

Desarrollo del Derecho de Sociedades en la UE

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Directive 2017/1132: (partial) codification of the EU Company Law

Posted on **10 de julio de 2017** por **Carles Górriz López**

1. The Action Plan 2012 seems to start bearing fruit. In 2014, the Commission adopted the [Recommendation of 9 April 2014 on the quality of corporate governance reporting](#). It remained loyal to the principle “comply or explain”, but it proposed some improvements. Essentially it asked listed companies to enhance the explanations when they do not comply with the corporate governance codes. Three years later, the European Parliament and the Council have approved Directive 2017/828 of the European Parliament and of the Council, of 17 May 2017, amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. As I briefly commented in “[Directive 2017/828 on the encouragement of long-term shareholders' engagement](#)”, the aim is threefold: to improve medium- and long-term shareholder's engagement, to increase control over directors' remuneration and to restrain transactions with related parties. Barely one month later, another law has been passed: [Directive 2017/1132 of the European Parliament and of the Council, of 14 June 2017, relating to certain aspects of company law \(codification\)](#).

It has 168 articles and four Annexes. Title I contains the general provisions and the establishment and functioning of limited liability companies. After determining the subject matter (Chapter I), Chapter II rules the incorporation and nullity of the company. Chapter III governs the disclosure of information regarding companies and the branches, as well as the interconnection of central, commercial and companies registers. Title I finishes with the provisions devoted to the share capital: Chapter IV establishes the capital requirements, its safeguards, the distribution to shareholders, the acquisition of the companies' own shares and the increase and reduction of capital. Mergers and divisions are the object of Title II. The first Chapter contains the general provisions that are applied to all kind of mergers. The second is addressed to cross-border mergers. The third and last one governs divisions. The last Title of the Directive has the final provisions.

Regarding the annexes, the first two list the types of companies to which some articles refer. The third one enumerates the codified Directives, with a reference to their amendments and the limits for their transposition into domestic laws. Annex IV has a correlation table: links the articles of the merged Directives with the new ones. Directive 2017/1132 enters into force on the 20th day after its publication in the OJ, which has taken place the 30 June 2017.

2. Directive 2017/1132 is an answer to the methodological concerns the Commission expressed in the Action Plan 2012. It codifies six previous Directives, that are repealed. They are the following ones:

- Sixth Council Directive concerning the division of public limited liability companies (82/891/EEC)
- Eleventh Council Directive concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC)
- Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies
- Directive 2009/101/EC of the European Parliament and of the Council on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent
- Directive 2011/35/EU of the European Parliament and of the Council concerning mergers of public limited liability companies
- Directive 2012/30/EU of the European Parliament and of the Council on coordination 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 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital.

The aim is legal certainty. The before mentioned Directives had been substantially amended several times. Hence, it was difficult to know the exact rules that were in force. To dispel the doubts, the Commission decided to merge their current versions, looking for clarity and rationality. It holds that their provisions will now be easier to interpret, transpose and apply. In my humble opinion, the Commission is right, because there is only one legislative text. Although there are some referrals, they are internal. Therefore, the jurist does not need to handle two or more legal texts at the same time. Secondly, it is correctly systemized. Thirdly, each article has a 'title' that helps to identify the content. Lastly, Annex IV contains a correlation table links the provisions of the repealed Directives with the corresponding ones of the 2017/1132.

3. Nonetheless, the new Directive has an important weakness: the lack of ambition. On the one hand, it merely brings together the provisions established by the repealed Directives, without improving their content. The only amendments it introduces are the formal ones that the

codification technique requires. But there is no intention to modify the meaning, address the doubts or improve the repealed provisions. As the Commission described in the [explanatory memorandum](#) of the Proposal:

“... this proposal fully preserves the content of the acts being codified and hence does no more than bring them together with only such formal amendments as are required by the codification exercise itself”.

As it does not introduce any new legal rule, there is no date for the Member States to transpose it. Annex III remembers the time limit to incorporate the abolished Directives into the domestic legal systems.

On the other hand, the codification is partial: it only amalgamates the six referred Directives. There are others that also appertain to the EU Company Law and which contain could also had been included in Directive 2017/1132. For instance, the European Economic and Social Committee suggested extending the codification to the following Directives:

- Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2006/48/EC and 2006/49/EC as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies
- Directive 2004/25/EC of 21 April 2004 on takeover bids
- Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees
- 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. Notwithstanding, it is important to take in mind that this legal instrument will be amended whether through the proposal of *Directive Unius Personae*
- Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents
- Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts
- Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.

The codification of all them in one legislative instrument would had improved the effectiveness of the EU Company law. It would had enhanced its unity and coherence, easing the understanding, application and knowledge. The fact that these other Directives have not been amended so many times as the repealed ones does not justify, in my humble opinion, their exclusion.

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