The Digitalisation Directive II – a Major Expansion and Upgrade of EU Business Registers –

by

Jessica Schmidt*

The Digitalisation Directive II (DigiD II) signifies a major expansion and upgrade of EU business registers. It introduces significant reforms which address two key issues: transparency of company data and cross-border use of company data. Regarding transparency of company data, DigiD II not only upgrades the existing framework for limited liability companies, but also for the first time establishes harmonised provisions concerning commercial partnerships. Regarding cross-border use of company data, DigiD II introduces sweeping reforms to improve the existing system of business registers concerning the application of the once-only principle, scrutiny of information, mutual recognition of register data, and reliance on registered information. This paper provides an overview and critical assessment of the key elements of these reforms.

Table of Contents ECFR 2024, 563–603

* Professor of Civil Law, German, European and International Company and Capital Markets Law at the University of Bayreuth (Germany).

1. DigiD II as a further pivotal step in the evolution of the EU business registers framework

The foundation stone for the harmonisation of the European business registers system was already laid in 1968 with the very first directive harmonising company law, the Publicity Directive[1]. The next major steps were the requirement to keep the registers in electronic form as from 1 January 2007[2] and the interconnection of the national registers in the Business Registers Interconnection System (BRIS)[3] in 2017[4]. In 2019, the Digitalisation Directive I (DigiD I)[5] introduced new harmonised rules on the online formation of companies, online filing, a new concept of register publicity, and a further extension of BRIS.

However, despite these reforms, various obstacles and problems persisted – especially in cross-border situations. To address them, in 2021, the Commission started a new initiative entitled "Upgrading digital company law". Building upon a public consultation[6], a study[7] and two reports by the Informal Expert Group on Company Law and Corporate Governance (ICLEG)[8] (in which the author of this paper collaborated), the Commission finally presented a proposal for a Directive as regards further expanding and upgrading the use

1 First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, [1968] OJ L 65/8.

2 Introduced by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, [2003] OJ L 221/13.

3 https://e-justice.europa.eu/searchBris.do (last accessed: 21 January 2025).

4 Based on the reforms by Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, [2012] OJ L 156/1.

5 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, [2019] OJ L 186/80.

6 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13055-Upgrading-digital-company-law/_en (last accessed: 21 January 2025).

7 Study on the disclosure and cross-border use of company data, and digital developments related to company law (Milieu Consulting SRL) 2023.

8 *ICLEG*, Report on Transparency of Company Data, 2023; *ICLEG*, Report on cross-border use of company information, 2023 (both available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en (last accessed: 21 January 2025).

of digital tools and processes in company law (DigiD II)[9] on 29 March 2023. The following deliberations in the European Parliament (EP) and in the Council were rather swift, and on 13 March 2024, a trilogue compromise was reached. On 20 March 2024, this compromise text was endorsed by COREPER[10], and on 24 April 2024, by the EP[11]. After legal-linguistic finalisation, DigiD II was officially adopted by both the EP and the Council in autumn 2024 and published in the Official Journal on 10 January 2025[12]. Member States shall

9 COM(2023) 177. See on this *Jens Bormann/Maximilian Wosgien*, "Die Digitalisierungsrichtlinie 2.0 und die Rolle des Notars im Europäischen Gesellschaftsrecht", in: Till Bremkamp (ed.), Notarielles Vor-, Haupt- und Nachverfahren. Festschrift für Norbert Frenz zum 70. Geburtstag, 2024, p. 59 ff.; *Philip Denninger*, "Der Kommissionsvorschlag für eine Zweite Digitalisierungsrichtlinie im Gesellschaftsrecht", GmbHRundschau (GmbHR) 2023, 482 ff.; *Christoph Kumpan/Philipp Pauschinger*, "Entwicklung des europäischen Gesellschaftsrechts 2022", Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2023, 446, 450; *Benoit Lecourt*, "Le droit des sociétés et le numérique: proposition de directive", Revue des sociétés (Rev. soc.) 2023, 327 ff.; *David Markworth*, "Neuigkeiten zum Entwurf einer Digitalisierungsrichtlinie 2.0 – Zusätzliche Formerfordernisse bei Personenhandelsgesellschaftsgründungen?", Zeitschrift für das Recht der Personengesellschaften und Einzelunternehmen (ZPG) 2023, 462 f.; *David Markworth*, "Die geplante Digitalisierungsrichtlinie 2.0 – weiterhin viel Konfliktpotenzial", ZPG 2024, 100 f.; *Mario Pofahl*, "Die DigiRL II-E – ein digitales Upgrade für europäische Register", Der Betrieb (DB) 25/2023, M4 f.; *Jessica Schmidt,* "Upgrading digital company law. Der Kommissionsentwurf für die DigiRL II", NZG 2023, 593, 595 ff.; *Jessica Schmidt*, "BB-Gesetzgebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2022/2023", Betriebs-Berater (BB), 2023, 1859, 1863 ff.; *Peter Stelmaszczyk/Maximilian Wosgien*, "Die Digitalisierungsrichtlinie 2.0. Öffentliche Präventivkontrolle und gegenseitige Anerkennung im EU-Gesellschaftsrecht", EuZW 2023, 550 ff.; *Isabelle Tassius*, "Neue Vorschriften zur Gründung und Registrierung von Personenhandelsgesellschaften? Neuer Richtlinienvorschlag der EU-Kommission für digitalen Fortschritt im (Personen-)Gesellschaftsrecht", ZPG 2023, 361 ff.; *Christoph Teichmann*, "Das Informationsmodell des Europäischen Gesellschaftsrechts im digitalen Zeitalter", Recht Digital (RDi) 2023, 357 ff.; *Susanne Zwirlein-Forschner*, "EU-Digitalisierungs-„Upgrade" für Personen- und Kapitalgesellschaften", NZG 2023, 863 ff.

10 ST 7966/24.

11 P9_TA(2024)0360.

12 Directive (EU) 2025/25 of the European Parliament and of the Council of 19 December 2024 amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law, OJ L, 2025/25, 10.1.2025. See on the final text: *Michael Beurskens,* "Digitalisierungsrichtlinie II – Viel Publizität, wenig Digitalisierung", RDi 2024, 305 ff.; *Stefanie Jung/Carolin Siebeck*, "Das neue EU Company Certificate – EU-Gesellschaftsbescheinigung", Zeitschrift für Wirtschaftsrecht (ZIP) 2024, 781 ff.; *Jan Lieder,* "Modernisierung des europäischen Gesellschafts- und Registerrechts durch die Digitalisierungs-RL II", Neue Juristische Wochenschrift (NJW) 2024, 2065 ff.; *Jessica Schmidt,* "Einigung zur DigiRL II", NZG 2024, 466; *Jessica Schmidt,* "Die Digitalisierungsrichtlinie II. Upgrade für die Handels- und Gesellschaftsregister in der EU", NZG 2024, 563 ff.; *Jessica Schmidt*, "BB-Gesetz-

adopt the provisions implementing DigiD II by 31 July 2027 and apply them from 31 July 2028[13].

DigiD II introduces significant reforms of the Company Law Directive (CLD)[14] and the Single-Member Companies Directive (SMCD)[15] which address two key issues: transparency of company data (→ 2) and cross-border use of company data (→ 3).

2. Measures to enhance transparency of company data

2.1. Targeted amendments regarding transparency of limited liability companies

To enhance transparency of company data, DigiD II includes several targeted amendments regarding disclosure requirements for limited liability companies.

2.1.1. Particulars of company organs

Since the original Publicity Directive, limited liability companies must disclose the "particulars" of the persons who either as body constituted pursuant to law or as members of such body are authorised to represent the company or take part in the administration, supervision or control of the company ("company organs") (originally: Art. 2(1)(d) Publicity Directive; today: Art. 14(d) CLD). However, it was never defined what exactly these "particulars" include.

DigiD II finally (indirectly) closes this gap. The new Art. 16b(2)(j), Art. 16b(3)(c)-(d) and Art. 18(4) CLD show that in case of natural persons, at least the first name(s) and the surname must be disclosed. Considering the different national traditions as regards the inclusion of the date of birth in the register, the European legislator refrained from requiring also the disclosure of the date of

gebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2023/2024", BB 2024, 1859, 1864 ff.; *Peter Stelmaszczyk/Maximilian Wosgien,* "Upgrading European Company Law – Die Digitalisierungsrichtlinie 2.0", GmbHR 2024, R164 ff.

13 Cf. Art. 4(1), (2) DigiD II.

14 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification), [2017] OJ L 169/46; last amended by Regulation (EU) 2021/23, [2021] OJ L 22/1.

15 Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the area of company law on single-member private limited liability companies (Codified version), [2009] OJ L 258/20.

birth; instead, Member States may require the disclosure of "equivalent information", which allows to unequivocally identify the person (e.g. an ID number) (cf. Art. 16b(2)(j), Art. 18(4) CLD and recital 37 DigiD II).[16] In case of legal persons, the company name, legal form, EUID (or, where EUID is not applicable, the registration number) must be disclosed (Art. 16b(2)(j), (k), Art. 16b(3)(c)-(d), Art. 18(4) CLD).

2.1.2. Object of the company

The new Art. 14(l) CLD, which was inserted upon the initiative of the EP[17], requires the disclosure of the object of the company describing its main activity or activities – albeit only where the object is recorded in the national register. With this caveat, the European legislator wants to accommodate the different national traditions. Yet, this diminishes the level of harmonisation and the information available in the national registers and via BRIS. At any rate, many Member States already require disclosure of the object of the company in the national register.[18]

The object can be expressed using the NACE code[19], where such code is used for the purposes of the register pursuant to applicable national law. It would be preferable to make the indication of the NACE mandatory, because this would allow to determine the object of the company quickly and easily and without language problems.[20]

2.1.3. Average number of employees

The new Art. 19(2)(i) CLD, which was also inserted upon the initiative of the EP[21], requires disclosure of the average number of employees of the company during the financial year – but only via BRIS (not in the national register) and only where national law requires this information to be made available in the

16 Cf. *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
17 Cf. JURI report, A9-0394/2023, Art. 14(ma) CLD-draft.
18 Examples: Germany (§§ 39(1)1 AktG, § 10(1)1 GmbHG, § 43 no. 2 lit. c HRV).
19 See Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains, [2006] OJ L 393/1; last amended by Commission Delegated Regulation (EU) 2023/137, [2023] OJ L 19/5.
20 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
21 Cf. JURI report, A9-0394/2023, Art. 19(2)(fa) CLD-draft.

company's financial statements[22] and from the moment this information is available for extraction[23]. This information is, for example, relevant to determine the size category of a company for accounting purposes.[24]

2.1.4. Transparency of single-member limited liability companies

DigiD II also enhances the transparency in cases where a company becomes a single-member limited liability company because all its shares come to be held by a single person. Previously, Member States had the choice between three different options of disclosing this fact and the identity of the sole member: record it in the file, enter it into the national register or enter it into a register kept by the company and accessible to the public (Art. 3 SMCD in the version before DigiD II). DigiD II discarded the last option and amended the provision in order to bring the disclosure standards in line with the general disclosure standards: Pursuant to the new Art. 3 SMCD, the fact that the company has become a single-member company, and the identity of the sole member must be recorded in the file or entered into the national register. Furthermore, this information must be publicly available through BRIS and Art. 18, 19(1) CLD apply *mutatis mutandis*.

2.1.5. Information on branches of third-country limited liability companies

In addition, DigiD II enhanced transparency as regards branches of third-country limited liability companies. They must now also have an EUID (Art. 36(5), 29(4) CLD) and the documents and information which must be disclosed about them in the national register must now also be available via BRIS, much of it even free of charge (Art. 36(3), (4) CLD).

22 The rationale of this caveat is unclear. The average number of employees during the financial year must be included in the notes to the financial statements pursuant to Art. 16(1)(h), 17(1)(e) EU Accounting Directive (Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, [2013] OJ L 182/19; last amended by Directive (EU) 2025/2, OJ L, 2025/2, 8.1.2025). This applies also to companies which prepare their accounts in conformity with the IFRS.

23 See on this also recitals 17, 20 DigiD II.

24 Cf. recital 17 sentence 2 DigiD II.

2.2. Extension of the register disclosure framework to commercial partnerships

2.2.1. Background and significance

The extension of the register disclosure framework to commercial partnerships by DigiD II is tantamount to a small revolution.[25] The EU register disclosure framework traditionally covered only limited liability companies, because when the original Publicity Directive was adopted in 1968, the need for harmonisation was felt to be most urgent with respect to them.[26] In 2019, DigiD I expressly allowed Member States to also make available documents and information for other types of companies (Art. 18(1)2 CLD) – but this was only a Member State option and there was no harmonisation as regards the scope of data to be disclosed.[27]

Now DigiD II establishes harmonised disclosure standards also for the commercial partnerships listed in Annex IIB CLD and makes their register data available via BRIS. The commercial partnerships listed in Annex IIB include, inter alia, the German *Offene Handelsgesellschaft (oHG)* and *Kommanditgesellschaft (KG)*, the French *société en nom collectif* and *société en commandite simple,* and the Swedish *handelsbolag* and *kommanditbolag*. Considering the important role such commercial partnerships play in the economy of the Member States, there is indeed a considerable practical need for such transparency.[28] However, at least for the time being, the European legislator deliberately refrained from extending the scope of the register publicity framework also to other partnerships or legal entities (e.g. cooperatives) – although the review clause in Art. 3(3)(d) DigiD II expressly mandates an assessment of whether cooperatives should be included. This would indeed be the next logical step.[29]

2.2.2. Documents and information to be disclosed with respect to commercial partnerships

The new Art. 14a CLD establishes a minimum catalogue of documents and information to be disclosed by the commercial partnerships listed in Annex IIB CLD. By and large, these items correspond with the documents and

25 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
26 Cf. recital 1, 3 Publicity Directive.
27 Cf. *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
28 Cf. recital 15 sentences 1–2 DigiD II; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
29 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.

information to be disclosed by limited liability companies pursuant to Art. 14 CLD.[30] However, there are also some significant differences.[31]

It should be noted that, with respect to many items, disclosure is only required where the relevant information is recorded in the national register. In light of the differences between the various national types of commercial partnerships and the different national register traditions, this seems, on the one hand, understandable.[32] On the other hand, these caveats significantly diminish the level of harmonisation and the information available in the national registers and via BRIS.[33] Hence, it is welcome that Art. 3(2)(f) DigiD II expressly requires the Commission to assess these caveats in the course of the review of DigiD II.[34]

Apart from that, the following differences should be highlighted:

– Pursuant to Art. 14a(c) CLD, in case of commercial partnerships, Member States may require disclosure of an equivalent instead of the registered office. The rationale is that in some national legal systems, commercial partnerships do not have a "registered office" in the proper sense.[35] In Germany, for example, *oHG* and *KG* have only a "*Vertragssitz*" ("contractual seat").[36]

– In case of commercial partnerships, the instrument of constitution, and the statutes if they are contained in a separate instrument, must only be disclosed if the filing of these documents to the register is required by national law (Art. 14a(f)-(h) CLD). The reason for this caveat is that some national legal systems (e.g. German law[37]) traditionally do not require the filing of these documents to the register and an agreement on changing this could not be reached.[38]

– Since commercial partnerships do not (generally) have a subscribed capital or an administrative, supervisory or control organs, there is no duty to disclose such information.

– As regards representation, commercial partnerships must disclose the particulars of the partners, directors or other statutory representatives who

30 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
31 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
32 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
33 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
34 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 564.
35 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.
36 Cf. § 706 sentence 2 BGB; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.
37 See only *Holger Fleischer,* in: Münchener Kommentar zum HGB, 5th ed. 2022, § 105 mn. 127.
38 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.

are authorised to represent the partnership in dealings with third parties and in legal proceedings, and information as to whether those persons are authorised to represent the partnership alone or are required to act jointly, or if not applicable, information about the nature and scope of the authorisation of the partners, directors or other representatives to represent the partnership and their particulars (Art. 14a(i) CLD).

– If there are any general partners who are not authorised to represent the partnership, their particulars must be disclosed, too (Art. 14a(j) CLD).

– If there are limited partners, their particulars must be disclosed only where they are made publicly available in the national register (Art. 14a(j) CLD). Again, this takes into account the different national traditions.

– In addition, the maximum amount of liability or contribution of limited partners must be disclosed – albeit, again, only where this information is recorded in the national register (Art. 14a(e) CLD). Considering the different national traditions[39], it seems sensible to require either disclosure of the maximum amount of liability or of the maximum amount of contribution.[40] Moreover, the adopted text is a lot clearer and much more appropriate than the requirement in the Commission's draft to disclose the total amount of the contributions of the partners.[41]

– Furthermore, in contrast to limited liability companies, commercial partnerships must only disclose the winding-up, a declaration of nullity, the particulars of the liquidators and their respective powers, and any termination of a liquidation or the fact of striking off, where this information is recorded in the national register (Art. 14a(l)-(o) CLD).

– Unlike limited liability companies, commercial partnerships need not disclose their object.

2.2.3. Registration and effects of disclosure

Just like for limited liability companies, Member States must now also ensure that a file is opened for each commercial partnership listed in Annex IIB and that such commercial partnerships have an EUID (Art. 16(1) CLD).

Moreover, the established EU standards as regards keeping the documents and information in the file in the register or entering them directly into the register,

39 For an overview see *Zwirlein-Forschner,* NZG 2023, 863 (fn. 9), 868 f.
40 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.
41 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.

disclosure, effects of disclosure and avoidance of discrepancies between what is in the register and in the file, format of stored information, and access to disclosed information now apply to these commercial partnerships (Art. 16(7) in combination with Art. 16(2)-(6) CLD; Art. 16a(6) in combination with Art. 16 (1)-(5) CLD).[42]

Furthermore, electronic copies of the documents and information referred to in Art. 14a CLD shall also be made publicly available through BRIS (Art. 18 CLD). Like in case of limited liability companies (cf. Art. 19 CLD), any fees charged for obtaining these documents and this information shall not exceed the administrative costs (Art. 19a(1) CLD) and certain documents and information must be available free of charge through BRIS (Art. 19a(2) CLD).

2.3. Transparency of groups of companies

2.3.1. Background, rationale and overview

EU law has already provided for a certain transparency of groups with the rules on consolidated financial statements in the EU Accounting Directive and on transparency of beneficial ownership in AMLD4[43]/AMLD6[44]. However, consolidated financial accounts only provide for *ex post* transparency, there are numerous exceptions, and neither the EU Accounting Directive nor AMLD4/AMLD6 provide for real transparency of the group structure.[45] With the new Art. 19b CLD, DigiD II for the first time requires transparency of groups of companies also via BRIS. This serves the legitimate interests of shareholders, potential investors, creditors, employees, and authorities in having access to information related to the structure of the group to which a company belongs.[46]

42 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 565.

43 Art. 30 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, [2015] OJ L 141/73.

44 Art. 10–15 Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849, OJ L, 2024/1640, 19.6.2024.

45 *ICLEG*, Report on Transparency of Company Data, 2023, p. 5.

46 Cf. *ICLEG*, Report on Transparency of Company Data, 2023, p. 5; recital 18 sentence 1 DigiD II.

The availability of this information via BRIS enhances transparency and facilitates access.[47] Moreover, this makes it possible to automatically link a company to the other group member companies via the EUID.[48]

Based on preparatory work by the *ICLEG*[49], the Commission's draft had provided to add rather comprehensive information on the group structure as further information to be disclosed, thus integrating group transparency fully into the register disclosure system; moreover, it had provided for a visualisation of the group structure via BRIS.[50] However, this turned out to be too progressive.[51] Whereas the Council position wanted to delete these rules entirely[52], the agreement reached during trilogue negotiations set out a completely new approach[53].

The new Art. 19b CLD provides for transparency of the group structure exclusively via BRIS (and not, like the Commission's draft, also in the national registers).[54] It covers only groups of companies for which parent companies listed in Annex II or Annex IIB CLD are required to prepare and publish consolidated financial statements (→ 2.3.2) and is based on the basic concept that the information to be disclosed is extracted directly from the financial statements (→ 2.3.4).

2.3.2. Scope

Art. 19b CLD applies only to groups of companies for which parent companies listed in Annex II or Annex IIB CLD are required to prepare and publish consolidated financial statements in line with Art. 21–29 EU Accounting Directive (Art. 19b(1) CLD). The terms parent company, ultimate parent company, intermediate parent company, subsidiary company, and group are defined in Art. 13a(7)-(11) CLD. Since group transparency pursuant to Art. 19b CLD is based on the duty to prepare and publish consolidated financial statements pursuant to the EU Accounting Directive, these definitions are aligned with the definitions of parent undertaking, subsidiary undertaking, and group in

47 Recital 19 sentence 3 DigiD II.
48 Recital 19 sentence 4 DigiD II.
49 *ICLEG,* Report on information on groups, 2016; *ICLEG*, Report on Transparency of Company Data, 2023, p. 5ff.
50 COM(2023) 177, Art. 14b CLD-draft. See on this *Jessica Schmidt,* NZG 2023, 593 (fn. 9), 595ff.
51 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
52 ST 6538/2024.
53 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566; *Jessica Schmidt*, BB 2024, 1859 (fn. 14), 1865.
54 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566; *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1865.

Art. 2(9)-(11) EU Accounting Directive.[55] Although Art. 13a(7)-(11) CLD do not define the term "control", it can be assumed that this term means the same as in the context of the EU Accounting Directive.[56] Considering the alignment of the scope of Art. 19b CLD with that of the EU Accounting Directive, this is the only sensible interpretation.[57]

2.3.3. Information to be disclosed

In contrast to the Commission's draft[58], Art. 19b CLD only requires the disclosure of certain "key information" on the companies belonging to the group allowing them to be identified unequivocally.[59] With this "key information", market participants can then obtain further information about the individual company and/or the group.[60]

With respect to the details, Art. 19b CLD differentiates between companies governed by the law of a Member State and companies governed by the law of a third country.[61] This has several reasons: Firstly, companies governed by the law of a third country do not have an EUID and may not be entered into a register.[62] Secondly, only companies governed by the law of a Member State are required to prepare and publish consolidated financial statements pursuant to the national provisions implementing the EU Accounting Directive; therefore, if the ultimate parent company is governed by the law of a third country, the disclosure obligation must be placed on an intermediate parent company (i. e. the highest parent company governed by the law of a Member State[63]).[64] Thirdly, Art. 19b CLD is based on the basic concept that the information is (as far as possible) extracted directly from the consolidated financial statements or from BRIS (→ 2.3.4).[65] All this also explains the somewhat long-winded phrasing of Art. 19b CLD.[66] With respect to subsidiary companies governed by the

55 However, terminology differs slightly: whereas the EU Accounting Directive uses the term "undertaking", the CLD uses the term "company".
56 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
57 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
58 COM(2023) 177, Art. 14b CLD-draft; see on this *Jessica Schmidt* NZG 2023, 593 (fn. 52), 596 f.
59 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
60 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
61 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
62 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
63 Cf. Art. 13a(9) CLD.
64 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
65 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.
66 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.

law of a Member State, there is a redundancy, because disclosure of the name and registered office is required twice (once pursuant to Art. 19b(1)(b) CLD in combination with Art. 28(2)(a)(i) EU Accounting Directive and once pursuant to Art. 19b(1)(b) in combination with Art. 19(2)(a)-(c) and Art. 19a(2)(a)-(c) CLD). In practice, it should, of course, be sufficient to disclose this information once.

In addition, Art. 19b(2) CLD contains a Member State option: Each Member State may also require disclosure of the proportion of capital held between the ultimate parent company and each of the subsidiary companies.

2.3.4. Disclosure procedure and updates

Art. 19b(1) CLD only requires Member States to ensure that the information to be disclosed is available free of charge via BRIS.

Since the operative part of the CLD does not stipulate how this information is to be gathered, this is, in principle, left to the individual Member State.[67] However, as evidenced by recital 20 DigiD II, the European legislator had a very clear perception of how the relevant information should be gathered in a way to avoid new requirements on companies.[68] If and to the extent to which the information is not already available via BRIS (e.g. the information to be disclosed about subsidiary companies pursuant to Art. 19(2)(a)-(c) and Art. 19a(2)(a)-(c) CLD), the national registers should extract group information directly from the consolidated financial statements.[69] Given the requirements related to structured data and machine-readable and searchable formats under Art. 3-6 ESEF Regulation[70], Art. 3 Commission Implementing Regulation (EU) 2023/138[71] and Art. 16(6) CLD, this will even be possible by automated means in the future.[72] Hence, the transposition period for Art. 19 b CLD is one year longer.[73]

67 Cf. recital 20 sentence 1 DigiD II.

68 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.

69 Cf. recital 20 sentences 2-4 DigiD II; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.

70 Commission Delegated Regulation (EU) 2018/815 of 17 December 2018 supplementing Directive 2004/109/EC of the European Parliament and of the Council with regard to regulatory technical standards on the specification of a single electronic reporting format, [2018] OJ L 143/1; last amended by Commission Delegated Regulation (EU) 2022/2553, [2022] OJ L 339/1.

71 Commission Implementing Regulation (EU) 2023/138 of 21 December 2022 laying down a list of specific high-value datasets and the arrangements for their publication and re-use, [2023] OJ L 19/43.

72 Cf. recital 20 sentence 4 DigiD II; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.

73 Cf. Art. 4(3) and recital 20 sentence 5 DigiD II; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 566.

The basic concept to build upon the data already existing in the consolidated financial statements, extract this data automatically and thus avoid any new requirements for companies, is undoubtedly a brilliant idea.[74] Especially combined with the linking of the individual group member companies via the EUID, this achieves considerably more transparency on groups of companies with relatively little cost for companies and in accordance with the "once-only" principle.[75]

In addition, Art. 19b(3) CLD establishes a duty to update the information which must be disclosed in line with the new information included in subsequent financial statements. The same must apply *mutatis mutandis* if the information pursuant to Art. 19(2)(a)-(c) and Art. 19a(2)(a)-(c) CLD changes.

2.3.5. Review clause on visualisation

The Commission's draft had provided for a visualisation of the group structure through BRIS.[76] However, it was not possible to reach an agreement on this – probably not least because of the technical challenges.[77] The general review clause regarding disclosure of group information in Art. 3(3)(c) DigiD II explicitly requires the Commission to assess whether and how the group structure should be visualised through BRIS. It would indeed be desirable to complement the group disclosure framework with a visualisation – ideally, this visualisation should also be generated automatically from the existing data.[78]

2.4. Interconnection of BRIS, BORIS and IRI

A further welcome measure introduced by DigiD II to enhance transparency is the interconnection of BRIS with the Beneficial Ownership Registers Interconnection System (BORIS)[79] established on the basis of AMLD4/AMLD6

74 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 567.
75 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 567.
76 COM(2023) 177, Art. 14b(10) CLD-draft; see on this *Jessica Schmidt* NZG 2023, 593 (fn. 9), 597.
77 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 567; similarly *Jan Lieder,* NJW 2024, 2065 (fn. 14), 2069 f.
78 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 567. Critical with respect to the deletion of the visualisation also *Beurskens,* RDi 2024, 305 (fn. 14), 306. Proposing such a visualisation already *ICLEG,* Report on information on groups, 2016, p. 12; *ICLEG*, Report on transparency of company data, 2023, p. 6.
79 https://e-justice.europa.eu/searchBoris.do (last accessed 21 Januar 2025).

and the Insolvency Registers Interconnection System (IRI)[80] established on the basis of the EIR recast[81] (Art. 22(7) subparagraph 1 CLD). Thus, if one retrieves data on a company via BRIS, one can also at the same time retrieve data on the beneficial owner(s) and a potential insolvency.[82] Moreover, this is intended to help tax authorities' work.[83] The information is linked across the systems by the EUID.[84]

Notably, the interconnection of BRIS, BORIS and IRI shall not alter or circumvent the rules and requirements related to the access of the information set out under the relevant frameworks establishing these registers (Art. 22(7) subparagraph 2 CLD). Thus, a user who is not entitled to access certain information via BORIS, will not be entitled to access this information via BRIS.[85]

By contrast, there are currently no plans to interconnect BRIS also with the new European Single Access Point (ESAP).[86] When the Commission presented the proposal for the ESAP Regulation[87], it argued that the target groups of BRIS and ESAP were too different and that the overlap on data collected by BRIS and ESAP would be limited.[88] However, it would actually provide significant added value for users if they could access all data available about a company via ESAP also directly via BRIS. Hence, an interconnection of BRIS and ESAP is an important desideratum.[89]

80 https://e-justice.europa.eu/246/EN/bankruptcy_amp_insolvency_registers__search_for_insolvent_debtors_in_the_eu (last accessed: 21 January 2025).

81 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), [2015] OJ L 141/19; last amended by Regulation (EU) 2023/2844, OJ L, 2023/2844, 27.12.2023.

82 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 567; *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1865.

83 COM(2023) 177, p. 4.

84 Cf. recital 33 sentence 3 DigiD II.

85 Cf. recital 33 sentence 5 DigiD II.

86 Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, OJ L, 2023/2859, 20.12.2023.

87 COM(2021) 723.

88 Cf. SWD(2021) 344, 5.1.

89 *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1865.

3. Measures to enhance the cross-border use of company data

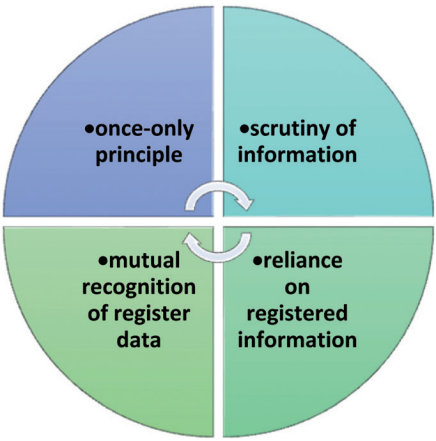
3.1. Background, need for reform and conceptual basis

To ensure that companies can use their freedom of establishment and their freedom to provide services within the internal market effectively, it is necessary that customers, suppliers, employees, and other stakeholders, as well as national authorities have access to reliable information about the companies; at the same time, the costs for companies should be kept as low as possible.[90] The establishment of BRIS has proven to be an important step forward to achieving these goals – but so far BRIS has not lived up to its full potential.[91]

As *ICLEG* has elaborated, the efficient use of company information saved in national company registers in cross-border and administrative proceedings and other cross-border situations depends on several factors, all of which are interconnected[92]:

- **"once-only" principle**: Data should have to be submitted by companies only once.
- **scrutiny of information**: The level of scrutiny to which the information is subject before being entered into the register correlates with the reliability of registered information: The more intensive the examination, the more reliable the registered information. At the same time, there is a balance of costs and benefits, as the enhancement of reliability must be measured against the costs and timeliness of the scrutiny.
- **reliance on registered information:** Reliable information in registers is essential in order for courts, authorities, businesses and citizens to be able to rely on the register data and recognition of register data in other Member States.
- **mutual recognition of register data**: In order to facilitate the cross-border use of company data and also reach the full potential of BRIS, once sufficient scrutiny to achieve reliability has been ensured, register data must be mutually recognised in all Member States in all matters where domestically registered data is normally relied on. This, in turn, is a prerequisite for the "once-only" principle.

90 *ICLEG*, Report on cross-border use of company information, 2023, para. 1.
91 *ICLEG*, Report on cross-border use of company information, 2023, para. 1.
92 *ICLEG*, Report on cross-border use of company information, 2023, para. 2.



That is why DigiD II introduces several measures to improve the European register framework with respect to these factors. In this context, DigiD II also aligns the CLD with the revision of the eIDAS Regulation[93] by integrating the new European Digital Identity Wallet (EDIW), inter alia as an electronic identification means (cf. Art. 13b(1)(c) CLD).

3.2. Extension of the "once-only" principle

Where a company wants to form a subsidiary or establish a branch in another Member State, it has so far often been necessary to file the same documents and information again with the competent authority in the target Member State which are already available in the register of the company's home Member State – and thus also via BRIS. This constitutes a waste of time, effort and money.[94]

This is why DigiD II has implemented the "once-only" principle in this respect: The register of the Member State where the subsidiary is formed or the branch is established shall not request the company to provide documents and information available in the home Member State of the company; instead, it

93 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, [2014] OJ L 257/73; as amended by Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework, OJ L, 2024/1183, 30.4.2024.

94 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 568.

must retrieve them by means of exchange of information through BRIS, retrieve an EU Company Certificate (EUCC) or access the documents and information which are available in BRIS or in the national register of the company's home Member State (Art. 13g(2a) subparagraph 1, 13k(1) subparagraph 1, 28a (5a) subparagraph 1 CLD). Moreover, it must, upon request, provide the documents and information retrieved to any authority or person or body that is mandated under national law to deal with any aspect of the formation of a subsidiary or registration of a branch (e.g. notaries, trade or tax authorities[95]) – unless this information is publicly available free of charge through BRIS (because in that case, the respective authority/person/body can access it free of charge) (Art. 13g(2a) subparagraph 2, 13k(1) subparagraph 1, 28a(5a) subparagraph 2 CLD). This extension of the "once-only" principle is a substantial and highly welcome improvement.[96]

3.3. Harmonised minimum standards for preventive control in case of formation and filing

3.3.1. Background, rationale and overview

The level of scrutiny to which the information is subject before being entered into the register correlates with the reliability of registered information: The more intensive the examination, the more reliable the registered information.[97] While all Member States carry out some kind of *ex ante* scrutiny of company documents and information before they are entered into the register, the level and intensity of these checks vary significantly.[98] Consequently, register data from one Member State is often not accepted as evidence in another Member State (this is, for example, a problem especially in Germany, but also in other Member States).[99]

The origins of this problem can be traced back to the adoption of the 1968 Publicity Directive. In the 1960s, the standards in the then six EEC Member States as regards the formation control of companies were rather heterogene-

95 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 568.

96 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 568. In favour of such an extension already *ICLEG*, report on cross-border use of company information, 2023, para. 10 f.

97 *ICLEG*, report on cross-border use of company information, 2023, para. 2.

98 Cf. recital 7 sentence 1 DigiD II; *ICLEG*, report on cross-border use of company information, 2023, para. 10 f.

99 Cf. recital 7 sentence 2 DigiD II; *ICLEG*, report on cross-border use of company information, 2023, para. 10 f.

ous.[100] In the course of the negotiations on the Publicity Directive, it was therefore only possible to agree on a rudimentary minimum standard, which was laid down in Art. 10 Publicity Directive and then became Art. 10 CLD 2017. According to this provision, Member States had the choice between providing for (i) preventive administrative or judicial control at the time of the formation of the company; or (ii) for the instrument of constitution, the company statutes and any amendments to those documents to be drawn up and certified in due legal form.[101] Moreover, the provision did not lay down any specific requirements as regards the procedure and intensity of the control or certification; this was deliberately left to national law.[102]

In 2019, DigiD I for the first time stipulated minimum standards for preventive control; however – at least pursuant to their wording[103] – they were only mandatory for online formation of limited liability companies listed in Annex IIA (private limited liability companies) and for the online filing of companies listed in Annex II (private and public limited liability companies) (cf. Art. 13g(3)-(5), 13j(4) CLD as amended by DigiD I).

DigiD II not only amends and updates these minimum standards, it also extends their scope of application explicitly to all online and offline filings and all online and offline formations of both limited liability companies listed in Annex II CLD and commercial partnerships listed in Annex IIB CLD.[104] Moreover, it stipulates mandatory minimum standards for preventive control of the instrument of constitution and the statutes.[105]

This history also explains the rather complicated system of references, which can be summarised (in a simplified way) as follows:

– Art. 13g(2)-(5) CLD lay down general rules for the preventive control in case of online formation of limited liability companies; they apply *mutatis*

100 Germany required both judicial control and notarisation of the statutes; Italy required judicial control; the Netherlands required a control by the Ministry of Justice; Belgium and Luxembourg required notarisation of the statutes; France, since 1966, only required a declaration by the founders that the company had been formed in accordance with all legal requirements. See *ICLEG*, report on cross-border use of company information, 2023, para. 13.

101 Member States were also free to combine the two alternative, like e.g. Germany did (*ICLEG*, report on cross-border use of company information, 2023, para. 15).

102 *ICLEG*, report on cross-border use of company information, 2023, para. 16.

103 Rightly arguing in favour of applying them also to offline formation of companies *Christoph Teichmann*, "Die digitale GmbH-Gründung: Ein Entwicklungssprung für die vorsorgende Rechtspflege", GmbHRundschau (GmbHR) 2021, 1237, 1243; agreeing *Jessica Schmidt* NZG 2023, 593 (fn. 9), 598.

104 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 568.

105 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 568.

mutandis also to online filings (Art. 13j(4) CLD), offline filings (Art. 13k (2) 1 CLD) and (to a large extent) also to offline formation (Art. 13k(1) CLD) of limited liability companies and commercial partnerships.

– Art. 10(1)-(3) CLD lay down specific rules for the preventive control of the instrument of constitution and (if they are contained in a separate document) the statutes; they apply both to online and offline formation of limited liability companies and commercial partnerships (Art. 10(4) CLD) and also to online filings (Art. 13j(4) CLD) and offline filings (Art. 13k(2) CLD).

Instead of this complicated referral system, it would have been preferable in the interest of legal clarity to lay down general minimum standards for the preventive control of all filings and complement them with special rules catering to the special features of online formation, offline formation, online filing and offline filing where appropriate.[106]

3.3.2. General rules for preventive control

As already indicated, DigiD II establishes minimum standards for the preventive control of all (online and offline) formations and filings of all limited liability companies listed in Annex II and all commercial partnerships listed in Annex IIB CLD (Art. 13g(3), 13j(4), 13k(1), (2) 1 CLD). Determining the means and methods for carrying out those controls has been deliberately left largely to the Member States.[107]

The minimum standard pursuant to Art. 13g(3), 13j(4), 13k(1), (2) 1 CLD consists of checks of the following items:

– legal capacity of the applicant and authority to represent the company/partnership;

– identity of the applicant[108];

106 See already *Jessica Schmidt* NZG 2023, 593 (fn. 9), 598 f.

107 Cf. recital 20 sentence 3 DigiD I; *Lieder*, NJW 2024, 2065 (fn. 14), 2066; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.

108 In case of online formation and online filing, Member States must provide for means to verify the identity of the applicants in accordance with Art. 13b CLD and for the requirements for the applicants to use trust services referred to in the eIDAS Regulation (Art. 13g(3)(b)-(c), 13j(4) CLD). For this purpose, Member States may use public remote audio-visual identity controls, including electronic checks of identity photos (recital 10 sentence 3 DigiD II). In case of offline formation, Art. 13k(1) subparagraph 2 CLD only requires Member States generally to lay down rules to verify the identity of applicants and leaves the details to them. In the interest of consistency, this must also

– legality of the object of the company/partnership;
– legality of the name of the company/partnership;
– appointment of directors.

Of course, the competent authority only has to check the items relevant in the specific case (if, for example, a new director has been appointed and this is filed with the register, it is not necessary to check the legality of the object of the company).[109]

Art. 13g(4), 13j(4), 13k(1), (2) 1 CLD list three further items that Member States may regulate in the context of the checks: The consequences of the disqualification of a director by the competent authority in any Member State; the role of a notary or any other person or body mandated under national law to deal with any aspect of formation/filing; the exclusion of online formation/filing where the share capital is paid by way of contributions in kind. But this list is not exhaustive ("in particular"); Member States are free – within the limits of the *effet utile* – to regulate other points.[110]

Furthermore, Member States shall not make the formation or filing generally conditional upon obtaining a licence or authorisation (Art. 13g(5), 13j(4), 13k (1), (2) 1 CLD).

3.3.3. Special rules for preventive control of the instrument of constitution and the statutes

3.3.3.1. Principle: mandatory preventive control of the instrument of constitution and the statutes

Pursuant to the new Art. 10(1), (2) CLD introduced by DigiD II, Member States shall provide for preventive control, at the time of formation of limited liability companies listed in Annex II CLD and (subject to the special rule in Art. 10(3) CLD) of commercial partnerships listed in Annex IIB CLD, of the instrument of constitution and of the statutes of if they are contained in a separate document. So the instrument of constitution and the statutes as the "fundamental documents"[111] of the company/partnership must now be sub-

apply to offline filings; insofar as Art. 13k(2)1 CLD refers to Art. 13g(3)(b)-(c) CLD in this respect, this is probably a drafting error. See *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.

109 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.

110 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.

111 Cf. recital 9 sentence 2 DigiD II; *ICLEG*, Report on cross-border use of company information, 2023, para. 29.

jected to preventive control in all Member States.[112] This applies irrespective of whether the formation takes place online, offline or in a hybrid way (Art. 10(4) CLD).[113] The rationale is to prevent a company/partnership from "starting its life" with an instrument of constitution or statutes which are defective or even null and void ("nullity prophylaxis").[114]

To take account of the different national traditions[115], Art. 10(1)1 CLD allows Member States to choose between administrative, judicial or notarial control; but they may also combine these three types in any way they choose (e.g. control by a court and a notary).[116] Moreover, Member States may additionally require that the instrument of incorporation and/or the statutes are to be drawn up and certified in due legal form (Art. 10(1)2 CLD). This reflects that certification requirements have a long tradition in some Member States.[117] German law, for example, traditionally requires that the statutes of AG, KGaA and GmbH are notarised (§ 23(1) AktG; § 2(1) GmbHG).

Furthermore, such a preventive control is also required in case of any amendments to the instrument of incorporation and/or the statutes (Art. 10(1)1, 13j (4), 13k(2) CLD). The rationale is to prevent circumvention and to ensure that the instrument of incorporation and the statutes comply with the relevant requirement throughout the "life" of the company/partnership.[118]

However, Art. 10(3) CLD lays down a special provision for commercial partnerships listed in Annex IIB CLD. Many Member States (e.g. Germany[119]) traditionally do not require the drawing up of instruments of constitution and statutes for such commercial partnerships for purposes of formation or at the time of registration; interfering with this tradition was not considered expedient.[120] Hence, Art. 10(3) CLD provides that in such cases, the procedure for the legality check shall include the formal and substantive control of the documents and information required under national law for the application for entry into the register of such partnerships.

112 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
113 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
114 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
115 Cf. recital 9 sentence 1 DigiD II; *ICLEG*, Report on cross-border use of company information, 2023, para. 32.
116 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569; *Stelmaszczyk/Wosgien,* GmbHR 2024, R164 (fn. 14). See also *Bormann/Wosgien*, FS Frenz, 2024, p. 59 (fn. 9), 75.
117 Cf. recital 9 sentence 4 DigiD II; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
118 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
119 See only *Holger Fleischer,* in: Münchener Kommentar zum HGB, 5th ed. 2022, § 105 mn. 127.
120 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569. Critical with respect to this *Stelmaszczyk/Wosgien,* GmbHR 2024, R164 (fn. 14), R166.

3.3.3.2. Minimum standards for the scope of the preventive control of the instrument of incorporation and the statutes

Art. 10(2) subparagraph 2 CLD lays down minimum standards for the scope of the preventive control ("legality check") of the instrument of constitution and the statutes.

Firstly, it shall be ascertained that the formal requirements for the instrument of constitution/statutes are fulfilled; where templates are used, the correct use of templates referred to in Art. 13 h CLD is verified (Art. 10(2) subparagraph 2 lit. a; 13j(4), 13k(2) CLD).

Secondly, it shall be ascertained that the mandatory minimum content is included (Art. 10(2) subparagraph 2 lit. b; 13j(4), 13k(2) CLD).

Thirdly, it shall be ascertained that the substantive legal requirements are met (Art. 10(2) subparagraph 2 lit. c; 13j(4), 13k(2) CLD). Whereas the Commission's draft had only required the ascertainment that there are no evident substantive legal irregularities[121], the provision now unequivocally requires a comprehensive substantive legality check.[122]

Fourthly, it shall be ascertained that the contribution, whether payment in cash or contribution in kind, has been provided for, in accordance with national law (Art. 10(2) subparagraph 2 lit. d; 13j(4), 13k(2) CLD). The Commission's draft, by contrast, had required an ascertainment that the contribution had been paid.[123] However, upon the initiative of the Council[124] this was changed, because in many national legal systems, the contributions do not have to be paid up in full at the time of formation of the company/partnership or at the time of registration of a capital increase.[125]

3.4. Ensuring registers are up to date

3.4.1. Background, rationale and overview

To ensure that registers are reliable, it is necessary to not only establish common standards for checking the data, but also that the registers are up to date.[126] Ultimately, this is also in the companies' and partnerships' interests, because

121 COM(2023) 177, Art. 10(2) subparagraph 2 lit. c CLD-draft.
122 *Lieder*, NJW 2024, 2065 (fn. 14), 2066; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 569.
123 COM(2023) 177, Art. 10(2) subparagraph 2 lit. d CLD-draft.
124 See Council position, ST 6538/2024, Art. 10(2) subparagraph 2 lit. d CLD-draft.
125 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 570.
126 Cf. recital 22 sentence 1 DigiD II.

bona fide third parties may rely on the register and the EUCC.[127] Hence, Art. 15(1) CLD generally requires Member States to have in place procedures to ensure that the information about companies listed in Annex II and commercial partnerships listed in Annex IIB stored in the registers is kept up to date. Art. 15(2) and (3) CLD then stipulate minimum standards for this. However, in contrast to the Commission's draft[128], there is no requirement for companies and commercial partnerships to confirm annually that the information is up to date.

3.4.2. Filing deadline

The first element of the minimum standard is a newly introduced filing deadline (Art. 15(2)(a) CLD): Any changes to the documents and information must be filed to the register within a time period not exceeding 15 working days as from the date the changes were made (sentence 1); but this does not apply to accounting documents referred to in Art. 14(f) and Art. 14a(k) CLD (sentence 2).

3.4.3. Deadline for registration and disclosure

Secondly, all changes in the documents and information regarding companies and commercial partnerships listed Annexes II and IIB CLD must be entered into the register and disclosed within 10 working days from the date of the completion of all formalities required for filing (Art. 15(2)(b) sentence 1 CLD). This deadline for registration and disclosure was first introduced by the BRIS Directive[129] and was originally 21 days; DigiD II shortened it to 10 working days[130]. Exceptionally, this deadline may be extended by 5 working days (Art. 15(2)(b) sentence 2 CLD). As examples for such exceptional cases, recital 22 sentence 8 DigiD II mentions the large number of documents filed with the register or unforeseen technical problems.

The deadline starts to run only once all documents and information have been received and all formalities – including the legality check confirming that the documents comply with national law – have been completed.[131] Thus, the time

127 Cf. recital 22 sentence 3 DigiD II.
128 COM(2023) 177, Art. 15(2)(c) CLD-draft.
129 Fn. 4.
130 The Commission's draft had even only stipulated 5 working days, cf. COM(2023) 177, Art. 15(2)(b) CLD-draft.
131 Cf. recital 22 sentence 6 DigiD II.

period of 15 working days refers exclusively to the registration and disclosure. By contrast, the CLD does not stipulate a specific time period for the completion of the formalities and especially for the legality check. However, pursuant to recital 22 sentence 7 DigiD II, the formalities should be carried out without undue delay and the company or commercial partnership should be informed about their expected duration.

It should be noted that the general registration and disclosure deadline set out in Art. 15(2)(b) CLD does not apply to accounting documents; for them, Art. 30(1) subparagraph 1, (3) subparagraph 1 EU Accounting Directive are *leges speciales*.[132] In addition, there are special rules pertaining to cross-border conversions, mergers and divisions (Art. 86m(7)1, (10), 127(7)1, (10), 160m(7) 1, (10) CLD)[133] and to formations of companies and commercial partnerships (Art. 13g(7), 13k(1) subparagraph 1 CLD).

3.4.4. Consultation of other authorities and registers

Thirdly, registers may consult other relevant authorities or registers within the procedural framework laid down in national law in order to verify specific company information (Art. 15(2)(c) CLD). Other relevant authorities include e.g. tax authorities, trade authorities or the police.

3.4.5. Monitoring of up-to-dateness

Furthermore, the new Art. 15(3) CLD introduced by DigiD II addresses the prevention and removal of registry entries which have become false as well as inactive companies and commercial partnerships.[134] Member States shall have in place procedures to verify, where doubts exist, whether companies or commercial partnerships registered fulfil the requirements to continue to be registered (Art. 15(3)1 CLD). There must be a possibility to correct the relevant information within a reasonable time period (Art. 15(3)2 CLD). Moreover, the register must be updated when the status of a company or commercial partnership changes (e.g. when it is closed, struck off the register, wound up, dissolved, undergoing insolvency proceedings, economically active or inactive) and – as a last resort[135] – there must be the possibility that companies and commercial partnerships are struck off from the register (Art. 15(3)2 CLD).

132 Cf. recital 22 sentence 9 DigiD II.
133 Cf. recital 22 sentence 5 DigiD II.
134 *Jessica Schmidt*, NZG 2023, 593 (fn. 9), 600.
135 Cf. recital 23 sentence 7 DigiD II.

3.5. Measures to facilitate proof and mutual recognition of company information

3.5.1. EU Company Certificate (EUCC)

DigiD II introduces an EU Company Certificate (EUCC) which contains all essential information about a company or commercial partnership (Art. 16 b CLD).[136] This new "identity card" enables companies and commercial partnerships to prove their incorporation/formation and further essential information about themselves quickly and easily within the entire single market.[137] With the EUCC, the European legislator acts on a suggestion of *ICLEG*[138], which in turn builds upon models in national company law (e.g. the French Kbis or the German "aktueller Abdruck (AD)") and standardised verification documents in other areas of EU law (e.g. the European Certificate of Succession pursuant to the EU Succession Regulation[139] or the key information document (KID) pursuant to the PRIIPs Regulation[140]).[141]

3.5.1.1. Content

The EUCC contains all essential information about a company or commercial partnership.[142] For limited liability companies listed in Annex II CLD, it includes the following information (Art. 16b(2) CLD): date of issuance; name(s); legal form; registration number and Member State of registration; EUID; registered office; (electronic or postal) correspondence address; date of registration; amount of capital subscribed; status of the company; first name(s), surname and date of birth[143] of the persons authorised to represent the company

136 See in more detail with respect to the content of the EUCC: *Jung/Siebeck*, ZIP 2024, 781 (fn. 14), 784 ff.; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 570 f.

137 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 570; *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1866.

138 *ICLEG*, Report on cross-border use of company information, 2023, para. 61 ff.

139 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L 201/107.

140 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), [2014] OJ L 352/1; last amended by Regulation (EU) 2023/2869, OJ L 2023/2869, 20.12.2023.

141 *Jessica Schmidt*, NZG 2023, 593 (fn. 9), 600.

142 See in more detail *Jung/Siebeck,* ZIP 2024, 781 (fn. 14), 784 ff.

143 Where the date of birth is not recorded in the national register, an equivalent information which allows to unequivocally identify the person must be indicated (cf. also recital 37 sentence 9 DigiD II).

either as a body or as members of any such body ("company organs") and whether they may do so alone or jointly (in case of legal persons, the company name, legal form and EUID must be indicated); object; duration; details of the company website (where such details are recorded in the national register).

In case of commercial partnerships listed in Annex IIB CLD, Art. 16b(3) subparagraph 1 CLD naturally provides the requirements to indicate the amount of capital subscribed and the "company organs" authorised to represent the company are not necessary. Instead of the registered office, it is sufficient to include an equivalent (Art. 16b(3) subparagraph 1, subparagraph 2 lit. a CLD). In addition, pursuant to Art. 16b(3) subparagraph 2 lit. b-d CLD the following information shall be included: amount of maximum liability or contribution of limited partners (where this is recorded in the national register); peculiarities of the persons authorised to represent the partnership and, where applicable, of other general partners and limited partners.

3.5.1.2. Format

The EUCC is issued on the basis of a template available in all official EU languages (Art. 16b(8) CLD). This method, which has been tried and tested in various areas of EU law (e.g. European Certificate of Succession), overcomes language barriers and obviates translation requirements.[144] The details will be set out by the Commission in an implementing act (Art. 16b(8), 24(2)(d) CLD). Consequently, Art. 16g(1)(a) CLD provides that Member States shall endeavour not to require a translation of an EUCC.

In order to cater to both the traditional analogue and the new digital world, the EUCC will be available both in paper and in electronic version (Art. 16b(4) CLD). The electronic EUCC must be authenticated by means of trust services referred to in the eIDAS Regulation and must be compatible with the European Digital Identity Wallet (EDIW) (Art. 16b(6) CLD). An EUCC in paper format must include the date of issuance, the stamp of the register or equivalent means, and a feature that allows the electronic verification of the origin and authenticity of the document (e.g. a unique protocol or identification number) (Art. 16b(7) CLD).

Pursuant to Art. 16d(2) CLD, the EUCC is exempted from legalisation or any other similar formality (e.g. apostille).

144 Cf. *ICLEG,* Report on cross-border use of company information, 2023, para. 62.

3.5.1.3. Availability and costs

Anyone[145] can obtain an EUCC in paper or electronic format from the register (there is no requirement to demonstrate a legitimate interest or similar); the electronic version can also be obtained via BRIS (Art. 16b(4) CLD).

The price for obtaining an EUCC shall not exceed the administrative costs thereof, including the costs of the development and maintenance of the registers (Art. 16b(5) subparagraph 2 CLD). The company/partnership itself may obtain its EUCC in electronic format free of charge unless it causes a serious prejudice to the financing of the business registers; in any case, it shall be able to obtain its EUCC free of charge at least once per calendar year (Art. 16b(5) subparagraph 1 CLD). This fee structure is a fly in the ointment: Since most of the information included in the EUCC is already available free of charge via BRIS (cf. Art. 19(2), 19a(2) CLD), at least the electronic version of the EUCC – which will probably be generated automatically anyway – could have generally been made available free of charge.[146]

3.5.1.4. Evidentiary value

For the EUCC to be able to fulfil its function as "identity card", Art. 16b(1) CLD stipulates expressly that the EUCC shall be accepted in all Member States as sufficient evidence, at the time of its issuance, of the incorporation of the company/partnership and the information listed therein. The Commission's draft had provided that the EUCC should be "conclusive evidence".[147] Yet this was considered as too far-reaching by both the Council[148] and the EP. The agreement reached during trilogue negotiations settled on the wording suggested by the EP[149]: "sufficient evidence". This presumably takes account of the fact that Member States may exceptionally refuse to accept an EUCC provided that the requirements set out in Art. 16e CLD (reasonable doubt as to the origin or authenticity)[150] or Art. 16f CLD (reasonable doubt as to abuse or fraud)[151] are met.[152]

145 The doubts voiced by *Jung/Siebeck,* ZIP 2024, 781 (fn. 14), 786f., 789 are unwarranted; see already *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.

146 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571. Critical in this respect also *Beurskens,* RDi 2024, 305 (fn. 14), 306.

147 COM(2023) 177, Art. 16b(1)2 CLD-draft.

148 In the Council's mandate for negotiations, Art. 16b(1)2 CLD-draft spoke simply of „evidence" (ST 6538/24).

149 JURI report, A9-0394/2023, Art. 16b(1)2 CLD-draft.

150 See in more detail infra 3.5.6.2.

151 See in more detail infra 3.5.6.3.

152 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.

3.5.2. Digital EU power of attorney

Since the EUCC indicates only the power of representation of the members of a company's governing bodies or of a partnership's statutory representatives, DigiD II also creates a digital EU power of attorney. With this digital EU power of attorney, a person can be authorised to represent a limited liability company listed in Annex II or a partnership listed in Annex IIB CLD in another Member State for purposes of procedures within the scope of the CLD (e.g. formation of a company/partnership; registration or closure of branches; cross-border conversions, mergers, and divisions) (Art. 16c(1) CLD).[153]

3.5.2.1. Format

As the name implies, the digital EU power of attorney exists only in electronic form. To overcome language barriers, the digital EU power of attorney is – like the EUCC – issued on the basis of a template available in all official EU languages (Art. 16c(4) CLD). The details are set out in an implementing act of the Commission (Art. 16c(4), 24(2)(e) CLD). Although the digital EU power of attorney is not explicitly mentioned in Art. 16g(1) CLD, the use of such a template implies logically that Member States shall at least endeavour not to require a translation. Moreover, the digital EU power of attorney must be authenticated by means of trust services referred to in the eIDAS Regulation and must be compatible with the European Digital Identity Wallet (EDIW) (Art. 16c(1) subparagraph 3 CLD).

Pursuant to Art. 16d(2) CLD, the digital EU power of attorney is exempted from legalisation or any other similar formality (e.g. apostille).

3.5.2.2. Member State option: registration

According to the Commission's draft, the digital EU power of attorney, any amendment to it, and any revocation was to be filed with the register where the company/partnership is registered.[154] However, such a registration requirement was not acceptable to all Member States in the Council[155]; apparently some Member States had concerns regarding the costs and efforts this would entail[156]. Hence, during trilogue negotiations it was agreed to relegate the registration requirement to a mere Member State option. This is regrettable, because

153 *Lieder*, NJW 2024, 2065 (fn. 14), 2069; *Jessica Schmidt*, NZG 2023, 593 (fn. 9), 601; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.

154 COM(2023) 177, Art. 16c(3) CLD-draft.

155 Cf. the Council's mandate for negotiations: ST 6538/24, Art. 16c(3) CLD-draft.

156 *Beurskens,* RDi 2024, 305 (fn. 14), 306; *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.

the evident advantage of such a registration requirement is that the authenticity and continuing existence of the power of attorney can be checked quickly, easily and reliably.[157] Thus, *de lege ferenda*, the digital EU power of attorney should generally be integrated into the national registers and into BRIS.[158]

Pursuant to Art. 16c(3)1 CLD, each Member State may require that the digital EU power of attorney, any amendment to it, and any revocation is to be filed in a register. This may be the business registers of this Member State or a different register[159], i.e. a Member State may establish a special register for digital EU powers of attorney[160]. The first option is certainly preferable to avoid market participants having to access a separate register.[161] In any case, the fees charged for obtaining access to the information about the digital EU power of attorney shall not exceed the administrative costs thereof, including the costs of development and maintenance of the register (Art. 16c(3)2 CLD).

3.5.2.3. Content

The detailed requirements regarding the content of the digital EU power of attorney will be specified in the template to be adopted by the Commission (cf. Art. 16c(4) sentence 1, 24(2)(e) CLD). However, pursuant to Art. 16c(4) sentence 1 CLD, it shall include at least the scope of representation, the person authorised to represent the company/partnership and the type of representation.

3.5.2.4. Grant, amendments and revocation

According to Art. 16c(1) subparagraph 2 CLD, the digital EU power of attorney shall be drawn up, amended and revoked in accordance with national legal and formal requirements. This begs the question whether the governing law is the law determined by the general rules of private international law or the *lex societatis*. Since the digital EU power of attorney is an authorisation to represent a company/partnership within the framework of company/partnership law, the express purpose of which is to authorise a person to represent a company/partnership in another Member State for the purpose of carrying out procedures within the scope of the CLD, the only solution supported by the rationale of the provision is that the governing law is the *lex societatis*.[162]

157 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.
158 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.
159 Cf. recital 28 sentence 3 DigiD II.
160 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.
161 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.
162 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571; with respect to the Commission's draft see already *Jessica Schmidt*, NZG 2023, 593 (fn. 9), 601.

Art. 16c(1) subparagraph 2 sentence 2 CLD lays down a minimum standard for the respective national requirements[163]: They shall include at least the verification of the identity, legal capacity, and authority to represent the company/partnership of the person granting, amending or revoking the power of attorney; moreover, this verification shall be carried out by courts, notaries or competent authorities. This ensures that a digital EU power of attorney can only be granted by a person authorised to do so.[164]

3.5.2.5. Evidentiary function

Pursuant to Art. 16c(2) CLD, the digital EU power of attorney shall be accepted as evidence of the authorised person's entitlement to represent the company as specified in the document. In view of the considerable practical problems that have existed to date with regard to proving the authority to represent a company/partnership in another Member State, the digital EU power of attorney thus constitutes a significant progress.[165]

However, according to recital 27 sentence 6 DigiD II this evidentiary value is without prejudice to the national rules relating to formation of companies and limitations on the use of powers of attorney in general. Presumably, this refers to instances where the relevant national law generally prohibits representation by an agent in the context of the formation of the company/partnership or during its "life".[166]

Furthermore, Member States may exceptionally refuse to accept a digital EU power of attorney provided that the requirements set out in Art. 16e CLD (reasonable doubt as to the origin or authenticity)[167] or Art. 16f CLD (reasonable doubt as to abuse or fraud)[168] are met.[169]

3.5.3. Recognition of copies and extracts from national registers

The CLD as amended by DigiD II still does not provide for an express general rule regarding the recognition of copies and extracts of documents and infor-

163 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571; see also *Stelmaszczyk/Wosgien,* GmbHR 2024, R164 (fn. 14), R165.
164 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571; similarly *Lieder*, NJW 2024, 2065 (fn. 14), 2069.
165 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.
166 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.
167 See in more detail infra 3.5.6.2.
168 See in more detail infra 3.5.6.3.
169 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 571.

mation stored in the national registers within the meaning of Art. 16a CLD. Art. 13g(2)2 CLD only addresses the specific case of online formation of limited liability companies, specifying that electronic copies of documents and information referred to in Art. 16a(4) CLD may be submitted for purposes of online formation – and thus must be recognised.

However, the CLD as amended by DigiD II now expressly provides that Member States may exceptionally refuse to accept copies and extracts from national registers if the requirements laid set out in Art. 16e CLD (reasonable doubt as to the origin or authenticity)[170] or Art. 16f CLD (reasonable doubt as to abuse or fraud)[171] are met.

Recital 26 sentence 2 DigiD II indeed emphasises that this should not be interpreted as implying a general mutual recognition principle in relation to all information and documents stored in national registers. However, if copies and extracts from the national registers of other Member States do exceptionally not have to be accepted if the requirements set out in Art. 16e CLD or Art. 16f CLD are met, this can *e contrario* only mean that they must be accepted if the requirements set out in Art. 16e CLD or Art. 16f CLD are not met.[172] This is presumably what recital 26 sentence 2 DigiD II (which is only a non-binding recital anyway) ultimately means: copies and extracts from the registers of other Member States do not have to be accepted generally, but only if the exceptions set out in Art. 16e and Art. 16f CLD do not apply.[173]

In fact, Art. 16e and Art. 16f CLD ultimately only substantiate the general principles which were already applicable before DigiD II: Naturally no Member State is required to accept register documents and information if they have been falsified or in case of abuse.[174] At any rate, it is an integral element of the European register disclosure system, that each Member State shall generally recognise the registers of the other Member States and the data disclosed therein.[175] Furthermore, recital 26 sentence 6 DigiD II highlights that Member States should ensure that different approaches between Member States as to how to carry out the preventive control, or differences in Member States' legal systems and legal traditions, do not serve as grounds for refusal.

170 See in more detail infra 3.5.6.2.

171 See in more detail infra 3.5.6.3.

172 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572; *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1866. Dissenting *Lieder*, NJW 2024, 2065 (fn. 14), 2069 f.; *Stelmaszczyk/Wosgien,* GmbHR 2024, R164 (fn. 14), R165.

173 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572; see also *Jessica Schmidt,* BB 2024, 1859 (fn. 14), 1866.

174 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.

175 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.

3.5.4. Exemption from legalisation and any similar formality

In the past, courts and authorities in some Member States (e.g. Germany) have required a legalisation or apostille for documents from other Member States, which generated costs and delays.[176] DigiD II has fortunately prohibited requirements of legalisation or similar formality (e.g. an apostille)[177] for several important documents from other Member States (Art. 16 d CLD). For these documents, the "guarantee of authenticity" which a legalisation or apostille provides, is not necessary, because their authenticity is already ensured by the relevant EU legal framework.[178]

Firstly, the exemption from legalisation and any similar formality applies to the EUCC, the digital EU power of attorney, and the pre-operation certificates in case of cross-border conversions, mergers, and divisions pursuant to Art. 86n, 127a, 160n CLD (Art. 16d(2) CLD). The authenticity of these "EU documents" is ensured by the relevant provisions of the CLD.[179]

Secondly, the exemption applies to copies and extracts of documents and information from the register of a Member State (including certified translations) (Art. 16d(1) CLD). However, in case of electronic copies and extracts, this is only the case where they have been authenticated in accordance with Art. 16a (4) CLD, so that their authenticity is ensured. Correspondingly, paper-based copies and extracts must include the date of issuance, the seal or stamp of the register (or an equivalent means), and show a feature (e.g. a unique protocol or identification number) that allows the electronic verification of the origin and authenticity of the document.

Thirdly, the exemption applies to notarial acts, administrative documents, as well as their certified copies and translations issued in a Member State in the context of the procedures of the CLD (Art. 16d(3) CLD). To ensure their authenticity, for electronic documents this requires their authentication by means of trust services referred to in the eIDAS Regulation; for paper-based documents, the same requirements apply like for register documents pursuant to Art. 16d(1) CLD.

176 *ICLEG*, Report on cross-border use of company information, 2023, para. 59; recital 29 DigiD II.

177 See the definitions in Art. 13a(12)-(13) CLD.

178 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572; see also *Lieder*, NJW 2024, 2065 (fn. 14), 2069.

179 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.

3.5.5. Restrictions on translation requirements

In cross-border situations, translation requirements often act as barriers. The EUCC and the digital EU power of attorney, which are based on templates available in all official EU languages constitute significant progress in this respect.[180] Above this, the Commission's draft had envisaged a comprehensive prohibition of translation requirements.[181] But this apparently went too far for some Member States.[182] The new Art. 16 g CLD introduced by DigiD II now only requires Member States to "endeavour" not to require translation of information accessible in the EUCC or via BRIS (Art. 16g(1) CLD) and lays down certain restrictions for translation requirements regarding other documents provided by national registers (Art. 16g(2) CLD).

Pursuant to Art. 16g(1) CLD, Member States shall endeavour not to require a translation of copies or extracts of documents provided by the register from another Member State, when the specific information needed about a company/partnership can be accessed and consulted in the EUCC (lit. a), or through BRIS and is identifiable through explanatory labels referred to in Art. 18 CLD (lit. b). In these situations, a translation is in principle superfluous, because the design of the EUCC and BRIS ensures that language barriers are largely removed. In fact, language barriers may only arise regarding the object of the company; but these could have been solved by requiring the disclosure of the object (also) in English.[183] Alternatively, the European legislator could have provided for machine translation services (like Art. 7(1)(e) ESAP Regulation[184])[185] or a requirement to disclose (additionally) the NACE code. In light of this, it is regrettable that the European legislator has only provided that Member States shall "endeavour" not to require a translation. This should be reconsidered in the context of the review of DigiD II.

Art. 16g(2) CLD sets out restrictions on translation requirements regarding the instrument of constitution, the statutes, and other documents provided by the national registers: When such documents are presented in another Member State, the latter may only require a certified translation when this is justified by

180 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 572.

181 COM(2023) 177, Art. 16 f CLD-draft. See on this *Jessica Schmidt*, NZG 2023, 593 (fn. 9), 601 f.

182 Cf. the Council's mandate for negotiations, ST 6538/24, Art. 16 f CLD-draft.

183 *ICLEG*, Report on cross-border use of company information, 2023, para. 62.

184 Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 establishing a European single access point providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability, OJ L, 2023/2859, 20.12.2023.

185 *ICLEG*, Report on cross-border use of company information, 2023, para. 62.

the purpose for which the document shall be used and is strictly necessary. The examples given are mandatory public disclosure requirements and presentation in judicial proceedings.

Art. 16g(3) CLD clarifies that Art. 16g(1) and (2) CLD are without prejudice to the special language rules laid down in Art. 21 and Art. 32 CLD.

3.5.6. Treatment of (potentially) defective documents

DigiD II for the first time introduced provisions on the treatment of (potentially) defective documents and information from the registers of other Member States. They concern the rectification of manifest errors (Art. 16f(3) CLD, → 3.5.6.1), reasonable doubts as to the origin or authenticity (Art. 16e CLD, → 3.5.6.2), and reasonable doubts as to abuse or fraud (Art. 16f(1)-(2) CLD, → 3.5.6.3).

3.5.6.1. Rectification of manifest errors

In case of manifest errors (e.g. clerical errors, transposed digits, mix-ups, etc.) the competent authority may alert the register from which the information or document originates with a view to seek its possible rectification before relying on the information or document, including for entries into its own register (Art. 16f(3) CLD). Strictly speaking, Art. 16f(3) CLD only says that this possibility exists. This wording results from the fact that the provision has been included in the same article as cases of abuse and fraud in order to clarify that such manifest errors must be clearly distinguished from cases of (potential) abuse or fraud.[186] Where a document or information evidently contains only a manifest error, the *effet utile* of EU law mandates that the competent national authority shall generally first seek a rectification and must not simply reject the document or information.[187]

3.5.6.2. Reasonable doubts as to origin or authenticity

Art. 16e CLD establishes a special procedure for cases where a national authority has reasonable doubts as to the origin or authenticity of a EUCC or of documents and information provided and certified as true copies by a register in accordance with Art. 16d(1) CLD. In such cases, the national authority must not simply reject the document or information. Instead, it must first check whether the document can be authenticated through electronic verifica-

186 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
187 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.

tion methods (*argumentum ex* Art. 16e(2) subparagraph 1 sentence 1 CLD).[188] If this fails, the national authority must submit a request for information in accordance with the procedure specified in Art. 16 e CLD and may only decide not to accept the document or information if their origin or authenticity is not confirmed (Art. 16e(4)1 CLD).

For this purpose, Member States shall notify electronic mail addresses as contact points (Art. 16e(1) sentence 1 lit. b CLD, recital 30 sentence 2 DigiD II). Hence, the entire procedure is carried out electronically. A request for information may then be submitted either (a) directly to the contact point of the register in the other Member State which has provided the documents, or (b) to the contact point of the Member State of the requesting authority. In the second case, that register shall verify the authenticity of the documents via BRIS with the register that provided them.

Art. 16e(2) CLD stipulates the formal requirements for the request for information. It must present the reasons for which the authority doubts the origin or authenticity of the document, including at least the failure of authentication through electronic verification methods (Art. 16e(2) subparagraph 1 sentence 1 CLD). Moreover, every request shall be accompanied by the copy or extract of the document or information transmitted electronically (Art. 16e(2) subparagraph 1 sentence 2 CLD). If these formal requirements are not complied with, the request shall be rejected without examination (Art. 16e(2) subparagraph 2 CLD).

If the formal requirements are complied with, the contact point shall reply to the request within a period not exceeding 5 working days (Art. 16e(3) CLD). The requesting authority may only decide not to accept the copies and extracts of documents and information only if the origin or authenticity is not confirmed (Art. 16e(4) sentence 1 CLD). In such case, it shall notify those who submitted such documents and information of that decision without undue delay and no later than 10 working days after receiving the reply from the contact point.

If this procedure is implemented and carried out pragmatically in all Member States, it will constitute a tremendous progress compared to the previous situation.[189] In particular, it is reasonable that the authority may only initiate the request procedure where it cannot check the authenticity itself through electronic verification methods (e.g. by a search in BRIS).[190]

188 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
189 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
190 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.

3.5.6.3. Reasonable doubts as to abuse or fraud

Art. 16f CLD, which was inserted by DigiD II upon the initiative of the Council[191], exceptionally allows national authorities to refuse to accept information or documents about a company/partnership from a register in another Member State in case of reasonable doubts as to abuse or fraud. However, Art. 16f CLD imposes strict formal and substantive requirements – and rightly so (→ 3.5.6.3.1, 3.5.6.3.2). Moreover, the refusal to accept the documents is without prejudice to the disclosure effects (→ 3.5.6.3.3).

3.5.6.3.1. Substantive requirements for refusal to accept documents and information

Firstly, non-acceptance of the documents or information must be justified by reasons of public interest to prevent abuse or fraud and there must be reasonable grounds to suspect fraud or abuse (Art. 16f(1) CLD). Thus, there must be concrete evidence.[192]

However, neither the operative part of the CLD nor the recitals to DigiD II define the terms abuse or fraud or provide examples. Yet, recital 26 sentence 6 DigiD II rightly emphasizes that different approaches between Member States as to how to carry out the preventive control, or differences in Member States' legal systems and legal traditions, must not serve as grounds for refusal.[193] In fact, this already follows from freedom of establishment (Art. 49, 54 TFEU).[194] Instances where a national authority may rely on Art. 16f(1) CLD may e.g. include cases of company identity fraud or cases where a debtor company tries to evade its creditors by multiple transfers of the registered office, name changes, etc., before finally filing for insolvency (known as "Firmenbestattung" ["company funeral"] in Germany).[195]

Secondly, refusal of acceptance is only permitted exceptionally and on a case-by-case basis (Art. 16f(1) CLD). Thus, national authorities must not refuse information or documents from the registers of another Member State systematically[196], because that Member State (allegedly) applies less rigorous standards;

191 Cf. the Council's negotiation mandate, ST 6538/24, Art. 16ea CLD-draft.
192 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
193 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
194 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
195 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
196 Cf. also recital 26 sentence 4 CLD.

instead, it must consider all circumstances of the individual case.[197] Refusal is the exception, not the norm.[198]

Thirdly, Art. 16f(1) CLD entitles a national authority only to refuse to accept information or documents as evidence of the registration of a company/partnership, its continued existence, or of the specific information subject to suspicion of fraud or abuse. Thus, if there are, for example, reasonable grounds to suspect that a company hijacker has appointed himself as director of a company, the national authority must not refuse to accept the existence of the company, but only that this person has been appointed as director.[199]

3.5.6.3.2. Formal requirements for refusal to accept documents and information

Moreover, Art. 16 f CLD provides for a consultation procedure.[200] If a national authority wants to refuse documents or information on the grounds of reasonable doubt as to abuse or fraud, it shall consult the register which provided the information or document (Art. 16f(2)1 CLD). Thereby, the register which provided the information or document can present its views (cf. recital 26 sentence 3 DigiD II).[201] It may thus, for instance, be possible to clear up any misunderstandings (example: An in-depth analysis of the legal system of the Member State of the register which provided the document shows that there is actually no abuse or fraud, but the company has only made legitimate use of the legal framework).[202] At the same time, this consultation procedure also alerts the register which provided the document or information about any potential problems.[203] If the national authority ultimately decides not to accept the information or document in accordance with Art. 16f(1) CLD, it shall in any case inform the register which provided such information or document (Art. 16f(2)2 CLD).

197 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
198 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573; somewhat less strict apparently *Lieder*, NJW 2024, 2065 (fn. 14), 2068; *Wachter/Heckschen/Stelmaszczyk/Wosgien* Praxis HandelsR/GesR, 6th ed. 2024, margin note 2382.
199 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
200 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
201 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
202 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.
203 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 573.

3.5.6.3.3. Continuing disclosure effects

Art. 16f(3) CLD expressly clarifies that the application of Art. 16(1)-(2) CLD is without prejudice to the application of Art. 16(5) CLD. So even if a national authority refuses to accept a document or information on the grounds of reasonable doubts as to abuse or fraud, the "negative publicity" of the register established by Art. 16(5) CLD continues to apply. Of course, this also encompasses Art. 16(5) CLD as applied to partnerships via Art. 16(7) CLD. Hence, the company/partnership may only rely on the document or information as against third parties after they have been disclosed, unless it proves that the third parties had knowledge thereof (Art. 16(5)1, (7) CLD), i.e. bona fide third parties may rely on the "silence" of the register. Moreover, third parties may always rely on the "true situation" (Art. 16(5) subparagraph 3, (7) CLD).

The same must consequently apply also to the "positive publicity" of the register (i.e. that bona fide third parties may rely on what the register "says"); it is also not prejudiced. Art. 8 CLD expressly provides for positive publicity with respect to irregularities in the appointment of company organs. However, since the amendment by DigiD I, the CLD no longer[204] contains an express general rule on "positive publicity" like the earlier provisions in Art. 3 (6) subparagraph 2 Publicity Directive and Art. 16(7) CLD 2017. Art. 16(4) subparagraph 3 CLD only states that "In cases of any discrepancies under this Article the documents and information made available in the register shall prevail." This has led some authors to conclude that EU law does currently not provide for any "positive publicity" of the register.[205] However, as explained in more detail elsewhere, Art. 16(4) subparagraph 3 CLD must be interpreted to the effect that third parties can rely on documents and information disclosed by being made publicly available in the register (unless they had knowledge that they are incorrect).[206] This view is also favoured by

204 Such a provision was included in Art. 3(6) subparagraph 2 Publicity Directive (= Art. 16(7) subparagraph 2 CLD 2017).

205 *Jan Lieder*, "Die Bedeutung des Vertrauensschutzes für die Digitalisierung des Gesellschaftsrechts", NZG 2020, 81, 87; *Christian Linke*, "Gesetz zur Umsetzung der Digitalisierungsrichtlinie (DiRUG). Analyse des Regierungsentwurfs", Neue Zeitschrift für Gesellschaftsrecht (NZG) 2021, 309, 313; see also *Sebastian Omlor*, "Digitalisierung im EU-Gesellschaftsrechtspaket: Online-Gründung und Registerführung im Fokus", Deutsches Steuerrecht (DStR) 2019, 2544, 2548.

206 Seminal: *Walter Bayer/Jessica Schmidt*, "BB-Gesetzgebungs- und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2018/19 – Teil I: Company Law Package", BB 2019, 1922, 1925; see further *Peter Krebs,* in: Münchener Kommentar zum HGB, 5th ed. 2021, § 15 HGB mn. 3; *Ulrich Noack*, Unternehmensrechtliche Notizen, 30. August 2019; *Jessica Schmidt*, "Company Law Package: Collateral Damage – ausgewählte Zweifelsfragen und Redaktionsfehler –", in Stefan Grundmann/Hanno Merkt/Peter O. Mülbert (eds.), Festschrift für Klaus J. Hopt zum 80. Geburtstag am

ICLEG.[207] After all, why would the European legislator have made the effort to ensure that registers are established in all Member States when the public could not rely on them?[208] Moreover, it would be highly contradictory if bona fide third parties could rely on the "silence" of the register (Art. 16(5) subparagraph 1 CLD), but not on what the register "says".[209]

To sum up: Even if a national authority refuses to accept a document or information from the register of another Member State, this does not affect the possibility of bona fide third parties to rely on this document or information.

3.5.7. Assessment

The comprehensive measures to facilitate proof and mutual recognition of company information constitute an important milestone in the evolution of the EU register and disclosure system. Their implementation will make the professional practice of companies, authorities and stakeholders significantly easier, faster and more efficient.[210] At the same time, the harmonised standards ensure that the security and reliability of the registers is not only ensured, but significantly improved.[211]

4. Summary and conclusion

I. DigiD II addresses two key issues: transparency of company data and cross-border use of company data.

II. The reforms to improve the transparency of company data include in particular

- targeted amendments as regards limited liability companies;
- introduction of harmonised disclosure standards for commercial partnerships;

24. August 2020, 2020, 1097, 1099 f.; *Jessica Schmidt*, "DiRUG-RefE: Ein Digitalisierungs-Ruck für das deutsche Gesellschafts- und Registerrecht", Zeitschrift für Wirtschaftsrecht (ZIP) 2021, 112, 119.

207 *ICLEG*, Report on cross-border use of company information, 2023, para. 45 ff.

208 *ICLEG*, Report on cross-border use of company information, 2023, para. 47.

209 *ICLEG*, Report on cross-border use of company information, 2023, para. 47; *Jessica Schmidt,* FS Hopt, 2021, 1097 (fn. 208), 1099 f.

210 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 574.

211 *Jessica Schmidt*, NZG 2024, 563 (fn. 14), 574.

- disclosure of certain key information about groups of companies;
- interconnection of BRIS, BORIS and IRI.

III. The reforms to improve the cross-border use of company data include in particular:

- extension of the "once-only" principle;
- harmonised minimum standards for preventive control in case of formation and filing;
- measures to ensure that registers are up to date;
- introduction of an EU Company Certificate (EUCC) and a digital EU power of attorney;
- acceptance of EUCC, digital EU power of attorney, as well as documents and information from the registers of other Member States as evidence, coupled with provisions permitted to exceptionally refuse acceptance in case of reasonable doubts as to origin, authenticity, abuse or fraud;
- exceptions from requirements of legalisation and translations;
- alignment with the revision of the eIDAS Regulation.

IV. Some points could have been optimised. Moreover, DigiD II could have been a little bit more progressive. But altogether, DigiD II signifies a major leap forward towards a more digitalised company law framework and a more efficient use of company information in cross-border situations.