foundation is recognized and entered into the company register. It is feared that the short period allowed can facilitate criminal activities, such as money laundering or bogus self-employment, as well as the setting up of letterbox firms. Transposition legislation must clearly state that the maximum period of 5 or 10 days must be waived if there are difficulties in performing anti-abuse checks, e.g. due to delays in another member state's response to a request for information.

E) CROSS-BORDER COOPERATION

The issue of recognition of documents from other countries is not covered. In addition member states may adopt different rules leading to a patchwork across Europe. The Directive could have defined minimum requirements for an "authenticity certificate", which would assure recognition for registration in the online cross-border context. The lack of cooperation in the exchange of information between member states is a major problem in combatting corporate fraud.

F) TRANSPARENCY - ULTIMATE BENEFICIAL OWNERSHIP

The Ultimate Beneficial Owner (UBO) is the controlling shareholder/owner at the end of the chain. EU anti-money laundering legislation requires owners with 25% or more of a company's control rights to be registered in a national UBO database. It is important to know the true identity of ultimate beneficial owners, who might be persons with criminal pasts. However, many national UBO registries do not verify if the information provided by companies on their UBOs is accurate. Some registries do not get information on UBOs from other countries. Finally, most UBO registries restrict the public's access, e.g. by requiring payment per inquiry or the provision of justified grounds for receiving information. It is important that workers and the public have unrestricted access to UBO registries and that these registries verify the true identity of UBOs.

G) TRANSPARENCY - DISQUALIFIED DIRECTORS

Why can people be disqualified for certain economic activities?

One of the positive aspects of this directive is that it requires member states to clearly state the reasons for which persons are not allowed to be company directors and that a list of these disqualified directors must be maintained. Company directors risk to lose their rights of setting up or representing a company if they fail to meet their legal responsibilities. Although practically all member states have at least one reason for disqualification, in practice there

is wide variation in the reasons and in whether or not a list is kept. Responsibility for bankruptcy is a frequent reason; other grounds for disqualification can include committed fraud, continuation of trade or lack of cooperation with public authorities when the company was insolvent, tax evasion, the use of company assets for personal benefit, failure to maintain proper company accounting records, etc.

The consequences of disqualification vary across member states, but in general the ‘disqualified persons’ are not allowed to serve as company directors and/or executives as well as (in some cases) other roles vis-a-vis the company. The length of time for which they are disqualified as well as penalties for violating the prohibition are quite different in different countries.

Currently most EU countries do not have a codified section in company law with a clear definition of ‘disqualified director’ and grounds for disqualification.⁸ In most countries the grounds for disqualification are limited and scattered over different laws. Few countries (e.g. Estonia, Finland, Ireland and the Netherlands) keep a public record of disqualified directors. It is therefore urgently necessary that member states define broad criteria for disqualification, keep a list of current and former disqualified persons, and give public access to this list.

What does the directive say about disqualified directors?

Member states:

- > shall ensure that they have rules on disqualification of directors.
- > may require that persons applying to become directors declare whether they have been disqualified.
- > may refuse the appointment of a person as a director of a company where that person is currently disqualified.

Furthermore, member states need to be able to pass information about the disqualification of directors to other member states in time. Given that a company foundation has to be completed within five working days for natural persons or ten for legal persons, it is difficult for public authorities to reach out to other member states’ public authorities in order to conduct a check on the applicant’s qualification to set up a company. In other words, public authorities are under a lot of time pressure and it is to be expected that several companies will be automatically founded without any checks. It is therefore of utmost importance that such a system is made available for other member states – at best it should be issued centrally.

Although, the directive makes a good point in calling member states to come up with rules on how to disqualify certain individuals from economic activities, it does not provide further details on such criteria for disqualification. This way, it leaves a lot of leeway to the member states and risks both a patchwork of different laws across Europe and a raise to the bottom by member states instead of an appropriate minimum standard.

In order to avoid a patchwork of different laws across Europe and a raise to the bottom by member states instead of an appropriate minimum standard, it is of utmost importance that member states make use of the option to refuse the application of any individual that has been disqualified in another member state. The competition between member states has to be regulated at least in the sense that one country cannot be the target for fraudulent activities at the expense of others.

⁸ The former EU member state Great Britain was a major exception in that it has a specific law on disqualified directors.

V. RECOMMENDATIONS

In light of the ongoing transposition period, the ETUC recommends the following points to member states when implementing the Directive on Digital Tools and Processes in Company Law.

- a) The transparency and reliability of company information available in company registers should be greatly increased:**
1. All documents should be available free of charge.
 2. Searchability should be improved (e.g. by sector, employee size).
 3. Available information should be expanded (e.g. employee numbers, ICP agreements).
 4. Bulk downloads of all registered companies should be enabled.
 5. Ultimate Beneficial Owner (UBO) register information should be integrated in the company register and made freely available to the public.
 6. Significant penalties for late and fraudulent information should be increased.
- b) Member states should take the opportunity to revise their systems of disqualified directors as follows:**
1. A clear and broad definition of reasons for disqualification should be codified in law.
 2. Reasons for disqualification should go beyond insolvency-related behaviour to include financial fraud, employee-related misconduct (e.g. labour law violation, non-payment of social security contributions), state aid fraud and other criminal conduct.
 3. A list of persons disqualified and the reasons for disqualification should be maintained and made available to the public and through the European Business Register Interconnection System (BRIS).
 4. Member states should include the requirement of applicants declaring that they are not listed as disqualified directors in any other country as well as the obligation to refuse an individual's application due to disqualification in another member state into the transposition of the directive into national law.
- c) Member states not already having an electronic identification system notified with the European Commission at the highest assurance level (as defined by the Electronic Identification Regulation (Nr. 910/2014) should establish such a system, and only accept eIDs at the highest assurance level in conjunction with video conferences or other online means that provide a real-time audio-visual connection for online company foundations.**
- d) Member states should enable notaries, courts, company registers or other authority responsible for company foundations to carry out the following anti-abuse checks:**
1. Check whether company principals are on the disqualified directors list not only in the country of registration but also the country of residency of the principals.
 2. Check with the tax and labour market authorities regarding any outstanding obligations of company principals.
 3. Check the ultimate beneficial owners registry.
- e) Trade unions should use transposition as an opportunity to raise the issue of whether responsible authorities have adequate skilled personnel and other resources to properly carry out anti-abuse checks.**

ANNEX

I. THE ACTORS INVOLVED – WHO WANTS WHAT?

A) WHAT WAS THE AIM OF THE EUROPEAN COMMISSION WITH THIS DIRECTIVE?

The ‘digitalisation of company law’ has been on the European agenda for some time now. The EC has proposed measures which would help realize the ‘freedom of establishment’ (the right to found businesses by any EU citizen or company in any EU member State), and digitalisation of company law is seen as one way to promote this freedom of establishment. In October 2017, pressure on the EC increased through the Polbud ruling of the European Court of Justice⁹, which involved a Polish company converting into a Luxembourg company form and moving its registered address to Luxembourg, even though it had no substantial employment or activity there. The court ruled against the Polish authorities, who argued that Polish law does not allow for such corporate conversions. The Polbud ruling greatly constrains member states’ ability to restrict cross-border corporate reorganisations, and it appears that cross-border corporate mobility is on the rise.¹⁰ A key goal of the Company Law Package, which the Digital Tools Directive was part of, was to create a stronger legal framework regulating this cross-border mobility in the EU.

B) WHAT IS THE BUSINESS COMMUNITY’S POINT OF VIEW?

The business associations (such as Business Europe) strongly supported this Directive, as the new rules would enable all companies to register, set up new branches or file documents to the business register online. Many of their arguments were taken over by the European Commission. When the Directive was passed only 17 member states were providing a fully online procedure for registering companies. It was argued that online registration would take on average half of the time and could be up to three times cheaper than traditional paper-based registration formats. The EC claimed that an estimated €42 - €84 million per year could be saved through online registration. On the social aspect, in part through pressure from the European trade unions, the EC’s proposal was amended to include some provisions to help prevent fraud and abuse. For example, the Directive requires member states to establish a system for sharing information on ‘disqualified directors’ (i.e. persons who are determined to be ineligible to be a company director due to criminal or other activity).

The ETUC has pointed out the dangers of the Digital Tools Directive and the need for stricter provisions on electronic identification schemes and a more involved role of gatekeepers; these are needed to contribute to the safeguard of employment and workers’ interests. So far, the European institutions have not achieved to deliver on both sides of interests, but instead favoured the business-side driving for more market liberty. It is now up to the member states to make the most out of the vague provisions given by the directive.

As explained in Chapter II, the ETUC regrets the unbalanced development of the Single Market over the past decades, which has favoured more the business community than workers’ interests. The Directive missed the chance to reduce fraud and increase transparency and trust in the authenticity of company information. European institutions and member states need to understand that amendments to company law are not ‘merely a technical matter’, but key to the social consequences for citizens and employees.

C) WHAT HAPPENED AFTER THE EC PROPOSED THE DIRECTIVE?

Under EU law, EC proposals for Directives must be considered and approved by both the European Parliament and the Council of Europe. The ETUC with the support of the ETUI’s GoodCorp network actively lobbied for improvements in the ECs’ proposed Company Law Package in the legislative process. As the Council of Europe and the European Parliament had different views on aspects of the Digital Tools Directive, trilogue negotiations were necessary. Trilogue negotiations resulted in some improvements in the original EC proposal but fewer safeguards than were wanted by the ETUC.

9 Further information: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli%3AECLI%3AEU%3AC%3A2017%3A804>

10 Further information: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674089

II. RECOMMENDATIONS ARTICLE BY ARTICLE

Article 13b | Recognition of identification means for the purposes of online procedures

EXPLANATION	RECOMMENDATION
<ul style="list-style-type: none"> ➤ MS must accept own eID schemes or eID schemes from other MS recognized by the EU. ➤ MS may refuse to accept eID schemes with lower assurance quality standards. eIDs with the “highest” assurance levels require applicants to appear in person in front of state authorities. ➤ MS may also require physical presence when there are “reasons to suspect identity falsification”. 	<ul style="list-style-type: none"> ➤ Good practice: German draft legislation requires a procedure combining eID (which contains a picture of the owner) with a video-ID procedure with ➤ Recommendation 1: accept the “may” procedure to only accept eIDs with the highest quality assurance standards ➤ Recommendation 2: define broad criteria for “reasons to suspect identity falsification” which would require physical presence

Article 13f | Information requirements

EXPLANATION	RECOMMENDATION
<p>MS must clearly provide information regarding online procedures (including what documents are necessary and how to identify persons), and also regarding the rules for and information on disqualified directors</p>	<p>It should be implemented in a manner which allows a high degree of transparency of information. It also provides an opportunity to discuss these rules on the formation of companies and the registration of branches (see later recommendations).</p>

Article 13g | Paragraphs 1 & 2 - Online formation of companies

EXPLANATION	RECOMMENDATION
<ul style="list-style-type: none"> ➤ MS must allow the fully-online formation of companies (i.e. allow persons to found companies without personally appearing at a notary, court, company registry, government agency....) ➤ MS may limit the types of companies which may be formed fully online (to those listed in Annex IIA) 	<ul style="list-style-type: none"> ➤ MS should use the option to restrict the type of companies which must be formed online to those specified in Annex IIA.

Article 13g | Paragraphs 3 & 4

EXPLANATION	RECOMMENDATION
<ul style="list-style-type: none"> ➤ MS must provide information on the rules referred to in paragraph 3. ➤ MS may provide information on the rules referred to in paragraph 4. 	<p>Transposition should include the rules in both paragraphs (3 + 4).</p>

Article 13g | Paragraph 5

EXPLANATION	RECOMMENDATION
MS must not require company founders to obtain a license or special permission.	Transposition should ensure that checks are made whether a founder needs such a license or permission is needed (e.g. in a particular sector)

Article 13g | Paragraph 7

EXPLANATION	RECOMMENDATION
<ul style="list-style-type: none"> > MS must have as the “normal case” the completion of an online company formation within 5 days (for natural persons) or 10 days (for companies). > MS must inform applicants of the reasons for delay when they cannot meet these deadlines. 	Transposition should ensure that company foundations can be delayed if anti-abuse checks have not been completed or cannot be performed (e.g. to another MS not responding to a request for information).

Article 13g | Paragraph 8

EXPLANATION	RECOMMENDATION
MS may require physical presence of applicants when justified by “public interest” to ensure that the applicant has the legal capacity and authority to represent a company.	Transposition should define broad criteria for requiring physical presence, e.g. when the foundation should be in a sector with a high risk of abuse such as construction.

Article 13i | Disqualified directors

EXPLANATION	RECOMMENDATION
<ul style="list-style-type: none"> > MS must have rules on disqualification of directors, i.e. on the reasons for why persons are not eligible to be directors. > MS must have such rules for at least “persons who take part in the administration, supervision or control of the company” and those that “are authorised to represent the company in dealings with third parties and in legal proceedings” 	Most MS do not have a specific concept of “disqualified directors” in company law (most however will disqualify if the person was negligent in a bankruptcy case). Transposition provides an opportunity to introduce this concept into company law in countries where this does not exist and to extend the reasons for disqualification to criminal offenses and negligence as an employer (labour law offences). It should also require that a current list of disqualified persons (together with the reason for their disqualification) be maintained, and that this list be accessible to the public.

Article 16 | Disclosure in Register

EXPLANATION	RECOMMENDATION
This article covers what kind of information should be provided to the company register and disclosed	The information in the company register should be linked to the ultimate beneficial ownership (UBO) register and the disqualified directors’ list.

Article 16a | Access to disclosed information

EXPLANATION	RECOMMENDATION
<p>This article regulates the public's access to the company register and information in it.</p>	<p>All downloadable information in the company register should be available to the public free of charge. It should be possible to search for companies in the register by more than just company name/company ID – also by legal form, sector and employment size. Finally, bulk downloading of a file with all companies in the registry without restriction should be required.</p>

Article 19 | Fees charged for documents and information

EXPLANATION	RECOMMENDATION
<p>This article sets parameters on the fees MS may charge for access to documents and information in the company register.</p>	<p>In line with the recommendation on the previous article, all information in the company register should be downloadable free of charge.</p>

III. IMPORTANT QUESTIONS FOR THE NATIONAL TRANSPOSITION

1) ANTI-ABUSE MECHANISMS

a. Disqualified Directors

- i. Is there an official definition of “disqualified directors”? If so, what are the grounds for disqualification? Where is this? (legal text and link)
- ii. Is there an official list of (current) disqualified directors? If so, where is it? (name and link)
- iii. Who has access to this list?

b. Beneficial Owners

- i. Where is the database of beneficial owners and who maintains it (link)
- ii. Are there any checks on the authenticity of beneficial owners, or does the organization depend on a “statutory declaration” or “affidavit” from the company directors??
- iii. How quickly must the company give notice when ownership has changed (updating of lists/databases)?
- iv. Who has access to the beneficial ownership database? Does the general public have unrestricted access, restricted access or no access?

c. Electronic identity (E-ID) scheme – name and eIDAS level of assurance

2) COMPANY REGISTRY

a. Identity and location

b. To what extent is the registry digitalized? Can company foundations/registrations and reporting be carried out fully online/digitally?

c. Are bulk downloads of the entire list of registered companies possible?

d. Does the registry have search features beyond the name of the company or person (e.g. by sector or employee size)

e. What is the typical cost of downloading a document from the registry?

f. Is there information on employment beyond what is contained in company annual accounts?

g. Information on European ny forms and EU reorganizations (CBM) is a search possible for companies with the SE legal form or companies reorganized through a CBM?

3) FIRM FOUNDATIONS

a. What authority or organization is responsible for registering new companies?

b. What are the steps needed to found and register a new company? To what extent can these happen digitally?

c. What checks (if any) are done on the authenticity of documents, identity of founders, record of founders (e.g. disqualification as directors) and beneficial owners?

- i. By registration authority
- ii. By notaries
- iii. By “facilitator” companies (foundation agents)



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