



# Online establishment of companies: the case against an European “preventive administrative or judicial control”

Alessio Bartolacelli  
*University of Macerata*



# First of all: what's a company?

Art. 54 TFEU

"Companies or firms **formed in accordance with the law of a Member State** and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms **constituted under civil or commercial law**, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

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# So, domestic competence

Reassessed by the EUCJ as well, from the *Daily mail* decision on “companies are **creatures of the law** and, in the present state of Community law, creatures of **national law**” (Daily Mail, § 19)

So:

- it's **domestic law** that establishes how to form them...
  - ...but a **few rules** come from the **EU**
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# EU rules on companies' formation

Directive (EU) 2017/1132, title I, chapters II (section 1) and III (CodDir)

Scope of application: **varies** from just public companies (annex 1), to all the companies (annex 2), to at least private companies (annex 2a)

How are companies established?

- “**Classic**” formation: mainly up to the MS
  - **Online formation** (mandatory just for private companies): arts 13 on CodDir, amended by Directive (EU) 1151/2019
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# Any general rule of harmonisation?

Yes! Art. 10 CodDir, addressed to the MS (Chapter I, section 2, scope: **all company forms**)

**“Drawing up and certification of the instrument of constitution and the company statutes in due legal**

In all Member States **whose laws do not provide for preventive administrative or judicial control**, at the time of formation of a company, the instrument of constitution, the company statutes and any amendments to those documents shall be **drawn up and certified in due legal form.**”

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# This means that...

In all the MS...

...for all the company types...

...the formation procedure implies that there are either:

- **Preventive administrative or judicial control** at the time of formation,  
or
  - **Drawing-up and certification** *in due legal form*
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# A few – traditionally overlooked – interpretative questions (1)

- **Preventive...**
    - With respect to what? Reasonably: coming to existence of the company, and therefore, at least in most of the cases, registration
  - **...administrative or judicial...**
    - The core issue: see *infra*
  - **...control...**
    - On what, precisely? See *infra*, again
  - **...at the time of formation**
    - *Id est?* reasonably, when the instrument of constitution is drawn up, necessarily before its registration
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# A few – traditionally overlooked – interpretative questions (2)

- **Due legal form**
    - A huge problem: “due”, on what basis?
      - European? or
      - Domestic?
  - The answer?
    - If companies are **creatures of domestic law**, therefore the conditions must be laid down by domestic law
    - And **domestic law might also be an implementation of the European Law**; European Law should not lay down conditions directly
      - On the contrary, e.g., in the Italian translation of art. 10 CodDir “Due legal form” is (mis)translated into “atto pubblico”, which has a specific normative meaning
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# Control – or certify... why?

Art. 10 is **functional to** art. 11, on **nullity**

## “Article 11 – Conditions for nullity of a company

The laws of the Member States may not provide for the nullity of companies otherwise than in accordance with the following provisions: [...]

(b) nullity may be ordered only on the grounds:

(i) that no instrument of constitution was executed or that the rules of **preventive control or the requisite legal formalities were not complied with**”

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# Control – or certify... why?

Therefore, the **control or certification is aimed at preventing the nullity** of the company, to offer reliability to the market players with reference (inter alia) to the correct establishment of the company

But, again, correct with a view to the **rules laid down for the establishment of a company**. Laid down *by the domestic law*, not by EU Law, as companies are creatures of domestic law

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# Therefore, control – or certify... what?

The formal and substantive content of the instrument of constitution...  
...whose **requirements are mainly laid down by the domestic law**

Is there **room for EU Law**? Partially, yes:

- **Public companies:** arts 3 and 4 (+ art. 11) CodDir (minimum content of the instrument of constitution);
  - **Private companies?** Not very much:
    - From a **general perspective: no requirement apart from art. 11 CodDir** (“name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company”)
    - **No help from the new rules on online establishment:** art. 13h.4 on templates for online formation of companies: “The content of the templates shall be governed by national law.”
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# Therefore, control – or certify... what?

This means that the **scope** of control of certification, according to **EU Law**:

- Is limited to a **few profiles of public companies**
- Leaves **basic freedom** – according to a principle of regulatory competition – for **private companies**

However, for sure, at least the control/certification of the **identity of the parties** is needed

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# Control – or certify... how?

The core question, from a systematic point of view

Who decides **how pervasive**

- the administrative or judicial control; and
- the *due legal form*

**must** be?

According to the previous reasoning, **just the MS**

- With the **abovementioned minimum requirements on the *what***
  - But with ***no European obligation*** regarding the ***who*** must perform the control, or issue the certification
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## Control – or certify... how?

Said in a different way, *once the minimum obligations laid down by the EU Law are met (regarding the **content** of the instrument of incorporation), MS are free to decide the **extent** and the **body/officer entitled** either to perform the control or to issue the certificate*

As for the control, e.g., also just the **administrative officer at the Trade Register**

As for the certification, it's up to the *Member State*, and not to the EU decide the **actually due legal form**

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# Control – or certify... how?

An application?

- The *due legal form* can be, for instance, the **Italian *atto pubblico***, necessarily drawn by a public notary, but it is not needed due to the European Law
    - In spite of the misleading translation of art. 10 CorDir (and now also arts 13h, 102, 108, 148, 153)
    - Therefore, for instance, Italy is free to decide a *different* due legal form...
    - ...or even to **leave freedom of form**, once it (Italy, and just Italy) decides that the *preventive* administrative or judicial control are sufficiently effective
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# What does this all mean?

That the control/certification upon a company's establishment is another of the areas where the **regulatory competition** is present

Once the MS are compliant with the (loose) European rules, there is nothing in the EU Law that obliges them to have a minimum level of effectiveness in the *preventive administrative or judicial control*, nor in the definition of the *due legal form*

In addition, the **concept of *due legal form* is not given by the EU**, and is left to the Member States in its actual definition. Any different claim, even if it comes from the very text of the (European) law, is excessive.

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# What does this all mean?

A further development – or just a necessary fallout – in this sense is that the **MS are basically free to decide to exclude public notaries** from the process of establishment of a company, at least in general cases

This already happened in **France** and **Portugal**; but not in the digital incorporation process of companies according to the Directive (EU) 1151/2019

- On the other hand, consistently with this general view I propose, it was not up to the EU to decide to get rid of the notaries...

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Thank you very much for your  
attention...  
and for your questions I hope!

*alessio.bartolacelli@unimc.it*

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