Prevention of organised crime:
The registration of legal persons and their directors and the international exchange of information

a comparative legal study in the EU Member States on the possibilities for the improvement of the international exchange of information on legal persons with the purpose of (transnational) organised crime prevention

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I. INTRODUCTION

1. Background

Recommendation No. 8 of the Action plan to combat organised crime, adopted by the Council of the European Union on 28 April 1997, reads as follows:

'Member States shall, with respect to legal persons registered in their territory, seek to collect information, in compliance with the relevant rules relating to data protection, with respect to the physical persons involved in their creation and direction, as well as their funding, as a means to prevent the penetration of organized crime in the public and legitimate private sector. It should be studied how such data could be systematically compiled and analyzed and be available for exchange with other Member States and, where appropriate, with bodies responsible at Union level for the fight against organized crime, on the basis of appropriate rules to be developed by the Council...'

Within the framework of the Netherlands presidency in the first half of 1997 and during the European Union Conference on Crime Prevention held in Noordwijk, May 1997, attention was paid to the prevention of organised crime, in pursuance of this Recommendation in the Action Plan, and in particular to the role of legal persons - as an instrument or as a front - in all forms of organised crime. The possibilities of preventing organised crime that damages the integrity of business and the government, with the help of criminal audits, was also a main consideration.

During the preparation of the European Union Conference on Crime Prevention, the Ministry of Home Affairs of the Netherlands had commissioned a research project on the 'Prevention of and administrative action against organised crime - a comparative study of the registration of legal persons and criminal audits in eight EU Member States' (1997). The following year a follow-up study was commissioned by the Ministry of Justice of the Netherlands on 'The sanction of deprivation of the right to act as director of a legal person - a comparison of criminal and other bans on the exercising of professional activities / bans on the holding of directorships' (1998). Both research projects were undertaken by the T.M.C. Asser Instituut.

The first study was carried out by distributing questionnaires among relevant public and private bodies and experts in the countries to be investigated (Belgium, France, Germany, Italy, the Netherlands, Spain, Sweden and United Kingdom). These bodies and experts were requested to describe the situation with regard to their own country. In addition, relevant literature on the subject was perused. The first study concerned two subjects. Firstly, it was asked whether requirements regarding the establishment, registration and dissolution of legal persons play a part in the prevention of the abuse of those legal persons (attention was also paid to the question whether information from official registers can be used and is actually used when investigating irregularities). Secondly, possibilities that governments have to exclude legal persons, which are known or suspected to be used for, *inter alia*, criminal purposes in European as well as national tenders were explored. In this latter case, the question of the possible use of 'criminal audits' was the main issue. The study has shown that the prevention of the abuse of legal persons is a relatively new issue in many of the countries that were investigated. Little legislation has been developed for the prevention of crime; this situation often leads to applying regulations that were written for other purposes. Requirements regarding the establishment and registration of legal

persons, for instance, are traditionally focused on the protection of individual parties concerned and not on the prevention of crime. Governments that wish to exclude criminal organisations from public tender procedures often have to utilise legal means which were not developed especially for that purpose.

The same methodology was also used in the follow-up study, in which it was asked whether the countries to be investigated (Belgium, France, Germany, Italy, the Netherlands, Spain, Sweden, United Kingdom, United States of America (federal law, as well as New York and Texas)) have the possibility to deny certain delinquents the authority to be a director of a legal person and, furthermore, whether this possibility can be utilised in practice and whether it is effective, i.e. whether it actually serves as a deterrent. The purpose of the investigation was to enable the Ministry of Justice of the Netherlands to consider the usefulness of explicitly adding this sanction or measure to the existing set of instruments in order to prevent the abuse of legal persons. The study further ascertained whether there are possibilities within the context of the European Union to come to a common policy, uniformity of regulations or other forms of co-operation. The result of the study was that all investigated countries have certain legally arranged possibilities at their disposal to prevent persons from exercising certain professions or activities. The study further established that the competence to impose the sanction of deprivation of the right to act as a director of a legal person belongs to the authorities in all investigated countries. No reliable conclusions could be drawn about the implementation and enforcement of the legislation in question, owing to the fact that only a few countries collect relevant data in a systematic way.

Policy implications and further steps

In November 1998, the Ministry of Justice of the Netherlands presented the following conclusions to the European Council's Multidisciplinary Group on Organised Crime on the basis of both above-mentioned studies.

For nearly all forms of organised crime, especially financial and economic crime, legal persons play an integral role. The ambition towards a higher level of transparency in this area is not only in the interest of the prevention of and combat against organised crime, but it is also of interest for the maintenance of the integrity of business, the government and certain sensitive professional groups in general. The integrity of the decisions regarding (European and national) tender procedures, the granting of subsidies and permits also is at stake. Finally, transparency promotes legal security in international economic relations. It is of great importance that the Member States have adequate information regarding legal persons that operate in their countries, the physical persons who are in charge of the legal persons and the relationships between legal and physical persons. In almost all Member States, the possibility exists to deny persons who have committed serious forms of financial or economic crime, the right to perform as a director of a legal person for a certain period. According to the 1998 follow-up study, there is no structured exchange of information on those sanctions between the Member States. This is an unfortunate state of affairs, if we take into consideration the further internationalisation of organised crime.

In February 1999, at the Symposium on the (draft) United Nations Convention against Transnational Organized Crime in Rome, the Minister of Justice of the Netherlands stressed that the subject of the 'prevention of organised crime' should be added to the draft Convention. Once again he emphasised the importance of improving the transparency of

legal persons. Therefore, high priority had to be given to the international exchange of information about legal persons and their directors. In this way, states must reach agreements in this area and establish common structures. However, this was not meant to be a plea for setting up new databases, since better use should be made of already existing tools. In the Minister's view, a first step should be an inventory of information regarding legal persons that is available in the individual states. The revised Draft UN Convention against Transnational Organized Crime contains two special articles on the prevention of organised crime. Article 22(a) requires States Parties to prevent the misuse of legal persons by organised crime through (i) the collection and storage of information on legal persons and natural persons involved in their establishment, management and funding, (ii) the deprivation of the right of persons convicted for organised criminal activities to act as directors of legal persons incorporated in their jurisdiction, (iii) the establishment of national registers of persons disqualified as directors of legal persons, and (iv) the exchange of these types of information with competent authorities of other States Parties.

With this in mind, the Ministry of Justice of the Netherlands concluded to take measures to ascertain the advisability to have a study performed into the possibilities of actual, cross-border exchange of data on legal persons, and in particular: (a) the possibilities of arriving at procedural arrangements within the not too distant future, which will lead to an opening-up and actual, cross-border exchange of data on legal persons; and (b) the possibilities of arriving at a structured, cross-border exchange of information on natural persons who have been denied the right to act as director of a legal person.

Europol

According to the Europol Convention, which is based on the Treaty of Maastricht, the mandate of Europol consists of the prevention as well as repression of organised crime in EU Member States. Recently, the Treaty of Amsterdam has further strengthened the co-operation between Member States in the field of justice and home affairs ('third pillar'). Current mandated crime areas are: unlawful drug trafficking; trade in human beings; child pornography; illegal immigrant smuggling; trafficking in nuclear and radioactive substances; terrorism; illegal money laundering; counterfeiting money and other means of payment; and motor vehicle crime.

On 30 November 1998, with reference to the Action Plan to combat organised crime, the Council of the European Union adopted a resolution on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it. The resolution invites the Member States, Europol and the Commission, each within their respective competencies, to study the matter and related questions. Thereafter, the Commission and Europol are invited to co-operate in the preparation of a comprehensive report by the end of 2000, which in particular makes proposals on how prevention measures could be promoted in future work at the European level, and in particular on how they could be reflected in the legislative process; analyses what measures for the prevention of organised crime, by which bodies and at what level seem appropriate with a view to optimum effectiveness; analyses proposals for the encouragement of the evaluation of measures for the prevention of organised crime; analyses to what extent preventive measures can be taken at the European level (particularly in the light of the Treaty of Amsterdam); makes proposals for drawing up and updating a repertory of good practice in the area of organised crime prevention; analyses to what extent ideas and measures for

the prevention of organised crime could be taken into account in the process of enlargement and relations with third States.

Europol's preventive intervention task is focused not only on the phenomenon of organised crime itself, but also on private industry and public administration at the national and European level. This is the result of experience which demonstrates that criminal enterprises behave like average firms, act among private industry and need facilities of public administration. Like legitimate corporations, the wider the scale of organised criminal activities, the more important is the streaming of its `lifelines' as procurement, transport, financing, security, or distribution. In the international context they may take advantage of the low level of unity in administrative procedures, transparency, legislation and co-operation within and between bodies of public administration. As a result, the facilitating opportunities for organised crime are considerable.

In view of the `Organized Crime Prevention 2000 Report', Europol envisages five projects as catalysts for the subject. One of them is `the development of a European-wide structure of access to national directories of legal persons and related organised crime prevention and combating data'.

2. Outline of research

2.1 Purpose of research

Based on the information noted above, it can be concluded that both the Ministry of Justice of the Netherlands and Europol agree about the usefulness of research into the possibilities to implement and improve international co-operation in the field of the exchange of information on legal persons. The results of the study can be used to support the prevention and repression of organised crime, the prevention and repression of the intrusion of organised crime into the society at large (public administration, legitimate industry) in order to maintain its integrity. Furthermore, this study can be used to strengthen the integrity of administration and legitimate industry as well as the transparency of the economy.

A follow-up study concerning the exchange of information on legal persons between EU Member States also was one of the final recommendations in the T.M.C. Asser Instituut's first report of 1997. It was established that there does not exist any structured international exchange of information on legal persons between EU Member States. Studies into the international aspects of the matter (cross-border crimes, abuse of foreign legal persons) and into the drafting of possible new relevant legislation were the other recommendations.

2.2 Scope

The basis for the study to be undertaken was outlined in the T.M.C. Asser Instituut's first report, which could be considered as a pilot study on the matter. In that study the following aspects of each selected country were dealt with:

- forms of incorporation;
- establishment of limited companies: co-operation with public authorities, preventive authorisation;
- registration of limited companies, shareholders, bankruptcies;

- identification prior to the carrying out of essential legal acts concerning the limited company;
- background investigations;
- steps undertaken against `empty companies' or companies in contravention of the law;
- most widely used and abused legal persons;
- use of information from official registers for the investigation of irregularities.

The present study will concern all EU Member States and consist of three parts or phases:

First phase:

Countries to be surveyed:
An inventory of the existing situation concerning the registers and databases on legal persons in the fifteen EU Member States will be compiled. This will be an `upgrading' of and follow-up to the inventory taken by the T.M.C. Asser Instituut in its first report with regard to eight EU Member States, i.e. Belgium, France, Germany, Italy, the Netherlands, Spain, Sweden, and the United Kingdom.

Questions:
The following, main questions will be asked:

a. What kinds of registers and databases on legal persons exist? This includes the registers and databases that are available in private industries and in `open sources', such as the Internet.

b. Which bodies administer these registers and databases? This implies that all centralised and decentralised institutions in the Member States that administer them have to be defined.

c. What kind of data comprises the registers? This implies an inventory of the precise contents of the registers and databases and of the ways and means to search for information.

d. Who has access to the registers and databases, for which purposes and under what conditions (cf., rules for data protection, financial aspects)?

e. Which data should be available for practitioners (criminal justice, public administration and industry) in order to serve effectively?

Second phase:

International exchange of information:

a. Who has access to the registers in other EU Member States, for what purposes and under what conditions?

b. What is the position of Europol and the European Commission (European procurement procedures) in this respect?

c. Which forms of co-operation already exist under (a) and (b) and what are the difficulties encountered?

These questions imply research into all legal aspects that are relevant in the context of the exchange of information between EU Member States, as well as EU Member States and Europol and the European Commission. Possible relevant legal aspects are: the legal and institutional basis of the registers and data bases; the public or private character of the registers; and the applicable data protection regimes.

Third and final phase:

Evaluation

How can the existing situation with regard to the international exchange of information be improved?

This examines whether a set of common organisational and procedural measures for a better international exchange of information could be formulated that would be acceptable to all EU Member States.

Ultimate purpose of the present study

The results gathered from the above survey address the existing situation with regard to the international exchange of information and how it can be improved. Furthermore, whether a set of common organisational and procedural measures for a better international exchange of information that would be acceptable to all EU Member States can be devised will be examined.

Additional questions

At a later stage during the research process, two additional research questions have been added:

1) In particular, to what extent are *disqualification orders* (bans on conducting business) registered in the various EU Member States?
2) *Criminal investigations* of legal persons: what kinds of data are required and which databases are used?

Ad 1) Disqualification orders

One of the ways in which persons that tend to abuse legal persons can be prevented from re-offending is to ban them from acting as directors of legal persons for a specified period. This ban on conducting business (disqualification order) concerns the prohibition of the court or other administrative body to exercise the function of director of a legal person for a limited or limited person.

In the above-mentioned study of 1998, the T.M.C. Asser Instituut evaluated the situation with respect to seven EU Member States (Belgium, Germany, United Kingdom, France, Italy, Spain, Sweden) and the United States. This study has demonstrated that such punishment already exists in one form or another in various EU Member States.
Upon (an additional) request of the Ministry of Justice of the Netherlands, the current study will address the situation with respect to disqualification orders in all Member States, to the extent that information was provided by the Member States. Questions 11(a) and 23 of the questionnaire address the national registrations and regulations of disqualification orders.

Ad 2) Criminal investigation
Further questions that Europol wanted to have addressed in this study concern the process of criminal investigations of legal persons, the gathering of data on legal persons and the exchange of information with other Member States and with the European Union in this respect.
A questionnaire has been drawn up at a later stage of the research process containing a number of questions concerning the process of criminal investigation and data and information exchange. The questionnaire has been sent to the Heads of Europol National Units (via Europol Liaison Officers).
The questions concerned the following: the character and frequency of the crimes committed by legal persons; preventive checks that were made and the problems encountered when checking data; and the kinds of databases that were being used and their nature.

Delineation of the scope of the present study

It should be noted that this study mainly focuses on limited liability companies, since these are most frequently misused. Other legal entities are taken into account to the extent that information on them was provided by our respondents. Furthermore, this study mainly discusses legal entities that are established according to the laws of the respective EU country. The misuse of legal entities established in non-EU Member States is, again, discussed to the extent that information was provided by our respondents. The same goes, finally, for the discussion of (non-official) commercial databases in addition to official registers, since the primary focus is on official registers.

Terminology: limited liability companies

Some confusion may arise as regards the indication of limited liability companies. In continental Europe, a distinction is usually made between share or stock companies on the one hand and limited liability companies on the other. The UK and several other countries discern between public and private limited companies, which are both considered to be limited liability companies.
In order to avoid this confusion, this report uses the general (umbrella) term ‘limited liability company’ when referring to both public and private limited companies or share companies and limited liability companies. When referring to public and private limited companies, the terms public/share company and private/limited liability company are used interchangeably (depending on the country).

3. Method of research

The study reflects research into relevant legislation, documentation and literature in each selected country, and interviews with experts and practitioners in the field. Extensive use has been made of the earlier two research projects carried out by the T.M.C. Asser Instituut (1997 and 1998).

Additionally, relevant bodies of public administration, academic and other institutions have been requested to reply to a general questionnaire on the registration of legal persons (see Annex 3). As mentioned above, a second questionnaire dealing with investigations of legal persons and data required has been sent to the Heads of Europol National Units (see Annex 4).

4. Partner-organisations

For the purposes of this research, the T.M.C. Asser Instituut has sought the co-operation of two partners, Prof. Dr. G. Heine from Giessen University, Germany and Prof. Dr. S. Arrowsmith from the University of Nottingham, United Kingdom. As experts in the field, both were asked to comment upon the final version of the report.

5. Advisory Committee

Futhermore, the T.M.C. Asser Instituut was advised by an Advisory Committee, consisting of the following members: Mr. J. Lely (Ministry of Justice, the Netherlands), Mrs. H.A. Blomberg (Ministry of Justice, the Netherlands), Mr. A. Dekker (Europol), Mr. R. de Heer (Europol), Mr. V.A.E.M. Meijers (de Brauw Blackstone Westbroek/ Leiden University), Mrs. I.C.W.R. Rusz (Dutch Association of the Chambers of Commerce) and Mr. J.J. Nuss (Falcone Committee, European Commission).

6. Structure of the report

The structure of this report is as follows. Chapters II-IV are substantial chapters dealing with a particular aspect of the topic of this research. In Chapter V, overall conclusions will be drawn and a number of recommendations will be made.

Chapter II of this study deals with the problem that is faced when dealing with crimes committed by legal persons. It addresses the process of criminal investigation of legal persons, the gathering of data on legal persons and the exchange of information with other Member States and with the European Union. The results are based on a questionnaire that has been sent to the Heads of Europol National Units.

Chapter III deals with the facts, i.e. general data concerning legal persons. Attention is first paid to European law with respect to the registration of legal persons. Then, based on existing literature and answers provided to the questionnaire, each EU Member State is discussed in a separate country report. The country reports deal, for example, with the use and misuse of legal entities, the establishment and registration of (limited) companies, identification and investigation, privacy, and sanctions.

Chapter IV deals with the improvement of the exchange of information on legal persons. For this chapter, the answers to the second part of the general questionnaire are used. The extent information is already exchanged internationally and which foreign databases are used are considered. How the exchange of information between legal persons can be improved is also addressed.

In Chapter V, overall conclusions are drawn that may serve the European Commission, Europol, the Netherlands Ministry of Justice and Member States in the improvement of the exchange of data on legal persons.

II. CRIME INVOLVING LEGAL PERSONS: THE EXPERIENCES OF LAW ENFORCEMENT AGENCIES

1. Introduction

As mentioned in the previous chapter, it has been asserted on numerous official occasions that crime involving legal persons constitutes a serious problem that penetrates the public and legitimate private sector and threatens the transparency of (international) trade as well as that of society as a whole. This chapter deals with the practice of law enforcement agencies in investigating legal persons and their directors. It analyses the types of crime involving legal persons that law enforcement agencies encounter and their experiences concerning the use of databases in this respect. The findings are based on the response of several police organisations and crime investigation departments in all EU Member States to questionnaires that were distributed via Europol (see Annex 4).

Attention will first be paid to the involvement of legal persons in crime (section 2), in particular, how they are involved in crime, the types of crime that exist in this respect and the incidence of these types of crime. Secondly, possible measures for the prevention of organised crime are discussed (section 3). In this respect, a distinction is drawn between factors that 'stimulate' and factors that 'facilitate' the abuse of legal persons. Thirdly, crime prevention and the (international) exchange of information is addressed (section 4). It is made clear that crime prevention requires a different approach with respect to data collection than repression of crime. Finally, the experiences of law enforcement agencies with the use of databases is discussed (section 5). In particular, the differences between governmental and commercial databases are discussed. The issue of whether and to what extent they can be used for the prevention of organised crime is highlighted.

For the purposes of this chapter, it is important to make a distinction between crime prevention and crime repression. The latter is the more traditional way of fighting crime: a crime has been committed and is investigated in order to prosecute criminals and to bring them to justice. Crime prevention is a more proactive way of fighting crime in that it aims to minimise the factors that facilitate and encourage crime. Whereas prevention precedes a crime, repression follows the commission of a crime. However, repression can also have preventive effects. A potential criminal may be deterred by the repression of similar crimes committed by others, for example, by the introduction of strict penalties, or where the likelihood of being caught is great. This type of crime prevention, though, is not the starting point of this report, which focuses in particular on the prevention of crime in its proactive form.

Secondly, a distinction should be made between the so-called 'volume crime' and 'organised crime'. 'Volume crime' concerns ordinary crimes like burglary and theft and is usually committed on a large scale. The majority of the offenders are involved in this type of crime. Unlike with organised crime, these crimes are usually reported to the police. Organised crime, on the other hand, is more sophisticated in character than volume crime, in the sense that there is a need for several people to act in consort, to have wide expertise and a structured approach to achieving the objectives. The perpetrators are less apparent and the crimes committed are less known, which contributes to the fact that organised crime is less often reported to the police. Crime involving legal persons is in most cases organised crime.

The activities of the Italian couple Giancarlo Parretti and Florio Fiorini illustrate the scale on which legal persons can be abused and fall victim to criminal activities. It is a striking example that demonstrates the importance of adequate international exchange of information about legal persons and their directors.

According to the French audit-office, these businessmen extracted loans with an estimated total value of US$ five billion. A large amount of these loans was obtained via malicious transactions and fraud involving all kinds of legal persons. Thanks in large part to these two gentlemen, the Credit Lyonnais Bank (CLB) was shaken to its foundations and almost went bankrupt. The French government could only save the CLB from total collapse by providing it with massive financial support ($US twenty billion).

The worst aspect of this drama was that Parretti had earlier been convicted in Italy for comparable crimes involving legal persons, and Fiorini had been involved in a large financial scandal, due to which he was forced to resign his directorship with the Italian chemical company ENI. Following their conviction and resignation, Parretti and Fiorini went to France and Switzerland, respectively, where they engaged in comparable activities, only this time on a larger scale and with the aforementioned devastating results. In 1991, Fiorini served three years imprisonment in Switzerland for fraud with a holding company. Parretti was recently arrested and is currently being prosecuted. However, this has not stopped him from starting new businesses in the Ukraine and Italy.

2. *How and in what way are legal persons involved in crime?*

How legal persons are involved in crime

Legal persons can be involved in crime in various ways. The following four levels of participation of companies in criminal activities can be discerned:

- **The legal person is *used* by a criminal group: legal persons can be used as a means to achieve certain criminal goals. This could be a company that is not even aware of its contribution to criminal activities. This contribution itself may not necessarily be illegal. For example, use can be made of a store where criminals buy or hire the materials that they need for their 'work';**
- **The legal person *co-operates* with a criminal group: companies exist that do partly legal and partly illegal work. In such companies, the official business is being misused for criminal purposes. For example, a company that transports flowers may also sometimes transport drugs;**
- **The legal person is *pressed* by a criminal group (extortion): on some occasions, companies are forced to co-operate with a criminal organisation;**
- **The legal person is *owned* by a criminal group: companies are established and used with the sole purpose of carrying out criminal activities, for example, money laundering. The company is used as a cover, and the official business description has nothing to do with the actual work.**

As emerges from the above-mentioned types of participation, companies can not only be the actor in a crime but they can also be its victims. Several respondents have made it clear that companies very frequently suffer damage from criminal activities. Banks, insurance companies, small and medium size credit banks and commercial firms that sell high value items are especially likely to be abused for criminal activities.

Types of crime

Legal persons are utilised for nearly all forms of organised crime. Depending on the type of crime, the abuse is sometimes very superficial and sometimes very structural. Transportation of drugs is one of the types that have often proven to be very structural. Money laundering, illegal car trafficking and (economic/tax) fraud are mentioned as other types of crime for which criminals often use legal persons. In general, it can be said that financial companies, transport companies and import and export firms are most frequently subject to misuse. Some respondents also mention cyber crime, meaning crime using computers, the Internet, etc. Fraud with EU subsidies, investment fraud, and exchange fraud are other types of crime that could be included, since they can be quite structural in character.

Quantity

It is very difficult to quantify crime involving legal persons at a national level, let alone at a European level. In general, countries do not register how frequently legal persons are addressed as the victim or suspect in criminal investigations. Nevertheless, respondents make it clear that almost every criminal act involves the use of legal persons. As mentioned above, this entails various degrees of participation, and crime can be committed even without the company acting illegally itself. Despite the difficulties in doing so, for the prevention of organised crime it is of the utmost importance to ascertain the degree of involvement of legal persons in organised crime.

3. *How can the abuse of legal persons be prevented?*

Since legal persons are frequently used as a means to commit crimes like the ones mentioned above, reducing the advantages of using legal persons might hinder such crimes, providing that the use of legal persons is indeed one of the factors that facilitates their commission. In other words, we need to know in what way legal persons facilitate criminal behavior. There appear to be two sets of factors that encourage the abuse of legal persons can be discerned:

- Factors that make it interesting to make wrong use of legal persons*: stimulating factors*;
- Factors that make it easy to abuse legal persons: *facilitating factors*.

Stimulating factors

Criminals often use legal persons as a legitimating façade to the non-criminal world. In trade the use of a legal person can usually provide someone with a certain kind of trustworthiness. This façade is even stronger when the real person 'behind' the legal person is not known to the bona fide outside world (often, an acting 'frontman' is appointed as the formal 'owner'). Consequently, a lot of stimulating factors have to do

with the shadowy state that companies can create regarding the real persons that are involved in the business. Companies can own other companies that own other companies and so on. This makes it very difficult to identify the real benefit owner, a factor which stimulates the use of legal persons for criminal activities. Very often the question in an investigation is who is 'behind' a company and in what way persons are connected with each other in business.

As a result, it is essential that law enforcement authorities are able to search databases by person. Our respondents point out that the fact that this is not always possible constitutes a serious obstacle in an investigation. It is very seldom possible to use the name of a person as a search entry, not to mention to link persons by a combination of their names and the companies they are involved in. Owing to the plethora of privacy rules and the varying purposes of those who maintain the databases, it is often hard to obtain the names of people connected to a legal person. Commercial databases are often less restrictive in this respect, since they may allow searches by personal name and may be able to connect names of various individuals and/or legal persons (see also section 5).

Facilitating factors

Facilitating factors are factors that make it easy to buy a legal person. For example, one can purchase an 'empty' or 'shelf' company without too many legal restrictions.

In Ireland, for example, companies may be established through the purchase of a 'shelf' company, which has already been incorporated with a standard memorandum and articles of association and has inactive shareholders, directors and secretary. On acquisition of the 'shelf' company, the inactive shareholders, directors and secretary transfer their shares to the purchaser and resign their positions. The purchaser's representatives can then take these positions and institute any changes to the company, such as changing its memorandum and articles of association, its name, registered office, or capital structure.

Most respondents point out that, in general, no preventive checks are made for the establishment of a company. In most countries it is easy to establish or to buy a legal person without any preventive checks on the buyer or founder, a factor which facilitates the abuse of legal persons.

An example of a preventive check can be found in the Netherlands, where one needs to obtain permission from the Minister of Justice for the creation of public and private limited companies. A certificate of incorporation is issued after specific data provided by the applicant have been checked. The data that are to be provided by the establisher range from names and addresses to the goal of the legal person and how many shares each founder subscribes to at the time of incorporation of the company. It is also checked whether the incorporation is incompatible with rules of criminal law and laws concerning economic crimes. This information is then stored in an automated database called '*Systeem Vennoo*t'. It must be said, however, that this certificate of incorporation is refused in very few cases and that most of the information is not updated at a later stage. Nevertheless, the idea of preventively checking the person who wants to establish a new legal entity can prove to be very useful. If, for example, it only takes one phone call to incorporate a new legal person, one can understand that it is

extremely easy to make use of legal persons for criminal activities. Since the preventive check seems to be a good tool to create a barrier and thus to make it more difficult for criminals to abuse legal persons, more use of it is strongly recommended. The criteria for not issuing a certificate of incorporation need to be up-to-date and as strict as possible.

Respondents also point out that there are several special rules, mostly applying to legal persons in the financial sector, that enable governmental bodies to preventively check data on legal persons. Rules that are referred often concern solvability and fair competition in trade. The already existing possibilities in these sectors to preventively check establishers should be used more extensively so that a barrier is created that increasingly excludes criminals from the ownership and use of legal persons.

Similarly, in most EU countries the possibility exists to issue a disqualification order, *i.e.,* a prohibition of a court or other administrative body from exercising the position of director of a legal person for an (un)limited period. Registration of such disqualification orders makes the establishment of legal persons with criminal intentions more difficult (see also Chapter III).

It should be observed that, in principle, facilitating and stimulating factors go hand in hand, since it is easy to establish a legal person (facilitating factor), which at the same time is a cover for illegal activities (stimulating factor).

4. Crime prevention and the (international) exchange of information

Our respondents report that national investigations are easier to carry out than international ones, also as far as the exchange of information is concerned. They observe that the international exchange of information on legal persons could be improved.

In this regard it is important to note that the above-mentioned distinction between repression and prevention of crime implies a different approach to exchanging information. In a standard repressive investigation, the request for information from another country can be expected to be quite concrete. A crime has been committed and, therefore, information (in)directly related to that specific crime is needed, sometimes from a foreign country. In those cases, a public prosecutor or examining magistrate is usually involved and can in most situations avail of the official channels and formal procedures to request and obtain information from other countries (see also Chapter IV). In preventive research, on the other hand, there is not always a defined suspect to whom the request for international exchange of information can be related, since no crime has yet been committed. Therefore, in this kind of investigation a public prosecutor or judge is usually not involved. As a result, the official channels that can be used are not accessible in preventive actions. At the preventive stage, the investigating authorities have to avail of other means to obtain and to exchange information. In particular, they use databases which provide general information about legal persons (see section 5). That is to say, the kind of information that is being sought for preventive purposes can be specific, but its scope usually is not. For example, rather than to search for the name of a certain specific suspect, information is needed on all persons that conform to a certain profile. This requires considerable

efforts and resources on the part of the country that is asked to provide the information. In addition, problems may arise from a general criminal law perspective with such preventive searches where there is no defined suspect. For example, consideration of people's privacy should be taken into account. As a result, the public authorities from that country are often hesitant to comply with such requests for information from other countries.

5. The use of databases for the exchange of information on legal persons

Law enforcement agencies make use of numerous databases containing information on legal persons, their directors and others 'behind' the legal person. Some of these databases contain very specialised information on legal persons, the character of which depends on the aim of the authority. Apart from the specialised information in these databases, law enforcement agencies also require basic information on persons or companies, for example the address of the company. As long as the person or company is located in the same country as the searching authority, finding this information will not be problematic. Usually, law enforcement agencies use (local) governmental information sources.

In international cases, however, it can be more difficult to obtain this basic information due to the fact that investigators are less familiar with the (police) networks and/or governmental sources in a foreign country. Therefore, law enforcement agencies frequently use international commercial databases, like 'Dun and Bradstreet', which are mostly immediately accessible.

Depending on the purpose of the investigation or the kind of information that is needed, databases are entered in different ways. Respondents point out that in most cases databases are used at the start of an investigation and suffice as long as it concerns a classical, simple crime. But when it comes to more complicated crimes, such as money laundering or other economic crimes, much more information is needed than can be found in databases. Further, in these cases databases are used only at the start of the investigation and later on as additional information or a double check.

Various databases are used for investigation purposes. As shown above, a distinction can generally be made between governmental and commercial databases (for an overview of both databases, see Chapter III and the list of Internet Sources after the Bibliography).

Most governmental databases are kept for special purposes, such as, for example, information about taxation, disqualified directors, or bankruptcies. Although some governmental databases are (partly) open to the public, most of them are not. The more specialised the information, the less accessible it is to others than the authority keeping the files. In the event governmental authorities do provide information to the public or other law enforcement agencies without intervention of a public prosecutor or examining magistrate, that information will always be at a very basic level.

Commercial databases, on the other hand, usually contain general information on forms of incorporation. Some have more specific information, for example, on company bankruptcies. Queries vary from a company's name to the type of business or structure of the incorporation and, above all, it is often possible to search by name. In general commercial databases are accessible to everyone, given that a payment is usually required. Most of these databases are computerised and accessible on-line.

The fact that such commercial databases contain more general, basic information than the governmental ones is for at least two reasons logical. First, whereas commercial databases are being used for several purposes, governmental databases usually have one, or at least one main, purpose. Secondly, serving a large group of people implies a 'commercial' interest: by satisfying a large group of customers who need general information, the commercial interest is well served. In this respect, it should be noted that in order to protect the privacy of companies and their owners, only a restricted amount of information may be made available through commercial databases.

Commercial databases usually derive their information from governmental ones. The surplus value of the commercial systems often lies in the search entries one can use. The (governmental) Dutch Chambers of Commerce, for example, are not entitled to give information on natural persons. Accordingly, it is not possible to use a person's name as a search entry to find out in which companies this person plays a role. Commercial databases, on the other hand, ask information on all companies known to the Chamber of Commerce and make links themselves. Accordingly, it is possible to get certain information from a non-commercial database via a commercial one. It concerns the same data but can be applied in a more useful way. This illustrates that obtaining useful information is more dependent on the search possibilities rather than the kind of data that is stored in the database. Commercial databases provide for more types of search possibilities.

An additional task of commercial databases is the collection of specialised information via risk assessments for companies stored in specific reports addressed to the company that made the request.

Altogether, the differences between governmental and commercial databases can be summarised as follows:

Governmental databases:	**Commercial database:**
• Specific, narrow purpose;	• Unspecific, broad purpose;
• Very specialised information;	• General, broad information (apart from risk assessment searches);
• Usually accessible by very few;	• Accessible by everyone;
• Usually no payment required;	• Accessible upon payment;
• Without a warrant the exchange of information to public or other investigating authorities is limited to a very basic level;	• No warrant required for the complete exchange of information to public or other investigating authorities;
• Privacy rules determine which information is exchanged from the	• Privacy rules determine which information is stored in the database;

database; • Search entry covers only that specific database; • Simple search possibilities; • Not always accessible on-line.	• Search entry covers several sources combined in same database; • Advanced search possibilities; • Accessible on-line.

6. Summary

Conclusions

When it comes to the more proactive way of fighting organised crime (the preventive approach), it is clear that improvements have to be made in the international exchange of information. At an international level, it is often difficult to obtain the general information that is required for the purposes of crime prevention from foreign authorities. One of the most important obstacles is the fact that the general criminal law may prevent the exchange of a large amount of information without there being a defined suspect.

When use is being made of automated databases, the most important prerequisites are that the database is up-to-date, reliable, easily accessible, has the possibility to search by a person's name and provides basic information about legal persons and the persons that are behind the legal person (directors, shareholders, beneficiary owners).

Recommendations

Taking into account the importance of the prevention of the use of legal persons for criminal activities, it is recommended:

- That national and international authorities make efforts in order to gain more insight into the character and incidence of abuse of legal persons;
- To take measures to make legal persons and the persons behind them more transparent. This can, *inter alia*, be done by
  making preventive checks when people want to establish or buy legal persons, and to see whether existing legislation could be used more extensively in this respect;
  making information on disqualified directors available.
- To make sure that the available databases that provide information on legal persons:

1. are up-to-date, reliable and on-line and generally accessible;
2. provide basic information about the legal person;
3. in addition, provide information about the natural persons who are ‘behind’ the legal person (directors, shareholders, beneficiary owners);
4. have a possibility to search by a person’s name and to reveal networks of natural and legal persons.

III GENERAL DATA CONCERNING THE LEGAL PERSON

1. Introduction

The questions addressed in Section I of the questionnaire (see Annex 3) can be summarised as follows:

a) Forms of incorporation
What types of legal entities exist?

b) Use and misuse of legal entities
Which types of legal entities are most often used and misused? Are foreign entities also misused?

c) Establishment of limited liability companies
What are the criteria for establishing these legal entities?

d) Registration of limited liability companies
What kinds of registers and databases on legal persons exist and which bodies administer these registers and databases? What data do the registers comprise?

e) Other registrations
What other forms of registration exist in your country?

f) Identification and investigation
Which types of identification are required with respect to legal persons?

g) Central registration
Are the above-mentioned registers centrally stored?

h) Accessibility of information
Who has access to the registers and databases, for which purposes and under what conditions (cf., rules for data protection, financial aspects)?

i) Privacy
What kinds of regulations exist with respect to the privacy of legal entities?

j) Sanctions
What steps are taken against legal persons which develop criminal activities?

2. European law with respect to legal persons

The European Community has issued a number of directives and one regulation concerning the law on limited companies. Some of these directives also govern the issues set out in this chapter. Sub-section 2.1 presents a short overview of the main directives and of related case law and infringement procedures concerning the company law directives. In sub-section 2.2, special attention is paid to the EU privacy and data protection directives.

2.1 Directives, case law and infringement procedures

First Directive:

The First Council Directive 68/151/EEC of 9 March 1968 (the 'First Company Law Directive') deals with the 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 *[now Article 43]* of the EC Treaty, with a view to making such safeguards equivalent throughout the Community (*Official Journal No. L 065 , 14/03/1968, pp. 8–12).* This directive provides for a system of publication in force for all limited companies. Member States are required to maintain publicly accessible official registers of limited companies, the data from which are to be published in a national bulletin. The directive further contains provisions on the legality of agreements entered into by the limited company. Section II of the directive lays down provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid. Article 9(1) of this section provides that acts done by the organs of the company are to be binding upon even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs (see the *Rabobank* judgment below).

- Judgment of the European Court: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Sixth Chamber) of 13 November 1990 (Case C-106/89, ECR [1990] 4135, Reference for a preliminary ruling: *Juzgado de Primera Instancia e Instruccion no 1 de Oviedo*, Spain). The case concerned Article 11 of the First Directive, which provides for a limited number of grounds for nullity of companies. The Court decided that the grounds mentioned in Article 11 must be strictly interpreted, so as to ensure that nullity on the ground that the objects of the company are unlawful or contrary to public policy must be understood as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association .

- Judgment of the Court (Fifth Chamber): *Verband deutscher Daihatsu-Händler eV v Daihatsu Deutschland GmbH* of 4 December 1997 (Case C-97/96, ECR [1997] I-6843, reference for a preliminary ruling: *Oberlandesgericht Düsseldorf*, Germany). This decision concerned Article 6 of the First Directive (requiring States to provide for appropriate penalties in case of failure to disclose the balance sheet, etc.). The Court ruled that this provision does not allow for the adoption of national legislation that prohibits members or creditors of the company to apply for imposition of the penalty provided for by the law of that Member State in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts.

- Judgment of the Court (Sixth Chamber) of 16 December 1997*: Coöperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud* (Case C-104/96, ECR [1997] I-7211, reference for a preliminary ruling, *Hoge Raad*, the Netherlands). The Court ruled that 'The rules governing the enforceability as against third parties of acts done by members of company organs in circumstances where there is a conflict of interests with the company fall outside the normative framework of the 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 *[now Article 48]* of the Treaty, with a view to making such safeguards equivalent throughout the Community, and are matters for the national legislature.'

- ***Judgment of the Court of 29 September 1998:*** **Commission of the European Communities v Federal Republic of Germany *(Case C-191/95, ECR [1998] I-5449). The Court held that the penalties laid down in German law for not disclosing to the company register annual accounts of companies limited by shares (which 90 per cent of German limited companies fail to do) were insufficient to ensure compliance with the disclosure requirement laid down by the first and fourth directives.***

Second Directive:

The Second Council Directive 77/91/EEC of 13 December 1976 concerns the 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 [now Article 48]* of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards (Official Journal No. L 026, 30/01/1977, pp. 1–13). This directive organises the provisions on the establishment of public limited companies and the maintenance of or alterations in such companies' capital. For example, Articles 3 and 4 outline the factors that the statutes or instruments of incorporation should consider. This directive is amended by Council Directive 92/101/EEC of 23 November 1992 (Official Journal No. L 347, 28/11/1992, pp. 64–66).

- In 1998, infringement proceedings (against Luxembourg) concerning the transposition of Council Directive 92/101/EEC amending Council Directive 77/91/EEC and (against Finland) concerning Council Directives 78/660/EEC, 83/349/EEC and 90/605/EEC (see hereafter) were terminated after the transposition was effectuated. An infringement procedure against Greece for non-implementation of Council Directive 92/101/EEC was started (Sixteenth Annual Report on monitoring the application of Community law 1998, OJ C 354/01, 07/12/1999).

- Relevant in this context is also the judgment of the Court in *case Alexandros Kefalas and Others v Elliniko Dimosio* (Greek State) and *Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* of 12 May 1998 (Case C-367/96, ECR [1998] I-2843, Reference for a preliminary ruling: *Efeteio Athina*, Greece). In this Greek case, the shareholders of a company contested the validity of the increase in capital

and argued that it was contrary to Article 25 (1) of the Second Directive, which provides that 'any increase in capital must be decided upon by the general meeting'. The Greek State argued that the shareholders abused the right arising from Article 25 (1). The Court ruled that this was not the case and that the shareholders could invoke Article 25 (1). For comparable cases, see the judgments of the Court (Sixth Chamber) in *Marina Karella and Nicolas Karellas v Minister for Industry, Energy and Technology* and *Organismos Oikonomikis Anasygkrotiseos Epicheiriseon AE (OAE)* of 30 May 1991 (Joined cases C-19/90 and C-20/9, ECR [1991] I-2691, references for a preliminary ruling: Symvoulio Epikrateias, Greece), and in *Syndesmos Melon tis Eleftheras Evangelikis Ekklissias and others v Greek State and others* of 24 March 1992 (Case C-381/89, ECR [1992] I-2111, Reference for a preliminary ruling: Polymeles Protodikeio Athinan, Greece).

Third and Sixth Directives:

The Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) lit g of the Treaty *[now Article 44 (3) lit g]* concerns mergers of public limited liability companies (Official Journal No. L 295 , 20/10/1978 pp. 36–43*).* Similarly, the sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) lit g of the Treaty *[now Article 44 (3) lit g]*, concerns the division of public limited liability companies (Official Journal No. L 378 , 31/12/1982 pp. 47–54*).*

Fourth and seventh directive:

The fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) lit g of the Treaty *[now Article 44 (3) lit g]* on the annual accounts of certain types of companies (Official Journal No. L 222, 14/08/1978 pp. 11-31) and the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) lit g of the Treaty *[now Article 44 (3) lit g]* on consolidated accounts (Official Journal No. L 193, 18/07/1983, pp. 1–17)) aim at attuning national legislation on annual accounts. Council Directive 90/605/EEC of 8 November 1990 amends both Directives as regards the scope of those Directives (Official Journal No. L 317, 16/11/1990, pp. 60-62). These Directives define which forms of companies have to produce accounts, establish which format should be used for the profit and loss account and the balance sheet, and lay down which valuation principles should be applied. The Directives also impose requirements to disclose the accounts. The Fourth Directive was due to be implemented by 31 July 1980, the Seventh by 31 December 1987 and the two amending Directives by 1 January 1993 (European Commission, DG Internal Market).

- The European Commission has decided on 2 July 1999 to refer the United Kingdom to the European Court of Justice for four cases of failure to implement company law Directives in the territory of Gibraltar. The Directives in question concern the annual accounts and the consolidated accounts of companies. The United Kingdom failed to give a satisfactory reply to the reasoned opinions sent in January 1999 (second stage of formal infringement proceedings under Article 226 of the EC Treaty (ex Article 169).

Eighth Directive:

The Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) lit g *[Article 44 (3) lit g]* of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents concerns the admission of persons authorised to carry out legal audits of company accounts (Official Journal No. L 126, 12/05/1984, pp. 20-26).

Eleventh Directive:

The Eleventh Council Directive 89/666/EEC of 21 December 1989 concerns disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State (Official Journal No. L 395, 30/12/1989, pp. 36–39). This Directive governs the publication obligations of branches established in a Member State of limited companies governed by the law of another state.

- The ECJ's judgment in *Centros Ltd v Erhvervs- Selskabsstylrelsen* (C-212/97, ECR [1999] I-1459) concerned the establishment of a branch of a pseudo-foreign company established under the UK Companies Act 1985 in Denmark. In this case the court decided that the establishment of a branch of a company not carrying out any actual business in order to 'circumvent' national law providing for a minimum capital requirement, does not in itself constitute an abuse of the right of establishment. The Court ruled that 'it is contrary to Articles 52 and 58 of the EC Treaty *[now Articles 43 and 48]* for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business (…)'. Accordingly it is no abusive exercise of the freedom of establishment, if a company takes advantage of the most liberal company law (in case the UK not requiring a minimum capital for private limited companies) in order to establish a company in this Member State for the sole reason of setting up a branch in another Member State (in case Denmark), thereby circumventing the Danish minimum capital requirement of then DKK 200,000. The Court found that the refusal of registration could not be justified as serving imperative public interests under Article 56 *[now Article 46]*. Concerning the purported aim of the minimum capital requirement namely to protect creditors the Court referred, *inter alia*, to the Fourth and Eleventh Company Directives. Furthermore 'the authorities of the Member State concerned [would not be prevented] from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in co-operation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member state concerned.'

Twelfth Directive:

The Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 concerns single-member private limited-liability companies (Official Journal No. L 395, 30/12/1989, pp. 40– 42). This directive aims at the introduction in all Member-States of private limited companies with one single owner.

Council Regulation on EEIG:

Council Regulation (EEC) No. 2137/85 of 25 July 1985 concerns the European Economic Interest Grouping (EEIG) (Official Journal No. L 199, 31/07/1985, pp. 1–9). Pursuant to this regulation, a new legal form of joint venture was created: the European Economic Interest Grouping (EEIG). Within an EEIG enterprises, entrepreneurs and/or representatives of the liberal professions resident in different Member-States co-operate. The regulation contains provisions having direct effect. Certain provisions refer to national legislation, e.g. concerning registration (Art 39), the question of legal personality of the EEIG (Art 1(3)) and the question whether an EEIG may be managed by a legal person (Art 19(2)). As the EEIG does not constitute an independent enterprise (participants maintain their own identity of entrepreneur or, as the case may be, legal person) but rather a partnership of enterprises, the EEIG will not feature separately in the country reports below.

2.2 Data protection

Protection of personal data

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 concerns the protection of individuals with regard to the processing of personal data and on the free movement of such data (Official Journal No. L 281, 23/11/1995, pp. 31-50). The deadline for transposition was 24 October 1998.

This Directive, which entered into force on 25 October 1998, establishes a regulatory framework to ensure both a high level of protection for the privacy of individuals in all Member States and the free movement of personal data within the European Union. By fostering consumer confidence and minimising differences between Member States' data protection rules, the Directive seeks to facilitate the development of electronic commerce.

The Directive also establishes rules to ensure that personal data is only transferred to countries outside the EU when its continued protection is guaranteed, so as to ensure that the high standards of protection introduced by the Directive within the EU are not undermined.

Individuals can invoke provisions of the Directive before national courts and authorities in accordance with the consistent case law of the Court of Justice about direct effect and consistent interpretation (e.g. *Becker* 8/81 ECR [1982] 53, *Marleasing* C-106/89, ECR [1990] I-4135). In addition, individuals suffering damage as a result of a Member State's failure to implement the Directive are entitled to seek compensation before national courts, under the conditions for state liability as established in the Court's case law since the *Francovich* case (C-6/90 and C-9/90, ECR [1991] I-5357).

Belgium, Finland, Greece, Italy, Portugal, and Sweden have notified measures which implement the Directive in full. Denmark and the United Kingdom have notified measures partially implementing the Directive, but still need to adopt some additional national measures to complete their implementation. All other Member States are still in the process of adopting implementing measures.

The European Commission has decided on 29 July 1999 to send reasoned opinions to France, Luxembourg, the Netherlands, Germany, the United Kingdom, Ireland, Denmark, Spain and Austria, for failure to notify all the measures necessary to implement the directive on the protection of personal data. The reasoned opinions represent the second stage of formal infringement proceedings under Article 226 of the EC Treaty. In the absence of a satisfactory response within two months of receipt by the Member State concerned, the Commission may decide to refer the cases to the European Court of Justice.

This Directive will have a positive impact insofar as it harmonises the different standards in the various EU Member States. On some occasions it may require States give up excessive standards. On the other hand, the EC standards will certainly go beyond some national standards and may as such negatively affect the access to certain data. Given that these standards are very new and not even fully implemented it remains to be seen which effects they will have in practice. It is, therefore, difficult to judge the overall positive or negative effects for access to data about legal persons and directors/beneficial owners.

Furthermore, this Directive stipulates that databases need to observe privacy regulations regardless of whether data is being processed by a public authority or a private legal or natural person. As such, this Directive may have an impact on the existence and functioning of (the growing amount of) commercial databases.

Protection of databases

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 concerns the legal protection of databases (Official Journal No. L 077, 27/03/1996, pp. 20–28). The deadline for transposition is 1 January 1998.

This Directive was due to be implemented by all Member States before 1 January 1998, but Greece, Ireland, Luxembourg and Portugal have still not done so. The Directive harmonises copyright protection applicable to creative on-line and off-line databases (in electronic form or on paper). Furthermore, it introduced a novel *sui generis* right protecting non-creative efforts of database manufacturers and publishers for fifteen years . The Directive is of crucial importance in the context of the Information Society, since most network services will be operated from databases.

The European Commission has decided on 30 July 1999 to refer Greece, Ireland, Luxembourg and Portugal to the European Court of Justice for failure to implement this Directive.

3. Country reports

- **AUSTRIA**

a) Forms of incorporation

The main forms of incorporation in Austria are:

Partnerships:
- *Gesellschaft bürgerlichen Rechts:* Gesb (private partnership);
- *Offene Handelsgesellschaft:* OHG (ordinary partnership);
- *Kommanditgesellschaft*: KG (limited partnership);
- *Eingetragene Erwerbsgesellschaft:* EEG (registered partnership);
- *Stille Gesellschaft:* StGes (silent partnership);
- *Offene Erwerbsgesellschaft (*small-scale or professional partnership*).*

Limited liability companies*:*
- *Gesellschaft mit beschränkter Haftung:* GmbH (limited liability company);
- *Aktiengesellschaft:* AG (joint stock company).

Other forms of incorporation:
- *Einzelunternehmer*: EU (single trader);
- *Erwerbs- und Wirtschaftsgenossenschaft:* GenG (co-operation);
- Associations pursuant to the Associations Act of 1852;
- Associations pursuant to the Associations Act of 1951;
- *Versicherungsvereine auf Gegenseitigkeit:* VAG (mutual security company);
- *Europäische wirtschaftliche Interessenvereinigungen:* EWIVG (European economic interest grouping);
- *Sparkassen (*saving banks*);*
- *Privatstiftungen (*private foundations*).*

b) Use and misuse of legal entities

The two most important types of corporate legal entity in Austria are the limited liability company (*Gesellschaft mit beschränkter Haftung,* GmbH*)* and the joint stock company (*Aktiengesellschaft,* AG*).* As the procedures for establishing an AG are somewhat more complex than those for establishing a GmbH, the majority of corporate legal entities in Austria are GmbHs.

No information was provided on the misuse of legal entities.

❖ Sections c) to j) only concern limited liability companies (GmbHs) and joint stock companies (AGs).

c) Establishment of limited companies

The *Gesetz über Gesellschaften mit beschränkter Haftung* (Limited Liability Companies Act) and the *Aktiengesetz* (Joint Stock Companies Act) regulate the limited liability

company and the joint stock company respectively. The rules governing both types of companies are in many aspects identical.

The incorporation of both types of companies requires the execution of a notarial deed of incorporation before an Austrian notary public. Regarding the limited liability company, this deed contains the articles of association or the declaration of the sole founder and is signed by the founder or the founders of the company whose signature(s) must be notarised. The procedures for establishing a joint stock company are somewhat more complex than for the limited liability company. The notary public must verify the specimen signatures of the members of the management board of the company as well as all signatures required for the application to the company register.
The following are required for the establishment of a limited liability company:

- The articles of association in the form of a notarial deed containing:
    1. The name of the company, which must either describe the company's business or contain the names of one or more of the shareholders. The names of persons other than shareholders may not be included. The words 'Gesellschaft mit beschränkter Haftung' must be contained in the name. Since January 1991, it is admissible to shorten these words (GmbH or GesmbH).
    2. The registered domicile of the company which must be a location within Austria.
    3. The scope of the company's business activities. This clause restricts the activities of the management of the company as a means of protecting the interests of shareholders. Management owes a fiduciary duty to the shareholders not to exceed the scope of the company's registered activities.
    4. The amount of the authorised share capital (minimum share capital: 500,000 Austrian schillings).
    5. The exact amount subscribed by each shareholder.
    6. The articles of incorporation do not commonly state a specific duration of a company. Unless one is stated, the company is of unlimited duration.;
- **Shareholders' resolutions concerning the appointment of the members of the Supervisory Board, if provided for by the articles of association or required under mandatory provisions of Austrian law;**
- Shareholders' resolutions concerning the appointment of the first managing director(s);
- List of shareholders;
- Clearance certificate from the local Austrian Revenue Office for Public Duties and Taxes on Transfers;
- Payment of the capital contribution by the shareholders or transfers of contributions in kind;
- Application for an expert opinion of the competent local chamber of commerce regarding the admissibility of the proposed company name, if registered;
- Written confirmation issued by an Austrian bank pursuant to Article 10 of the Limited Liability Companies Act (*GmbH-Gesetz*, GmbHG) stating that the managing director is entitled to control the company's nominal share capital contributed by the shareholders in accordance with the articles of association;
- Specimen signatures of the managing directors;
- Application to the company register for the registration of the company. This application must be in the form of a notarial deed;
- Actual registration and publication of the registration.

For the establishment of the joint stock company, the Joint Stock Companies Act provides for two procedures:

- one stage formation (*Einheitsgründung*); or
- successive formation (*Stufengründung*).

Since most joint stock companies are incorporated by one-stage formation, this form is described below. The following are required for registration of a joint stock company:

- **The articles of association established by the founders of the company in the form of a notarial deed containing:**
  1. **the company's name and seat;**
  2. **the scope of its activity;**
  3. **the nominal amount and type of its shares;**
  4. **the amount of its share capital (the minimum authorised share capital is 1,000,000 Austrian schillings of which at least 25% must be paid up prior to registration);**
  5. **the composition of the management board;**
  6. **the manner of publication of publishable material;**
  7. **any preferential rights;**
  8. **all outstanding incorporation expenses.**
- **Subscription of all shares by the first shareholders;**
- **Appointment of the supervisory board;**
- **Appointment of an auditor for the fiscal year;**
- **Appointment of the management board by majority decision of the supervisory board;**
- **A written incorporation report (*Gründungsbericht*);**
- **Review of the incorporation by the members of the management and supervisory board;**
- **Application to the tax authorities for the assessment of the capital transfer tax of 1% of the paid up share capital, payment of the same and receipt of the clearing certificate;**
- **Payment of at least one-quarter of the nominal value of the authorised share capital in cash by each shareholder or transfer of contributions in kind; in the case of contributions in kind, special regulations, e.g. the appointment of a certified auditor by the court, apply;**
- **Application for an expert opinion of the competent local chamber of commerce regarding the admissibility of the proposed company name, if required;**
- **Application to the company register by all shareholders and members of the supervisory and management board;**
- **Review of the company register and entry on the register;**
- **Publication of the incorporation.**

Both the limited liability company and the joint stock company do not exist until they have been registered in the company register. Despite the condition of involvement of a notary public this involvement itself will not be registered in the company register.

Modifications of the articles of association and of the statutes need to be laid down by a notary public and have to be registered in the company register.

The association's shares of a limited liability company can only be transferred by a contract drawn up by a notary public. However, the shares of a joint stock company can

either be transferred by handing over (bearer shares) or by endorsement and registration at the shares register (registered shares).

Managing directors of a limited liability company are appointed by a decision of the shareholders during the shareholder's meeting. This shareholders' meeting can make decisions without the co-operation of a governmental body or an independent third party. Regarding the joint stock company, the supervisory board appoints, dismisses and also supervises the management board. The supervisory board can make decisions without co-operation of a governmental body or an independent third party. Alterations taking place within the management board need to be entered on the company register.

In principle agreements with governmental bodies or with independent third parties are not required for the establishment of legal persons, amending the articles of association, transfer of shares, or changes in management. Nevertheless, Austrian law prohibits certain types of companies from engaging in specific types of business. A limited liability company, for instance, is not allowed to operate an insurance business or that of a bank.

Foreign branches must adhere to the Austrian registration requirements.

d) Registration of limited companies

All non-corporate and corporate legal entities (see above) as well as all Austrian branch offices of foreign companies must be registered with the company register of the competent commercial court (*Landesgericht*) for the location where the entity has its seat. In Vienna however, the company register is established at an independent trade court.

Before registration the company register has to examine whether the association was established properly, in accordance with the legal rules.

The registration of the limited liability company and the joint stock company with the company register marks the actual date of incorporation.

Directors of limited liability companies and joint stock companies are required to submit the annual accounts and the annual report to the company register. For large joint stock companies, the directors are also required to publish the annual accounts in the Official Gazette.

Alongside registration as referred to above, the registration of a limited liability company is additionally published nation-wide in the Official Gazette and in the Central Paper for registrations in the company register in the Austrian republic. Amendments to the articles of association are likewise announced in the Official Gazette and the Central Paper.

Transfer of the shares of a limited liability company requires no additional publication besides registration in the company register. In principle the transfer of shares of a joint stock company is not published, apart from relevant duties to disclose prescribed by the *BörseGestez* (Exchange Act) or the *ÜbernahmeGesetz* (Take-over Act).

Changes in management need not be announced further, apart from the registration in the company register.

e) Other registrations

In the limited liability company, transfers of shares and changes of name and address of the shareholders as well as of their capital contributions have to be immediately registered with the company register.
As mentioned above, the transfer of shares must take place through a notarial deed, or the transfer will be ineffective.

As for the joint stock company, when it issues registered shares or interim certificates, it is obliged to keep a shares register, irrespective of the number of shareholders. The register is to be kept by the management board. The shares must be entered on the register with the name, occupation and place of residence of the shareholder.
The transfer of shares has to be reported to the company and has to be registered in the shares register.
Inspection of the shares register is not regulated by law.

There is no central registration of trade bans or disqualification orders pronounced by the courts or other administrative bodies, barring a person from acting as director of a legal person for a limited or unlimited period of time.

Companies, which were declared bankrupt in the past, have such fact noted on the company register. In addition, information on companies, which are bankrupt, insolvent or nearing insolvency may be obtained from one of the creditors' rights associations in Austria.

All insolvencies, the private bankruptcies of natural persons included are published at the competent court. Accordingly, there is no official central registration of insolvencies. Insolvencies of legal persons are also laid down in the company register.
Apart from this, there are several private creditor protection associations, which also publish insolvencies or keep registers.
Banks, finally, are not allowed to disclose information on their customers' finances without customer consent. The obligation to maintain banking secrecy, however, does not apply to general information concerning the economic situation of a company, as is customary in banking business, if such a company does not expressly object to the provision of such information.

Other good sources of information are the chambers of commerce, trade, industry, banking and insurance, tourism and transportation.

Creditors' rights associations and other private information agencies are another source of information about companies. Although they can usually provide information beyond that which is laid down in the company register, such as the financial situation of a company, these non-official data files are seldom made use of.

f) Identification and investigation

Registrations in the company register have to be certified, i.e. the signatures must be certified judicially or must have been notarised (with the exception of registrations of insignificant facts). For this an official identity card (passport, driving license) is required. It is possible to submit the official identity card in original form or in the form of a certified copy, but an 'ordinary' copy will not suffice.

Registration of the number of the official identity card takes place at the certification entity.

Background investigation of natural persons does not take place in any form.

g) Central registration

The central database of the company register covers all districts of the competent courts (*Landesgerichtssprengel*).

The company register is available in the form of automated data files.

The government does not have its own internal database (other than the abovementioned registers) in which data concerning legal persons are registered.

h) Accessibility of information

The abovementioned company register is open to the public and keeps all registered documents of the respective entities including any amendments to the registered particulars (e.g. applications, annual financial statements, shareholders' resolutions, etc). Natural persons as well as the authorities can excerpt or print the information and make copies of the entire collection of documents. An excerpt from the company register contains certain information on the entity including:

- its name;
- its business objectives;
- its authorised share capital;
- the contributions to the share capital made by the shareholders;
- details of its management board;
- persons who have special powers of representation (*prokura*);
- amendments to the articles of association;
- details on certain shareholders' resolutions (e.g. resolutions on the increase or reduction of the share capital);
- names of shareholders (in case of a limited liability company).

The data can be accessed and searched through displays, which have been installed at the courts or the notaries or at law firms. Access is also possible through private terminals. The queries at the courts cost 180 Austrian schillings,

i) Privacy

The Data Protection Act (18 October 1978) is only to a limited extent applicable to the company register. Many of its provisions do not apply to the company register, making the act too extensive to deal with in the framework of the present report.

EC Directive 95/46 with regard to the processing of personal data has been implemented by the new Data Protection Act 2000, which entered into force on 1 January 2000.

j) Sanctions

Legal persons not meeting the requirements for their establishment, or for amendments to their statutes or articles of association will not be registered, or said amendments will not be registered. These entities become legal only after their registration.

On lack of business activity, whether a legal person has not embarked on a single activity during a certain time is not relevant under Austrian company law and, therefore, not penalised. However, other administrative and trade regulations could create conditions addressing lack of business activity.

Engaging in criminal activities is mainly dealt with in the field of regulations for exercising a profession, and not for acting as director of a legal person. Occasionally, however, criminal activities carried out by directors of private limited companies may have consequences for the legal person.

Not fulfilling the conditions for the establishment of limited liability companies can lead to cancellation or dissolution of the legal person.

- **BELGIUM**

a) Forms of incorporation

The main forms of incorporation in Belgium are:

Partnerships:
- *Société en nom collectif / vennootschap onder firma:* SNC, VOF (ordinary partnership);
- *Société en commandite simple/gewone commanditaire vennootschap:* SCS, GCV (limited partnership);
- *Société en commandite par actions/ commanditaire vennootschap op aandelen:* SCA, CVA (partnership limited by shares);
- *Société civile* (private partnership).

Limited liability companies:
- *Société anonyme/naamloze vennootschap:* SA, NV (public limited company);
- *Société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid:* SPRL, BVBA (private limited company).

Other forms of incorporation:
- Single trader;
- *Société co-opérative* (co-operation);
- *Société agricole/ Landbouwvennootschap* (farming co-operation);
- *Société professionelle et interprofessionelle* (professional and inter-profession company);
- *Association d'assurance mutuelle* (mutual insurance company);
- *Association sans but lucratif* (non-profit association);
- *Association momentanée* (temporary trading association (does not operate under a common name and has just one specific trade objective));
- *Association en participation* (trading association by way of participation (one or more persons participate in trade activities of one or more others who operate in their own names));
- Branch offices of foreign companies.

b) Use and misuse of legal entities

The *Société anonyme/naamloze vennootschap* and the *Société privée à responsabilité limitée/besloten vennootschap met beperkte aansprakelijkheid* (the public and private limited company) are the most widely used forms of incorporation.

Public and private limited companies are also the most frequently misused. Some facts concerning the misuse of legal entities: in 1997, 180 of 238 criminal organisations made use of commercial companies. In 1996, 121 criminal organisations used 161 commercial companies. In 39,4 to 50 % of cases public limited companies were involved.

❖ Sections c) to j) will mainly deal with public limited companies (SA/NV) and private limited companies (SPRL/BVBA).

c) Establishment of limited companies

The establishment and the operation of limited companies is regulated by:

- The new Company Act, approved on 13 April 1995 and come into effect on 1 July 1996;
- The law on the accounting and the annual accounts of companies, adopted 17 July 1975;
- The Bankruptcy Act of 8 August 1997.

For the establishment of public and private limited companies the following are required:

- Deposition of the initial capital with a bank; the bank issues a standard certificate confirming that the amount is held in a blocked capital account;
- A financial plan for the company, to be deposited for custody with a notary public;
- Articles of incorporation and bylaws;
- The recording of the basic documents at the local court of commerce (within fifteen days).

As mentioned above, a limited company is established by a notarial deed. For the drawing up of the deed the co-operation of a notary public is required.

Pursuant to the new Company Act, a company acquires legal personality, not upon signing of the notarial deed, but as of the deposit of the abstracts of the company charter with the court of commerce.

Furthermore, at the establishment or amendment of articles of limited companies, use of the services of a notary public is required. The notary public investigates the statute and checks whether the required authorised capital has been issued completely. Those establishing the company also need to supply the notary public with a financial strategy, which does not, however, need to be published.

In Belgium no preventive supervision of the establishment of companies exists. However, some activities require special authorisation, for example banking and insurance, transport of goods and passengers, hotels and restaurants, real estate and financial brokers, etc. The applicable legislation determines by whom this license is granted and under which conditions a license can be refused.

Foreign branches may also establish registered branches to carry out their business activities in Belgium. The branch is not a separate legal entity but forms a single entity with the foreign parent company. The foreign company must register the branch with the company register of the judicial district where the branch operates and a notice of its establishment must be published in the *Moniteur Belge* (Belgian Official Gazette).

d) Registration of limited companies

Each of the thirty courts of commerce (*Rechtbanken van Koophandel/tribunaux de Commerce*) keeps a company register of its own region, i.e. the area in which it has jurisdiction.

The Belgian chambers of commerce do not play a significant role in the registration process. Membership of a chamber is voluntary in Belgium.

Upon establishment companies must register with a court of commerce. The companies themselves must also register alterations with the court of commerce. In the articles of association, it can be determined that certain alterations can be made by simple decision. These alterations must also be published.
Registration is made public through publication of the registered data in the *Moniteur Belge*. Furthermore, registers at the courts are open to the public free of charge.

Registered are, *inter alia*:

- Trading name;
- Authorised capital;
- Address of the authorised seat;
- Statutory aims;
- Trading activities;
- The address, name and possible business sign of the place where the business will be carried out;
- Reference to documents if particular terms have been set for the carrying out of certain activities;
- Starting date of business activities;
- Business activities carried out in Belgium and abroad stating addresses of main offices, branches and franchises;
- Personal details of the managers, directors or business managers entrusted with executive management.

The appointment or dismissal of any director must be published in the annexes of the *Moniteur Belge*.

The companies have a VAT number as well. These numbers are entered in the central VAT register.

e) Other registrations

In a public limited company the shares are bearer shares and there is no register. In a private limited liability company the shares are registered and they are not transferable. They have to be registered in the shareholders register, which is kept by the company itself. Pursuant to the Law on the publication of major participation in quoted companies (2 March 1989, the so-called Transparency Act) in some cases ownership or acquirement of shares must be indicated. The most significant cases are acquirement, transfer or (sometimes) possession of significant portions of shares to which the right to vote is attached in a company under Belgian law quoted on the stock market within the EC. Thresholds have been set at 5%, 10%, 15 %, etc., of the total of voting rights. The indication must be notified to the company itself and to the Commission for Banking and Finances (*Commissie voor Bank- en Financiewezen*). The company is required to publish the notified indication unless the Commission has granted a waiver for banking and finances.

In Belgium, it is the courts of commerce that pronounce disqualification orders on the basis of the Act of 2 June 1998 (enactment of Royal Decree No. 22 of 24 October 1934), disqualifying certain convicts and bankrupts from exercising their duties or profession.
Moreover, on the basis of certain special criminal laws, a specific disqualification order can be imposed (*inter alia,* narcotics legislation, as well as legislation concerning hormones, etc.).
Although special criminal laws may prescribe different time limits, the duration for which a disqualification order can be imposed is three to ten years. The disqualification order is recorded by the clerk of the court of commerce. It is not entered on the criminal register, although it is published in the Belgian statute book.

Bankruptcies are also registered with the court of commerce and published in the Belgian statute book and in the *Moniteur Belge*.

Other databases concerning legal persons with public authorities may be found with the Governmental Social Security Service (*Rijksdienst voor Sociale Zekerheid*) (with an eye to collecting arrear payments) and with the tax authorities (also with an eye to payments owed, in particular VAT and company taxes).

Non-official (commercial) databases also exist in Belgium. The non-official database 'Help' is used by the Central Service for the fight against organised economic and financial crime (CDGEFID, *Centrale Dienst voor de bestrijding van de Georganiseerde Economische en Financiële Delinquentie*). *Euro DB* has a similar database (http://www.eurodb.be).

f) Identification and investigation

One is required to announce one's identity in carrying out essential legal acts concerning limited companies (establishment, registration). A copy of proof of identity is sufficient.

No investigations are carried out into the antecedents of those establishing a company or those otherwise involved with it.

Regarding licenses for the carrying out of certain professions, special legislation can provide for a background investigation of those establishing such a company (e.g. the Act of 10 April 1990 concerning Security and Surveillance Companies*).*

Data from official registers are used for, *inter alia*, investigating irregularities. Such investigations are, *inter alia*, carried out by the police, tax investigators, the High Committee of Supervision (*Hoog Comité van Toezicht*, a committee supervising the public authorities) and the social inspection service, on behalf of both judicial and administrative authorities.

With the courts of commerce trade investigation services (*despitagediensten*) have been set up. These aim to detect trade firms in trouble and to urge them to undertake measures of repair, the carrying out of which is also supervised by the trade investigation services.

No specific legal basis exists for trade investigation services. They are established within existing boundaries and are financed with the means available to the courts of commerce. The effectiveness of the trade investigation services varies among the districts.

The following sources of information are used:

- Information made available to the court of commerce for inclusion in the company register;
- Announcements of the public prosecutor;
- Information from institutions such as the governmental social security service, the direct tax board and the VAT board;
- Judicial decisions rendered and attachments executed against the relevant company;
- Information from third parties, usually creditors.

g) Central registration

A project is currently being undertaken by the center for information processing of the Ministry of Justice to automate files of local trade registers. These data are then stored centrally with *EURO DB* in Louvain la Neuve.

EURO DB also keeps data on 'protests on trade effects' and on court decisions on arrear payments to social security.

h) Accessibility of information

Company registers with the courts are open to the public free of charge.

i) Privacy

The law of 11 December 1998 provides for the implementation of EU Directive 95/46 of 24 October 1995 concerning the protection of personal data. It was passed by Parliament and published in the *Moniteur Belge* on 3 February 1999. It amends the 1992 Privacy Act.

The committee for the protection of privacy monitors compliance with this legislation.

j) Sanctions

Neither the Criminal Code of 1865, nor additional or complementary legislation provided for criminal responsibility for legal persons. However, the adage *societas delinquere non potest* (a legal person cannot commit a crime) does no longer apply in Belgian jurisprudence. In its decision of 18 April 1946 the Belgian Court of Cassation declared that a legal person 'can commit a crime, but cannot be punished for it'(*societas delinquere potest sed non puniri*). Accordingly, on the basis of this decision, if a legal person commits a crime, the natural person responsible for the crime will, or at least should, be prosecuted.
On 20 October 1988 the Council of Europe issued Recommendation No. (88)/18 in which Member States were advised to adopt legislation enabling the criminal responsibility of legal persons. Last year, such legislation was adopted in Belgium in the form of an amendment to Article 5 of the Belgian Criminal Code.

In addition to introducing criminal responsibility the following action can be taken against a legal person:

- Imposing a fine;
- Imposing a special confiscation;
- Dissolution of companies is possible where:
    1. The net assets have sunk below the minimum amount of 2,500,000 Belgian francs for the NV and 750,000 Belgian francs for the BVBA;
    2. During three consecutive fiscal years the obligation to submit an annual account has not been met;
    3. The continued existence of the company appears to be impossible due to serious circumstances such as when one of the partners is no longer able or refuses to meet his obligations or is involved in objectionable practices;
- Imposing a trade ban;
- The closure of one or more establishments;
- The publication or the distribution of the decision.

- **DENMARK**

a) Forms of incorporation

The main forms of incorporation in Denmark are:

Partnerships:
- *Interessentskab:* I/S (ordinary partnership);
- *Kommanditselskab:* K/S (limited partnership);
- *Kommanditaktieselkab* (partnership company, also referred to as limited partnership with share capital).

Limited liability companies:
- *Anpartsselskab:* ApS (private limited company);
- *Aktieselskab*: A/S (stock company, also referred to as public limited company).

Other forms of incorporation:
- *Enkeltmandsfirma (*single trader);
- *Andelsselskab med begaenset ansvar:* Amba (association with limited liability also referred to as co-operation).

b) Use and misuse of legal entities

The most common legal entity in Denmark is the limited liability company. Two types of limited liability company can be distinguished: the private limited company and the stock company, also referred to as the public limited company. The *Anpartsselskab* (private limited company) is the most used and misused legal entity in Denmark.

❖ Sections c) to j) will mainly deal with the ApS and the A/S.

c) Establishment of limited companies

The stock company is regulated by the Danish Companies Act (*Aktieselskabsloven* No. 370 of 13 June 1973, as amended by Act No. 545 of 20 June 1996).
The responsibility of the shareholders is limited to the capital contribution. The shareholders acting in general meeting are the main authority of the stock company. The management of the stock company consists of a supervisory board, a board of directors and a management body.

The Private Companies Act (*Anpartsselskab* No. 545 of 20 June 1996) regulates the private limited company. The main difference with the stock company is that the regulations are less strict and complex and better suited to small companies. The shareholders are the main authority but they do not have to hold general meetings and the management may consist of a one-tier system.

The Danish Act on Undertakings Carrying on Business for Profit and the Act on Foundations Carrying on Business for Profit are applicable to limited companies.

Neither a notary public nor any other preventive supervision is required for the establishment of a company.
To establish a private limited company or stock company the following requirements have to be met:

- The founder must be a resident of Denmark or be a national of another EU country, although the Ministry of Industry may grant an exception to the rule;
- A minimum share capital of 500,000 Danish crowns is required for a stock company and 125,000 Danish crowns for a private limited company;
- A memorandum of association (see below);
- Articles of association (see below).

A memorandum of association must contain the following:

- The names, occupations and addresses of the promoters;
- The price at which the shares are issued;
- The time limit for subscription and payment of the shares;
- The time limit within which the statutory general meeting is to be held and how and at how much notice the meeting has to be called;
- Whether the company is to pay the cover the expenses of incorporation and if so, an estimate of these expenses.

The articles of association must contain the following data:

- The name of the company and secondary names, which must include the word *Aktieselskab* or *Anpartsselskab* or the abbreviation *A/S* or *ApS* respectively;
- The municipality in Denmark in which the registered office of the company is to be situated;
- The objects of the company;
- The amount of the share capital, the nominal value of the shares and the shareholders' voting rights;
- The (minimum and maximum) number of members of the board of directors, any deputy directors and their terms of office;
- The (minimum and maximum) number of auditors and their terms of office;
- The procedure for convening general meetings and the issues on the agenda at ordinary general meetings;
- The financial year of the company;
- Whether the shares are to be issued to a registered holder, or may be issued to bearer;
- Whether the shares of the company shall be non-negotiable instruments.

Branch offices may also be established in Denmark if a foreign company does not wish to establish a Danish type of subsidary company. Branch offices are to be established according to international agreements or with the permission of the Danish Ministry of Industry. If the office is registered in one of the other EU countries, it may open a branch office without the permission of the Ministry of Industry. To establish a branch office the following information must be submitted for registration to the Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen)*:

- Proof that the foreign company is lawful in its home country;

- The memorandum and articles of association;
- Power of attorney from the company to the branch officer;
- Proof that the branch officer fulfils the requirement of being resident in Denmark, or that he has been exempted which will always be the case for EU citizens.

The Public Companies Act, the Private Companies Act and the Commercial Undertakings Act are applicable to branch offices.

d) Registration of limited companies

Registration must take place within six months from the date of the preparation of the memorandum of association at the Commerce and Companies Agency. If registration has not taken place within this period, the company can no longer be registered and the subscribers are relieved of their duty to subscribe the share capital. It is investigated whether these companies were legally established, i.e. in line with national laws. The registrations are published in the Danish Official Gazette. It must be noted that other legal entities exist according to Danish law which do not fall under the supervision of the Danish Commerce and Companies Agency.

The following information must be submitted by a company to the Commerce and Companies Agency:

- The memorandum and the articles of association, including information regarding the share capital and which officers have mandate over the company;
- The audited annual accounts and the annual report;
- Details of the auditors and the members of the supervisory board and management boards, including their full names, addresses, nationalities and occupations;
- All resolutions including winding-up resolutions and amendments of the articles of association;

Amendments of the memorandum or articles of association and appointments or dismissals of directors, members of the board and accountants must be registered at the Commerce and Company Agency and made public in the Danish Official Gazette.
As far as the transfer of shares in public limited companies is concerned only the persons with a controlling interest are made public through publication of the annual account.

e) Other registrations

In all companies, the board of directors maintains a register of shareholders, containing their names and addresses. The shareholders register must be made available for inspection by public authorities and the registered office.

Shareholders may inspect the shareholders register of a private limited company, whereas the shareholders register of a public limited company is not open for inspection to the general shareholders. The general public has the right to inspect the shareholders register of a private limited company if the share capital exceeds 500,000 Danish crowns but no access is available to the shareholders register of the public limited company.

In addition, a public limited company must maintain a register of all shareholders that control 5% or more of the voting rights or of the share capital if this is nominally more than 100,000 Danish crowns. Shareholders have a duty to report this to the company.

A register on disqualified directors is about to be established in Denmark. A central register on bankruptcies, which will be kept by the Danish Commerce and Companies Agency, is also about to be established.

Two registers are maintained by the *Danmarks Statistik*: a statistical business register and a central business register.

The central and customs tax administration (*Told og Skattestyrelsen)* co-operates with the Commerce and Companies Agency. The register is called *SE-registret* and is open to the public and available on line.

There are a number of other public registers, including, *inter alia*:

- The property register (kept by the local courts);
- The chattel mortgage register and the vehicle mortgage register;
- The ship register;
- The international ship register;
- The aircraft register.

Finally, there are commercial data files, also referred to as credit agencies, holding information on companies. The Danish Commerce and Companies Agency does not make use of these files.

f) Identification and investigation

Proving one's identity with original documents is not required when registering information regarding a legal person.
A background investigation is conducted through the central persons register of natural persons who have established a company, are appointed director upon establishment or at a later stage, become shareholder upon establishment, or otherwise exercise control over the legal person. Only persons who acquire shares after establishment are not subjected to a background investigation.

Bankruptcy or suspensions of payments, criminal convictions or other criminal activities of natural persons will be investigated in the future once the registers on bankruptcy and disqualification of directors have been established. Criminal convictions or other criminal activities as well as bankruptcies or suspensions of payments by legal persons with which a natural person is associated will also be investigated in the future.
At the moment, only the Danish Commerce and Companies Agency conducts background investigations by checking and consulting registers. However, in the near future all authorities with a legal interest will be able to conduct such background investigations.

g) Central registration

Since 1918 all the official registration of companies have been centralised under the Commerce and Companies Agency.
The Commerce and Companies Agency comes under the Ministry of Industry and is located in Copenhagen. It is responsible for:

- The registration of companies;
- The supervision of legislation related to commerce and companies;
- Holding and distributing of information regarding companies;
- Holding and distributing information regarding annual accounts.

Public-com is a separate body specifically in charge of sale, distribution and marketing of registered information.

The registered data can only be found at the Commerce and Companies Agency. All registers are centrally stored at a national level.

h) Accessibility of information

The registered data are not generally accessible. The authorities have access to more information than private persons. Some information is available on the Internet and some through a modem.
The information obtained from consulting the registers can be used for criminal investigations.

i) Privacy

The law on personal information, the law on registers and the law on public administration regulate matters regarding privacy.
The EC directive on the protection of personal data (95/46/EC) has only been partially implemented by Denmark. A law amending the Civil Registration Act came into force on 1 October 1998 and a bill has been introduced in Parliament twice. Introduction of the third bill in Parliament took take place in October 1999.

j) Sanctions

If the legal requirements for establishment or amendments of the articles of association have not been met, registration of the legal person will be denied.
A company, which has shown no signs of activity over a long period of time, will not be sanctioned. Criminal activities are, however, followed by sanctions.

- **FINLAND**

a) Forms of incorporation

The main forms of incorporation in Finland are:

Partnerships:
- *Avoin yhtiö* (ordinary partnership);
- *Kommandiittiyhtiö* (limited partnership).

Limited liability companies:
- *Julkinen Osakeyhtiö:* Oyj (public limited company);
- *Osakeyhtiö:* Oy (private limited company).

Other forms of incorporation:
- European economic interest grouping (EEIG);
- *Sivuliike* (branch);
- *Osuuskunta* (co-operation);
- Associations, economic associations, foundations (often in the capacity of holding entities) and unincorporated associations.

b) Use and misuse of legal entities

By far the most common form of incorporation in Finland is the *Osakeyhtiö* (limited company), in particular the private limited company. In 1998, 216,075 private limited companies were entered on the company register.

The limited company is the most misused company. The misuse of foreign entities, especially offshore companies, is increasing, but is still relatively rare.

❖ Sections c) to j) will mainly deal with the Oy and the Oyj.

c) Establishment of limited companies

The establishment and operation of limited companies (both private and public) is regulated by the Finnish Companies Act (*Osakeyhtiölaki* 734/1978), as amended by Act No.145/1997 and effective as of 1 September 1997.
Other applicable acts are, *inter alia*: the Company Register Act (*kaupparekisterilaki*), the Company Register Ordinance (*kaupparekisteriasestus*), the Trade Act (*laki elinkeinon harjoittamisen oikeudesta*), the Accounting Act (*kirjanpitolaki*), the Accounting Ordinance (*kirjanpitoasestus*), the Auditing Act (*tilintarkastuslaki*), the Auditing Ordinance (*tilintarkastusasetus*), the Securities Market Act (*arvopaperimarkkinalaki*), the Book-Entry Securities System Act (*laki arvo-osuusjärjestelmästä*), the Book-Entry Securities System Ordinance (*asetus arvo- osuusjärjestelmästä*), the Book-Entry Account Act (*laki arvo-osuustileistä*) and the Unfair Trade Practices Act (*laki sopimattomasta menttelystä elinkeinotoiminnassa*).

The mandatory company bodies are a general meeting of shareholders, a board of directors and auditors. In addition, a company whose share capital is at least 500,000 Finnish marks (80,000 euros) must have a managing director. Such a company may also have a supervisory board.

There is no requirement for any agreement or co-operation on the part of any governmental body or independent third party in connection with actions or decisions listed in the questionnaire (except in some specially regulated fields of business e.g. banking, insurance, securities etc., in which case the conduct of such business requires a license). However, if the shares of a limited company can, in connection with the establishment of the company (or in connection with an increase of the share capital of the company), be subscribed by investing other property than money in the company (contribution in kind), one or more approved auditors acting as independent experts have to evaluate such property and issue a dated and signed opinion thereon. Such opinion has to be attached to the memorandum of association (or the resolution concerning the increase of the share capital) of the limited company (see below). Moreover, the notification to the Finnish company register (see below) shall include a certificate of the company's auditors confirming that the provisions on the payment of the share capital contained in the Finnish Companies Act have been complied with. An auditor may refuse to sign an opinion or a certificate if the provisions of the Companies Act have not been complied with. A notary public is not required for the establishment of a company.

To establish a limited company the following requirements have to be met:

- The founders may be one or more legal or natural persons; at least half of them must be resident in a EEA Member State, unless the Ministry of Trade and Industry grants an exception to this requirement;
- A minimum share capital of 500,000 Finnish marks (80,000 euros) is required for a public limited company and 50,000 Finnish marks (8,000 euros) for a private limited company, payable prior to registration;
- A memorandum of association (see below);
- Subscription of the company's shares;
- A constitutory shareholders' meeting;
- A board meeting;
- A company register notice to be filed with the Finnish company register.

The memorandum of association should contain the following data:

- A proposal for the articles of association (see below);
- The name, residence and postal address of the founder(s) and, should it be a natural person, his/her Finnish personal identity number (or, in case of a foreign natural person, his/her date of birth) or, should it be a legal person, its registration number and relevant register;
- The nominal value of each share or, if there is no nominal value, information on the amount to be entered as share capital;
- The time period in which the shares must be subscribed and paid for;
- The time and manner of convening the constitutory shareholders' meeting, unless there is a unanimous decision that it shall be held without notice;

- The expenses resulting from the establishment of the company which are to be paid by the company, or the estimated maximum amount that these expenses will reach.

The articles of association should contain the following data:

- The name of the company;
- The seat of the company;
- The objectives of the company;
- The share capital, or the minimum and maximum share capital, within the limits of which it may be decreased or increased without amending the articles, bearing in mind that the minimum share capital shall not be less than one fourth of the maximum share capital;
- The nominal value of a share or, if the shares have no nominal value, the minimum and maximum number of shares;
- The number of, or the minimum and maximum number of the members of the board of directors, the deputy board members if any, the auditors and their terms of office;
- The procedure for convening the general meeting of shareholders;
- The issues to be considered in the annual general meeting;
- The financial year of the company.

Branch offices are considered to be an extension of the foreign company. To establish a branch office the following requirements have to be met:

- The filing of a notice of registration with the company register in accordance with the Company Register Act ;
- A representative of the branch office has to reside in Finland. Foreign entities from a non-EEA country need to obtain permission from the Ministry of Trade and Industry to conduct business in Finland.

d) Registration of limited companies

Within six months after signing the memorandum of association a registration notice concerning the incorporation of the company must be filed with the Finnish company register (Kaupparekisteri) maintained by the National Board of Patents and Registration. The registration notice must be made in duplicate on a form approved by the National Board of Patents and Registration.

Persons who have taken decisions prior to the registration are jointly and severally liable for any obligations incurred by the company as a result of those decisions. The liability for the obligations arising from these decisions is transferred to the company upon registration. However, the transfer of liability will only take place if these obligations arise from the memorandum of association or if the decisions were taken after the constitutory shareholders' meeting.

A company must submit the following information to the company register in connection with the registration: the name and postal address of the company, legal representation of the company, personal data on the board members, managing director, if any, members of the supervisory board, if any, and on the auditors.

In addition, a company must submit the following documenst to the Finnish company register:

- The memorandum of association;

- The articles of association;
- The minutes of the constitutory shareholder's meeting containing, *inter alia*, the election of the members of the board of directors and the supervisory board, if present.
- The minutes of the board meeting containing, *inter alia*, the election of the chairman to the board and the managing director, if present, and the resolution of the authorisation to sign for the company. In addition, consent to act is required from the members of the board of directors or supervisory board, the managing director and the auditor(s) as well as from their replacements;
- An affirmation by the members of the board of directors and the managing director, if present, that the Companies Act has been complied with in the establishment of the company and that the amount paid for the shares (i.e. the share capital) is in the company's possession;
- An auditors' confirmation that the share capital has been paid in accordance with the provisions of the Companies Act.

Any amendments to articles of association, appointments or dismissals in the board of directors, the supervisory board, if any, auditors or other management must be registered in the company register.

e) Other registrations

The shares of a limited company are entered on a shares register. The shares register contains the following information: the shares or share certificates in numerical order, the date of their issue, and the name and address of the shareholder.
In addition, a limited company is required to keep a shareholders register. In this register, the shareholders are listed in alphabetical order. It contains their names and addresses as well as their shareholdings. Both registers are open for inspection by any interested party.
Limited companies whose shares are publicly traded must have their shares entered into the book-entry securities system. For other limited companies the shareholders' meeting shall decide whether the limited company will have its shares entered into the book-entry securities system. This system consists of book-entry registers and lists of shareholders. The book-entry registers are maintained by, for instance, banks, stock exchanges, option dealers and investment firms. The central data system required for the organisation of the book-entry securities system is maintained by the Finnish Central Securities Depository Ltd which keeps a public register of the owners of book-entry shares (see below under g).

All disqualification orders (given by a Finnish court) are registered in a business prohibition register kept by the Finnish judicial registry. Information on business prohibitions is also registered in the data files of *Asiakastieto,* the largest company providing business and credit information services in Finland.

The Finnish judicial registry maintains a register on bankruptcies and company reorganisations as well as on insolvency loan arrangements of private persons, as registered by Finnish courts. Information about the credit history of companies and private persons can be found in the files of *Asiakastieto*.

In addition, certain government authorities must commonly be notified before a company engages in business in Finland. The most important notification is that of the

commencement of trade to the tax authorities, which serves as registration for VAT purposes and as an employer for social security and taxation purposes. The commencement of trade notification to the tax authorities includes basic company information, such as the company name, postal address, form of incorporation, field of operations, financial period, share capital, contact person and other information needed for the abovementioned purposes. The registers kept by the tax authorities are not, as such, public.

There are a number of other public registers, including, *inter alia*:

- Register of vessels, motor vehicles and aircraft (kept by the National Board of Navigation and the Administrative Board, The Centre of Motor Vehicles Register and the National Board of Civil Aviation respectively);
- Register of business mortgages (kept by the National Board of Patents and Registration);
- Land register (kept by the local District Courts);
- Insolvency register, which gives details of bankruptcies and company reorganisations (kept by the Finnish judicial registry);
- Register of rearrangement of private persons' debts (kept by the Finnish judicial registry);
- Register of trade bans (kept by the Finnish judicial registry);
- Register of marriage settlements (kept by the Finnish judicial registry).

Finally, there are many commercial, unofficial data files in Finland which are mainly accessible through the Internet. The largest company providing business and credit information services in Finland is *Suomen Asiakastieto Oy* (*Asiakastieto*, known also as *Finska* to its foreign customers), a credit information agency owned by Finnish industry, commerce and financial institutions. *Asiakastieto's* data files contain basic company information including information on the management and, in some cases, shareholders of the company as well as information on the credit history of companies and private persons, etc. *Asiakastieto* also co-operates with more than 100 credit information agencies worldwide and is a member of Febis (Federation of Business Information Services), Bignet (Business Information Group Network), and Accis (Association of Consumer Credit Information Suppliers). It should be noted that foreign entities cannot register as a direct customer of *Asiakastieto.* They have to order information about Finland through a credit information agency in their home country.

There are also other unofficial company registers such as the Helecon Enterprise data file maintained by the Helsinki School of Economics and Business Administration and the Blue Book data files maintained by Helsinki/Media corporation. These data files contain basic company information and annual reports of major Finnish companies as well as information about bankruptcies.

Such commercial databases are used in order to get information about a certain company in connection with, for example, an assignment or if a review of a company's credit rating information needs to be made. The data files are used in addition to the official company register information.

f) Identification and investigation

It is not required to prove one's identity when registering data with respect to a legal person in the company register. However, if a person to be registered in the company register (e.g. as a member of the board of directors) does not have a Finnish social security number, his/her identity must be proven by attaching, for example, a copy of his/her passport to the relevant company register notification.

The passport copies, as well as other attachments to the company register notification, are filed and available for inspection at the company register. Passport numbers and other document numbers are, however, not registered in the company register.

There is no official background investigation of natural persons in connection with activities listed in the questionnaire except for the investigation whether the persons have the necessary legal capacity, have not been disqualified or have not become (personally) bankrupt. This investigation is conducted by the company register in co-operation with the Finnish judicial registry and the population register centre. The members of the board of directors and supervisory board, the managing director and the auditors must, however, all consent to their appointment in order for it to be registered in the company register. Moreover, the company register may, if necessary, update and check personal data contained in it against data contained in the Finnish population register. Compliance with possible trade bans and disqualification orders imposed on natural persons is supervised by the Finnish police.

There is no statutory obligation to prove one's identity in connection with major legal transactions with regard to the company. The right to represent the company in connection with, for example, a business transaction is, however, in practice often proven by a power of attorney or by a company register excerpt stating the representation of the company. Moreover, the shareholders of a company are usually required to prove their identity when attending a shareholders' meeting for deciding, *inter alia*, on the amendment of the articles of association or other major transactions involving the company.

At shareholders' meetings, the shareholders exercise their rights either in person or through a representative. Representatives must present a dated proxy. The same applies to the establishment of a limited company.

g) Central registration

The Finnish company register is a nation-wide, central register and, accordingly, all registered data (i.e. data compulsorily registered in the company register) concerning legal persons can be found at there.

The tax authorities' registers form a separate system, not linked with the company register.

The data files of *Asiakastieto* are nation-wide as well, so that all business and credit information registered in their files can be found in the same register.
The Finnish company register is not linked to other registers, which would allow all information to be searched simultaneously, i.e. in one search. There are, however, already automated Internet links from one register to the other, e.g. from *Asiakastieto* to the company register, but these registers still have to be searched separately.

According to the respondents, the government does not have its own internal database on legal persons other than the official registers, such as the company register and the registers kept by the Finnish judicial registry.

As mentioned above under e), limited companies whose shares are publicly traded must have their shares entered into the book-entry securities system. The central data system required for the organisation of the book-entry system is maintained by the Finnish Central Securities Depository Ltd. This depository maintains, *inter alia*, lists of shareholders and book-entries and provides services relating to their use.

h) Accessibility of information

All registers referred to above are, at least to some extent, available in the form of automated data files.

The national company register is publicly available, either in the form of copies of registration documents or in the form of registration certificates. It has its own service programme called *Katka* (at least for Finnish customers) from which company register excerpts and articles of association of companies can be electronically ordered. The company register can also be consulted through the Internet and on CD-rom or microfilm or other types of mass delivery, all subject to a fee. The information is also available free of charge by telephone or as self service (computers and microfilms) at the company register in Helsinki and all local offices.

The shareholders registers kept by limited companies and containing the shareholders' names and addresses as well as their shareholdings, are open for inspection by any interested party.

The bankruptcy and company reorganisations register as well as the insolvency loan arrangement register of the Finnish judicial registry are available to designated authorities, corporations and credit information agencies. They are also available to the public for a fee.

The register of *Asiakastieto* is accessible to its contractual customers (which have to be entities registered in the Finnish company register). Other commercial registers are, as a rule, generally accessible subject to separate customer agreements.

Most of the abovementioned registers are accessible through the Internet for a service fee and subject to relevant customer agreements.

On some occasions, the authorities may have access to more information than others. For example, the tax authorities are entitled to access certain company data for taxation purposes.

The registers can usually be searched under the name of the legal (or private) person. The company register number of the company (or the social security number for private persons) is also often used.

The information derived from the abovementioned registers could be used for criminal investigations.

i) Privacy

The privacy of natural persons is protected by the Finnish Personal Data Act (523/1999). It applies to all collecting and processing of personal data and must therefore be complied with each time information is collected from or entered on an official or commercial register.

Data protection issues mainly arise with respect to private persons registered in the data files of *Asiakastieto*, and specifically, with respect to the transfer to a third party of credit information regarding a private person. Such information may only be transferred to another entity conducting credit information activities and/or to a person or business entity needing such information for the purpose of extending or supervising credit or similar purposes. Moreover, the social security number of a private person may in general only be processed with the express consent of the person concerned. Exceptions are made if the number is needed for identifying that person pursuant to a statutory obligation, for implementing rights and obligations of that person or of the registrar, for extending credit or collecting debts, for insurance, credit institution and leasing activities, for credit information activities, for health care and social services and in matters related to employment or similar matters. Any party using the services of *Asiakastieto* (or any other registrar) has to comply with these provisions as well as with other provisions of the Finnish Personal Data Act.

The EC directive on the protection of personal data (95/46/EC) has been fully implemented by Finland. The law was enacted by the Finnish Parliament on 10 February 1999 and entered into force on 1 June 1999.

j) Sanctions

The registration of the establishment of a company or amendment of the articles of association of a company has a constitutive effect. Therefore, the establishment of the company shall have lapsed if it has not been notified to the company register in accordance with the Finnish Companies Act. If, on the other hand, a decision of the shareholders' meeting of a company regarding, for example, the amendment of the articles of association has not been made in proper order or is otherwise against the provisions of the Companies Act or the articles of association, a shareholder, the board of directors, a member of the board of directors and the managing director have the right to bring action against the company in a court of law to have the respective decision invalidated or amended. Moreover, the management and founders of the company are in certain situations liable for damages caused to the company, to a single shareholder or to a third person.

If the business entity registered in the company register has during a period of ten years not filed a single notification with the company register, the company register has to inquire whether the business entity still conducts business. If, after a statutory public notice period, the company register has not received any information about the

existence of the business entity, it may strike the business entity off the register, after which it is deemed to have been dissolved.

Criminal activities are subject to scrutiny by the tax authorities and the police, and of course by the management and shareholders' meeting of the company itself. Sanctions for violating, for example, the provisions of the Companies Act include fines and imprisonment, depending on the severity of the crime

If the company register receives information from a court of law to the effect that certain information/resolutions should not have been registered (e.g. because such a resolution is invalid or incorrect), the company register authority shall remove the registration from the register.

- **FRANCE**

a) Forms of incorporation

The main forms of incorporation in France are:

Partnerships:
- *Société en nom collectif* : SNC (ordinary partnership);
- *Société en commandite simple* : SCS (limited partnership);

Limited Companies:
- *Société à responsabilité limitée:* SARL (private limited company);
- *Entreprise unipersonelle à responsabilité limitée:* EURL (private limited company with one shareholder);
- *Société anonyme à conseil d'administration / à directoire:* SA (public limited company or stock company);
- *Société en commandite par actions:* SCA (limited partnership on shares).

Other forms of incorporation:
- *Société par actions simplifiées*: SAS (simplified joint stock company);
- *Société en participation*: SEP (company by way of participation, equivalent of partnertship);
- *Société civile* (private partnership; has legal personality, requirements for establishment must be fulfilled as with trading companies);
- *Commerçant* (single trader);
- *Société civile professionelle, société civile de moyen* (special forms of the *société civile* concerned with professional activities);
- *Société coopérative* (co-operation);
- *Société mutuelle* (mutual security company);
- *Association* (association);
- *Groupement d'interêt economique:* GIE (a form of company after which the European economic interest grouping was modelled);
- *Groupement européen d'intérêt économique* (European economic interest grouping).

b) Use and misuse of legal entities

The most widely used legal persons are private limited companies (SARLs). Approximately 72% of legal persons are private limited companies. There are 657,000 SARLs and 158,000 SAs (1997). No information was provided on the misuse of legal entities.

❖ Sections c) to j) will mainly deal with the SA and the SàRL.

c) Establishment of limited companies

The establishment and the operation of legal persons are regulated by the Companies Act (Nos. 66-537 of July 1966 and 67-236 of March 1967).

The public limited company (SA) is composed of at least seven shareholders. Public limited companies may be divided into open SA's, making a public demand on the capital market, and closed SA's, not making such a demand. The term 'open SA' is interpreted broadly: an open SA is already said to exist when founders offer shares to a person they are not acquainted with. The simplified joint stock company (SAS) has been created in 1994 and is very similar to the SA. Its advantage over the SA is its flexibility as to the organisation of the management powers and the operation of its management bodies according to the wishes of the shareholders.

In drafting the statutes of a company the services of a notary public are not required.

To establish a limited company the following requirements have to be met:

- The SARL's minimum registered capital must be 50,000 French francs; for a privately held SA the minimum capital is 250,000 French francs and for a publicly held SA 1,500,000 French francs;
- There have to be articles of association (see below).

The articles of association of the private limited company must contain the following:

- The company form adopted;
- The company name;
- Seat and objectives;
- The amount of capital;
- The associates' percentages of ownership;
- An official evaluation of each contribution in kind;
- A statement that interests are fully paid;
- A statement that the cash contributions have been deposited;
- Information on appointments, managers' powers, rules for transferring company interests, procedures to follow in associates' meetings, majorities required for certain decisions, opening and closing dates of the financial year, allocation of profits and liquidation surplus, and rules for winding up the business.

The articles of association of the public limited company (SA*)* must contain the following:

- Declaration of juridical forms;
- The names of all individuals or legal entities signing the articles;
- The legal form adopted, in this case, that of an SA*;*
- The duration of the company, not to exceed 99 years;
- The corporate name;
- The location of its head office;
- The SA's corporate purpose;
- The amount of its share capital;
- The number and form (registered only) of shares issued and their par value, with any distinction among different categories of shares;
- Any restriction on the transferability of shares;
- The name of anyone making a contribution in kind to the capital of the company;
- The name of any individual or legal entity receiving a particular benefit from the organisation of the company;

- The names, operating structure, and powers of the company's management;
- Any specific provisions relating to a distribution of income, reserves, and liquidation of surplus; and
- The names of the first administrators of the company, or the members of the supervisory board, as well as of the first official auditors.

An open SA is both at establishment and for the duration of its existence subject to supervision of the *Commission des opérations de bourse* (COB). This supervision upon establishment may, *inter alia*, take the form of approval by the COB of the *note d'information* which founders have to prepare to inform the public.

At the establishment of a closed SA the *Tribunal de commerce* appoints one or more *commissaires aux apports* who need to supervise the value of the contribution in kind. The amount to be deposited on the shares has to be submitted with a notary public, together with a list of founders' shares and the report that needs to be prepared if contribution in kind has taken place.

The *Société à responsabilité limitée* (SàRL) has partners instead of shareholders. At the establishment of a SàRL the partners must unanimously appoint a contribution supervisor from their midst. This *commissaire aux apports* must compulsorily be chosen from the lists prepared by the Court of Appeal.

d) Registration of limited companies

The national register for companies is the *Registre National du Commerce et des Sociétés*. All companies have to register with the *Registres du Commerce et des Sociétés* kept by the registry of the *Tribunal de Commerce* in their district (*département*, or *arrondissement* in Paris) i.e., where the company's main office is situated. There are 264 *Tribuneaux de Commerce*.

Upon establishment of a company a file is submitted to the *Registre du Commerce et des Sociétés*. Such files are first examined and screened by the *Centre de Formalités des Enterprises* which resides at the French chambers of commerce. The involvement of the chambers of commerce is thus institutionalised in France.

Upon establishment of an SA the policy controllers must sign a declaration stating that they have not committed any offences penalised by law.

Data from local registers are included in a national register kept by the *Institut National de la Propriété Industrielle*.

The registers are automated and open to the public.

The following data are, *inter alia*, registered:
- Name of the company;
- Form of incorporation;
- Nominal capital;
- Address;
- Activities carried out;

- Statutory duration of the company;
- If available, date by which annual reports and accounts need to have been published;
- Data on names of partners, directors, members of the supervisory board, accountants.

The company's statutes must also be deposited. These contain, *inter alia*, information on the founders and, in case of an SàRL, whether the partners are acting in their proper legal capacity, the manner in which a partner's share may be transferred and the appointment and dismissal of directors, together with, in case of an SA, the composition, functioning and powers of the organs of the company.

The registry of the *Tribunal de Commerce* publishes the most important registered data in the *Bulletin Officiel des Annonces Civiles et Commerciales* (BODACC).

e) Other registrations

With respect to shareholder registration, an SA must, prior to the annual shareholders' meeting, prepare a list of shareholders and make this available to them. The list is not published.

Transfer of shares in an SA is not registered. Transfer of the participation of a partner in an SàRL is registered with the *Registre du Commerce et des Sociétés*, but only for the purpose of enabling third parties to contest the transfer.

Information about disqualification orders is available at the French Ministry of Justice's Internet site: http://test.justice.gouv.fr/cjn/.

As far as bankruptcy registration is concerned, all relevant bankruptcy data are registered in the *Registre du Commerce et des Sociétés* and thereby also in the national register of the *Institut National de la Propriété Industrielle*.

f) Identification and investigation

To establish the identity of persons whose data will be registered in the *Registre du Commerce et des Sociétés* such persons need to submit an excerpt of the register of births or a copy of an ID-card or passport.

Directors of a company are required to submit an excerpt from the criminal register. The criminal register also contains sanctions carried out in the context of insolvency procedures. Shareholders and partners are not investigated.

Several registers are used to investigate irregularities. In the first place, mention can be made of the *Registre du Commerce et des Sociétés*. Besides that, there are registers of the *Banque de France*, concerning, *inter alia*, bank accounts and arrears of payment (*Ficoba*, *Fiben*). There also exists a *Répertoire national des enterprises*, in which every enterprise is given an identity number for use with various public authorities (system *Sirene*). A similar number is also given to every natural or legal person heading an enterprise (system *Siren*) and to every branch of an enterprise (system *Siret*).

Investigations into irregularities as indicated here are carried out by the police and *gendarmerie* and also by several public authorities, such as tax authorities, customs, fraud prevention services and economic supervision services (*les services de la concurrence et des fraudes*), each in their own field. There is also the *Cour des comptes* and the regional auditor's offices who control the accounts (and the expenditures contained therein) of public authorities (state, *régions*, *communes*, *départements*) and of state enterprises and institutions existing by charity.

Mention can also be made of the *Mission Interministérielle d'Enquête sur les Marches et les conventions de délégation de service public* (MIEM). This service supervises the circumstances in which contracts for the transfer of public duties (e.g. public transport) are negotiated, entered into and carried out.

The *Service central de prévention de la corruption* is connected to the Ministry of Justice. Its task is the collection of information on a central level necessary for the detection and prevention of bribery or giving in to bribery, extortion, illegal conflicts of interests and distortion of competition in public procurement. The reporting activities of this service are primarily aimed at making proposals towards the prevention of said offences.

Tracfin is a co-ordinating service serving the Ministry of Economic Affairs *(Ministre de l'Economie et du Budget*). It is entrusted with processing information in the fight against money-laundering and serves as the place financial institutions report suspect transactions to, which may provide evidence of drug trafficking or organised crime. It receives information from banks, public financial institutions, insurance companies, the stock exchange and currency exchange services. *Tracfin* collects and analyses these data and alerts the judicial authorities if sufficiently strong suspicions of punishable acts exist.

g) Central registration

As mentioned above, the national register for companies is the *Registre National du Commerce et des Sociétés*.

h) Accessibility of information

The *Registre du Commerce et des Sociétés* may be consulted at the following Internet site: http://infogreffe.fr/ecran10.htm. This Internet page provides information on all formally registered companies. It also provides information on suspensions of payment, liquidations and legal action being taken against companies.

i) Privacy

EC Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data has not yet been implemented in French legislation. A new act has been drafted by the government, which is expected to enter into force in the spring of 2000.

j) Sanctions

The registrar of the *Tribunal de commerce* investigates the data offered for registration and verifies in particular whether the submitted declarations meet with legal criteria. If this is not the case, registration is refused.

The judge on the *Tribunal de Commerce* entrusted with the supervision of the register may also order those in charge of the company to add to or correct incomplete declarations. Not following such orders is penalised by law.

A company not carrying out any activities may also be included in the *Registre du Commerce et des Sociétés*. Ceasing all activities does not constitute a ground for dissolution, unless this follows from the achievement of the company's objectives (the achievement of the objectives or the impossibility of achieving them leads to the dissolution of the company). The ceasing of all activities may, however, be noted on the register. If this is the case, it must be possible to discern a resumption of activities within three years. If this does not happen, the registry is ordered by registered mail to normalise the situation within three months. If within this time span no answer is received the registry will be entrusted with striking the company off the register. The courts may then establish dissolution of the company.

- **GERMANY**

a) Forms of incorporation

The main forms of incorporation in Germany are:

Partnerships:
- *BGB-Gesellschaft* (partnership);
- *Sozietät* (a form of *BGB-Gesellschaft*);
- *stille Gesellschaft* (another form of *BGB-Gesellschaft*);
- *offene Handelsgesellschaft* (ordinary partnership);
- *Kommanditgesellschaft:* KG (limited partnership);
- *Kommanditgesellschaft auf Aktien* (limited partnership on shares);
- *GmbH & Co KG* (limited partnership of which all managing partners are a GmbH).

Limited liability companies:
- *Aktiengesellschaft* : AG (public limited company);
- *Gesellschaft mit beschränkter Haftung*: GmbH (private limited company).

Other forms of incorporation:
- *Einzelkaufmann* (single trader);
- *BGB-Verein* (association, a rare form of incorporation subject to consent);
- *Stiftung* (foundation; subject to government consent);
- *Reederei* (shipping company, a special form of association);
- *eingetragene Genossenschaft*: eG (co-operation);
- *Versicherungsverein auf Gegenseitigkeit* (mutual security company).

b) Use and misuse of legal entities

The most widely used and misused legal person is the private limited company (GmbH).

Furthermore, foreign entities, which do not have their statutory office and central administration in Germany, are quite frequently misused.

❖ Sections c) to j) will mainly deal with the public limited company (AG*)* and the private limited company (GmbH*)*.

c) Establishment of limited companies

The establishment and the operation of the public and private limited company are regulated by the *Aktiengesetz* and the *GmbH-Gesetz* respectively.
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The incorporation of a public limited company requires the following:
- Articles of association, which have to be drawn up by notarial deed;
- Subscription in notarial form to all the shares, whereby a kind of pre-company without legal personality is established;

- Of the shares, at least one quarter of the nominal value (and if any, the entire premium) must be subscribed;
- Entry on the company register, whereupon the company legally begins.

The articles of association of the public limited company should contain the following data:

- The founders;
- The par value, the issue price and, if there are different classes of shares, those which each founding shareholder subscribes;
- The amount of capital deposited.

The formation of the private limited company is procedurally less complicated than the private limited company. The incorporation of a private limited company requires the following steps:

- The execution of articles of association;
- The subscription to the original capital contributors;
- Registration in the company register.

The articles of association of the public limited company should contain the following data:

- The company's objectives;
- The name and seat of the company;
- The amount of the share capital and of the individual contributions;
- If applicable, a specification of the duration of the company's existence.

As mentioned above, for amending the articles of association as well as for changes in management, co-operation of a notary public and possibly of the register court is required. The transfer of (part of the) shares of a private limited company must also be notarised.
The notary public may refuse his services if he is being called to administer to activities with which apparently illegal or unreasonable aims ('*unerlaubte oder unredliche Zwecke*') are served.

The public limited company must, furthermore, comply with the following. In various circumstances, for instance when one of the founders is a member of the supervisory board or the board of directors, or when the supervisory board or the board of directors have been given special remuneration, the register court will appoint one or more *Gründungsprüfer* (establishment controllers). Upon establishment the founders prepare a *Gründungsbericht* (establishment report). Those testing the establishment (members of the supervisory board and/or *Gründungsprüfer*) each prepare a *Prüfungsbericht*. The tests are primarily concerned with the deposit of capital and the value of contributions in kind.

If the *Gründungsprüfer* declare(s) that the *Gründungsbericht* is incomplete or incorrect, or if this is obvious in other ways, registration in the company register is refused and, consequently, the company will not acquire legal personality.

Contracts entered into within two years after registration of the company in the company register by which assets are acquired in return for more than 10% of the company's *Grundkapital*, necessitate a so-called '*Nachgründung*'. This is made up of, firstly, consent of the general meeting of shareholders, which can only be given by qualified majority and after

one or more *Gründungsprüfer* have prepared a report on the contract, and, secondly, of registration in the company register.

Upon establishment of a private limited company the register court before which registration in the company register is sought tests the establishment. The register court especially investigates the company contract entered into by the founders and the contributions.

No authorisation by the public administration is required for the establishment of a company. However, use of the services of a notary public is required.

A foreign company may set up a branch in Germany. A branch is a registered place of business rather than a legal entity. It has to register with the company register and it is subject to the same law as its owner.

d) Registration of limited companies

Companies must register in the company register held by the *Amtsgericht*. The chamber of commerce (*Industrie- und Handelskammer*) holds duplicates of the register. Membership of a chamber of commerce is compulsory. With the *Amtsgericht* information may be inspected free of charge and without reason given. Data are also publicly accessible through the chamber of commerce. Registration information is published in the Official Gazette, the *Bundesanzeiger*.

In the company register the following is, *inter alia*, published:

- Founders of the company;
- Name and seat of the company;
- Objectives of the company;
- Amount of *Grundkapital* (public limited company) or *Stammkapital* (private limited company);
- Date of adoption of the statutes (public limited company) or of the entering into of the company contract (private limited company);
- The members of the board of directors and their powers of representation;
- Possible provisions on the duration of the company and the *genehmigte Kapital*.

e) Other registrations

There is no official registration of shareholders of limited companies. Shares are registered in the shares register, setting out the holder's name, residence and occupation. The shares register is not open to the public. It may be inspected only by shareholders and by those who have a legal interest in inspection.
Private registers do exist, amongst others with the *Kommerzbank*. These are concerned with registration of larger private limited companies. These private registers are not often used though, as their use is not free. Shares owned by private persons are mostly mentioned anonymously.

Requests for and decisions on bankruptcies are (decentrally) registered with the *Amtsgerichte*. Companies, which run checks on creditworthiness, the so-called '*Schufa*'

created by the banking industry, do exist. Anyone can request information with them provided reasons are given.

Furthermore, the Attorney General (*Generalbundesanwalt*) with the *Bundesgerichtshof* keeps a register of natural persons, the *Zentralregister*, containing information on criminal convictions, receiverships, insolvency and various administrative and judicial decisions. He also keeps the *Gewerberegister* onto which, *inter alia*, all decisions of public authorities are entered which are eligible for execution and against which no more legal redress is open and by which a request for access to (the carrying out of) a profession or business or the managing of a company has been denied (disqualification order). Decisions by which damages are awarded for offences connected with the carrying out of a profession or business are also registered. Data are submitted to the register by the authorities taking the decisions to be registered, among which the *Bundeskartellamt*. Data are supplied by the register to the relevant persons and to public authorities, among which prosecuting authorities.

f) Identification and investigation

Identification is required for essential legal acts concerning establishment and registration of companies. An ordinary copy of proof of identity will almost never suffice; an original copy or one legalised by a notary public must be submitted. Either an ID card or a passport is used; driving licenses are only sufficient in emergencies.
Registration of the document number is performed by the notary public.

When performing essential legal transactions with regard to the company the representatives of legal persons must be able to prove their identity. Amendments to the articles of association have to be taken down by a notary public.
The type of proof required is an identity card.
It is allowed for the founders to use representatives for performing legal transactions with regard to the company, establishment, any amendment to the articles of association, a transfer of shares, essential legal transactions with regard to the registration of data concerning the company and subsequent modifications of these data.

The antecedents of persons who are admitted to the board of directors or the supervisory board (either upon establishment or later) or who are entrusted with the management of the company (*Geschäftsführer*) are investigated. The background investigations relate to relevant criminal convictions ('*Konkursstraftaten*' among others) within the past five years and to possible bankruptcy of the investigated person. No investigation is undertaken into whether the person has been involved in bankruptcies or criminal acts of others or of a legal person.

The notary public or the *Amtsgericht* carries out the investigation by inspecting the relevant registers.

Furthermore, upon submission for registration of the company, members of the board of directors are required to declare that no circumstances exist which would stand in the way of their appointment and stating that they are aware of their duty of information *vis-à-vis* the *Registergericht*.

The use of the company register for automated searches is allowed. Such searches must remain limited to information contained in the company register. Carrying out a search is subject to prior consent from the *Landesjustizverwaltung*. Consent may be given to public institutions, insofar as the search is being carried out in the context of their duties, and to private institutions, insofar as the search is compatible with a justified professional or business interest of the recipient of the information and there is no reason to fear abuse. Consent may only be given when this form of information transfer is the most appropriate, given either the number of data or the urgency of the request for information.

g) Central registration

The company registers are not centrally kept, but are kept at the *Amtsgerichte*. There are 421 *Amtsgerichte*; it is intended to reduce this number. Although an electronic company register is in the course of being developed not all registers with the *Amtsgerichte* are automated yet (apart from the data of the board of control of securities), nor are the registers interlinked. Centralised requests are therefore not possible.

The government does not have its own internal database, in which data concerning legal persons are registered, as the federal government is not in charge of matters concerning individual companies.

Apart from the company register there is the *Gewerberegister* for registration of company data. As is the case with the company register the information in the *Gewerberegister* is publicly accessible, with no difference made between private persons, domestic or foreign authorities.

h) Accessibility of information

All registered information as referred to above is generally accessible to authorities as well as private persons, without reasons given.

Although it is being worked on, electronic data recall is not yet possible and up to now only paper copies of the registered information are available. One can access the registers by entering the company name of the legal entity.

The information derived from the abovementioned registers can be used for criminal investigations.

As a special point of interest, it should be mentioned that the *Gewerberegister* is also available for inspection to the federal banking supervision agency *(Bundesaufsichtsamt für das Kreditwesen)*.

I) Privacy

Germany has not yet implemented Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the

processing of personal data and on the free movement of such data. The new bill providing for the implementation of this Directive has been dealt with by the German parliament in October 1999.

j) Sanctions

Legal persons not satisfying the legal requirements for establishment, amendments to articles and/or registration, may be sanctioned through enforcement measures taken by the register court of the register, ranging from registration being denied it to it being struck off the register.

Against a legal person carrying out other (criminal) activities action can be taken by striking it off the register and by confiscation of means.
In extreme cases the occurrence of the abovementioned circumstances can lead to the dissolution of the legal person, or to the cancellation of its registration.

- **GREECE**

a) Forms of incorporation

The main forms of incorporation in Greece are:

Partnerships:
- *Omorrithmos Eteria:* OE (ordinary partnership);
- *Eterorrithmos Eteria:* EE (limited partnership).

Limited liability companies:
- *Eteria Periorismenis Efthinis:* EPE (limited liability company);
- *Anonimos Eteria:* AE (public limited company).

Other forms of incorporation:
- *Atomiki Epihirisi* (single trader);
- Limited liability co-operation.

b) Use and misuse of legal entities

The two most widely used legal entities in Greece are the EPE's (limited liability companies) and the EE (limited partnership). The most widely misused legal entities are the EPE's.

❖ Sections c) to j) address only the EPE *(*limited liability company*)* and the AE (public limited company)*.*

c) Establishment of limited companies

The establishment and operation of AE companies as well as of branches of foreign AE companies is regulated by Act No. 2190/1920, as amended. The establishment and operation of limited liability companies (EPE) and of branches of foreign limited liability companies is regulated by Act. No. 3190/1955, as amended.

The limited liability company (EPE) was introduced in 1955 to fill the gap between public limited companies (AE) and partnerships. It combines elements of capital and personal commercial companies and it enables business to be conducted with the benefit of limited liability of its members up to the amount of their contributions.

The establishment of a stock company involves the following stages of incorporation:
- The adoption of the articles of incorporation;
- The subscription of the shares;
- Authorisation by the Ministry of Commerce;
- Publication.

A stock company is incorporated by a notarial deed containing the articles of association. A certified copy of the deed is then submitted to the competent department of the prefecture where the registered office of the company will be established. The

articles of association are approved by decisions of the prefecture that confirm that the articles are in compliance with the provisions of Act 2190/90 as amended. The articles must address:

- The particulars of the founders;
- The name and objectives of the company;
- The seat of the company;
- The estimated incorporation costs;
- The rights of the shareholders;
- The amount of the share capital and how it is subscribed;
- The nominal value, type, number and issue of the shares;
- The number of shares of each category;
- The way to convert registered shares into bearer shares and vice versa;
- The powers, composition, operation and convening of the board of directors and of the shareholders' meeting;
- The distribution of profits and the balance sheet;
- The auditors;
- The duration of the company;
- The dissolution of the company and the liquidation of its assets.

The establishment of a limited liability company involves the following:

- Adoption of the articles of incorporation of the company by a notarial deed;
- Registration of the notarial deed.

A limited liability company is incorporated by the execution of the articles of association by partners or their proxies before a notary public. The notarial deed must contain:

- The name, nationality, residence and occupation of the partners;
- The name of the company;
- The objectives of the company and its seat;
- The designation of the company as a 'limited liability company'
- The capital of the company, certificates by the partners confirming that the capital of the company has been paid in, and the share of participation and the multiple company parts, if any, of each partner;
- The contributions in kind, the name of the contributor and the value of the contribution;
- The duration of the company.

Similar action by a public authority is necessary with regard to:

- Amendments of the articles of association;
- The transfer of (part of the) shares for limited companies and AE companies with nominal shares (not for those with anonymous shares). For all companies, however, a tax declaration must be filed and tax must be paid to the fiscal authorities;
- Changes in management.

Foreign corporations and companies with limited liability may conduct business in Greece through a branch office. For the establishment of a branch an application must be filed with the Greek Ministry of Commerce accompanied by a number of documents, including a certified copy of the deed of incorporation and the articles of the company, a certificate of the competent company register, a resolution of the board of directors, a power of attorney, and a certificate to prove proper conduct.

d) Registration of limited companies

As regards limited liability companies, a certified copy of the notarial deed and other data regarding their existence must be registered within one month of the execution of the deed with the company register. This register is kept by the Companies Department of the Court of First Instance in the place where the limited liability company is established. Stock compnaies are registered with the stock company register kept by the Ministry of Development in the local prefectures. The initial articles of association executed by a notary public are also kept in his files thereafter. Any amendments thereof are filed in the competent register, and, in the case of limited liability companies also executed by a notary public.

In general the following data are registered :

- Personal data concerning the shareholders (name, address, identity card number, fiscal registration number, occupation);
- Changes in the composition of the company;
- Legal representation of the company;
- The audited annual reports of the company;
- The annual general meetings.

Apart from the above, a number of other requirements apply:

- The establishment of SA companies must be notified to the Ministry of Development and must subsequently be published in the Official Gazette.
- A copy of (amendments to) the articles of association of limited companies must be filed with the register kept by the Companies Department of the Court of First Instance and must subsequently be published in the Official Gazette.
- For EPE companies, any changes in the composition of shareholders constitute amendments to the articles of association, which must as such must be filed with the Companies Department of the Court of First Instance.
- For SA companies with nominal shares, the transfer of (part of the) shares must be registered in the shareholders register, kept by the company. Relevant tax declarations are also kept on file by the fiscal authorities.
- As for the appointment or changes in the appointment of persons who exercise a controlling interest in the legal person, only changes in the management (i.e. changes in the board of directors or the legal representatives) are made known.

A summary of the articles of incorporation of an AE and the decision approving them are published in the Official Gazette, and the AE is registered in the relevant book of public limited companies kept with the prefecture where the registered office of the company will be established

e) Other registrations

For limited liability companies there is no special shareholders registers exist because this information is among the data kept by the courts, as mentioned above. Stock companies with nominal shares must maintain a shareholders register. This is, however, an official fiscal document and as such available only to the authorities

There is no registration of disqualification orders and they are not counted. No data/evaluations exist with respect to the effectiveness of disqualification orders and no exchange of data about disqualification orders takes place between Greece and other countries.

As regards the registration of bankruptcies or suspension of payment, the relevant registers are kept only at a regional level, i.e. for each judicial region and are kept by the respective court.

Non-official data files in Greece are those kept by private research companies, such as ICAP. Such files are available upon payment of subscription or a fee and they are used in addition to official data files for information not kept in the latter files, such as credit records, etc.

f) Identification and investigation

When registering a limited company, all legal representatives of the company must either present an EU passport or a police identity card. For residents of non-EU countries, the presentation of a residency and work permit is sufficient, and a photocopy may be used. The data that must be registered must always be notified to the authorities through a legal document, sealed with the relevant company seal and signed by the legal representative.

The founders or the representatives of legal persons are obliged to prove their identity by showing an identity card issued by the police. They need to do so in case of essential legal transactions with regard to the company, establishment, any amendment to the articles of association or a transfer of shares, essential legal transactions with regard to the registration of data concerning the company and subsequent modifications of these data. In the cases enumerated, the founders may appear in person or carry out the operation by notarial proxy.

In the majority of cases no background investigations takes place of natural persons who have established a legal person, become shareholders upon establishment or acquire shares in a later transaction, are appointed director upon establishment or at a later date or who otherwise exercise control over the legal person. Exceptions exist for certain kinds of companies such as football companies, mass media and investment companies. This investigation relates to criminal convictions, bankruptcies or suspensions of payments of the person concerned.

g) Central registration

The abovementioned registers are not available in the form of automated data files .

The registers are not centrally stored at the national level. There are decentralised registers for each prefecture regarding AE companies and one for each Court of First Instance regarding EPE companies. To request data from all registers at the same time is not possible as these registers are not interlinked.

h) Accessibility of information

Of all stock companies a register of the particulars and transactions is maintained in the prefecture in which they reside by the Ministry of Trade. These registers, known as MAE's, are available to the public by law.

A register of all limited liability companies (known as MEPE) registered within a district is kept by the secretariat of the Court of First Instance in that district.

In addition, a summary of the articles of association of stock companies and limited liability companies, the decision of approval of the articles of stock companies, as well as the paid-up capital and the annual financial statements of both are published in the Official Gazette. This information is thereby accessible to all, but it does not include all the data available to the authorities (as only a summary is published).

The databases mentioned are not automated and may thus not be searched either.

Furthermore, each company, whether a stock company or a limited liability company, must keep shares and shareholders registers. These are available for inspection to the responsible tax authorities but for evidentiary purposes only. They are not made available to the public.

As to the use of information derived from the abovementioned registers for criminal investigation purposes, the public prosecutor may dispose of the same data as is generally available to the authorities.

i) Privacy

Regarding the protection of privacy of natural persons, Act No. 2472/97 of 9 April 1997 has been adopted in Greece in order to implement EC Directive 95/46/EC.

j) Sanctions

A fine may be imposed or a legal person's license may be revoked if it does not satisfy the legal requirements regarding its establishment, amendment to its articles of association and/or regarding registration.

There is no specific action which could be taken against a legal person which has not embarked on a single activity over a long period of time or which develops criminal activities.

- **IRELAND**

a) Forms of incorporation

The main forms of incorporation in Ireland are:

Partnerships:
- Ordinary partnership;
- Limited partnership;
- Professional partnership.

Limited liability companies:
- Public limited company: PLC;
- Private limited company: Ltd.;
- Limited liability company by guarantee.

Other forms of incorporation:
- Unlimited company;
- Single trader;
- Co-operation;
- Building society.

b) Use and misuse of legal entities

The most widely used legal persons are public and private limited companies.
No information was provided on the misuse of legal entities.

Sections c) to j) will mainly deal with *PLC's* and *LTD's.*

c) Establishment of limited companies

The Companies Acts 1963-1999 regulate the limited companies. In general the public limited company is subject to more detailed disclosure requirements than those applicable to a private limited company.
A private company must restrict the right to transfer shares, it must limit the number of members to 50 and it must prohibit any invitation to the public to purchase shares or subscribe for debentures.
Other Acts which may be applicable are: the Business Names Act 1963, the Limited Partnerships Act 1907 and the European Communities (Economic Interest Groupings) Regulations 1989.

To establish a private limited company or a public limited company the following requirements have to be met:
- A minimum of seven subscribers in case of a public limited company and two subscribers in the case of a private limited company is required upon establishment;

- A minimum share capital of 30,000 Irish pounds is required for a public limited company while no minimum is set for a private company;
- A memorandum of association (see below);
- Articles of association (see below).

The memorandum of association should contain the following data:

- The articles of association (see below);
- The company's name;
- A statement that the liability of the company's members is limited;
- The objectives of the company;
- The amount of its nominal capital and its division into shares;
- An association clause containing the names and addresses of the minimum number of subscribers required, including the number of shares to be taken by each subscriber.

The articles of association should contain the following data:

- The company's capital structure and its alteration;
- The procedure for the transfer or transmission of shares;
- The calling of and proceedings at the general meetings;
- The appointment and removal of directors, their powers and duties, and the proceedings of their meetings;
- The payment of dividends;
- The procedure on the winding up of the company.

A company incorporated outside Ireland may establish a branch in Ireland. To establish a branch office the following information must be submitted for registration to the Registrar of Companies:

- Details of the company such as its legal form, place of registration and details of the branch itself;
- Details of the activities of the branch;
- A list of the directors and secretary, with their addresses, occupations and nationalities;
- The name and address of at least one person resident in Ireland authorised to accept service of process required to be served on the company;
- A certified copy of the company's constitution;
- A copy of the most recent accounts of the company.

Business carried out in Ireland by a branch is regulated by the laws applicable to commercial legal entities in general.

Companies may also be established through the purchase of a 'shelf' company, which has already been incorporated with a standard memorandum and articles of association and inactive shareholders, directors and secretary. On acquisition of the 'shelf' company, the inactive shareholders, directors and secretary transfer their shares to the purchaser and resign their positions. The purchaser's representatives can then take these positions and institute any changes to the company, such as changing its memorandum and articles of association, its name, registered office, or capital structure.

d) Registration of limited companies

A company is required on application for incorporation to obtain a statutory declaration (on form no. A1) before a commissioner for oaths, a peace commissioner or a practising lawyer. Every company incorporated in Ireland or having an established place of business in Ireland must file with the Registrar of Companies, who keeps a file of each company at the Companies Registration Office in Dublin. The Companies Registration Office comes unnder the aegis of the Department of Enterprise, Trade and Employment (Dublin).
Once the required documents have been submitted and the registration fee paid the Registrar will issue a certificate of incorporation. Applications for registration which do not comply with the provisions of the Companies Acts 1963-1999 are refused.
Within six weeks the incorporation of the company must be published in the Irish Official Gazette (*Iris Ofigiuil)*.
Any contract concluded prior to the incorporation of the company may be ratified after its formation and accordingly the company will be bound by the contract. However, prior to the ratification, the person who has concluded the contract on behalf of the company is personally liable and the company is not bound.

The following information must be submitted by a company to the Companies Registration Office:

- The memorandum of association;
- The articles of association, if they exist;
- A statement of capital on incorporation;
- A statement of the first directors and secretary, their written consent to act, and other particulars;
- Details of the situation of the registered office of the company;
- A statutory declaration of compliance with the legal requirements relating to incorporation.

In case of a public limited company additional data need to be provided to the Companies Registration Office:

- One quarter of the nominal value of minimum share capital must be paid in full;
- Details of preliminary expenses of the company;
- Details of any payment made to a promoter of the company.

Any changes in management or any amendments to the memorandum or articles of association must be registered at the Companies Registration Office.
In private companies the transfer of shares is restricted in that it is subject to the agreement of the board of directors (i.e. management board).

e) Other registrations

Under Irish law a company is not required to maintain a register of shares. Rather, it must keep one of its members.
The register of members must contain:

- The name and address of each member;
- The date each person was entered onto the register as a member;
- The date when a person ceased to be a member;
- A statement of shares held by each member;

- The amount paid or the amount considered to be paid on each share.

If a company refuses to register a transfer of shares, notice of such refusal must be given to the transferee within a specified period. If the name of a person has been omitted from the register of members, that person may apply to the court for an order that the register be rectified by the inclusion of his name.

This register must be maintained at the registered office of the company or the Registrar must be notified where it is maintained if this is somewhere else and of any change in location. The register is available to the public for a small fee, and must be open to members during business hours for at least two hours each day, without charge.

Companies must also maintain a special register of information as to interests and other matters that the director or secretary gives notice of to the company as required by law.

Some companies will also make available their statutory books to the public, generally for a small fee. These often include the register of directors and secretaries and the register of debenture holders. Other information may be available only to shareholders or debenture holders, or in some cases only to members.

Registers of restriction orders (Section 150 of the 1990 Act) and of disqualification orders (Section 160 of the 1990 Act) are also kept.

f) Identification and investigation

The minister can order an investigation to determine the true owners of a company who are or have been financially responsible for the success or failure of the company or able to control and influence the policy of the company. For the purposes of the investigation the investigators have all the powers of inspectors under a court investigation.
The minister can require the production of documents with a view to determine whether a formal investigation is necessary.
According to the Companies Registration Office no background investigation is made by them into natural persons who have established a company, are appointed director upon its establishment, become shareholders upon its establishment, become director or shareholders at a later date or otherwise exert some control over the company.

g) Central registration

The Companies Registration Office keeps all live company records, while the records of companies dissolved over 20 years before are given to the national archives to be retained there. Records kept by the Companies Registration Office appear on paper if they are pre 1989 documents, while documents from after 1989 are computerised. Images of all documents received since 1991 are kept on computer.

The following information can be obtained from the Companies Registration Office:

- annual accounts and reports of the company;
- the particulars of the directors and secretary of the company, to include: their full names, their nationalities, their occupations, and other directorships held;
- the company's memorandum and articles of association;

- particulars of the company's share capital;
- a certificate of incorporation, any certificate of re-registration (changing from a public company to a private company or vice versa), and any certificate of incorporation on change of name;
- copies of all resolutions that need to be filed, such as resolutions increasing the company's share capital, resolutions converting shares into another class, etc.;
- particulars of changes registered against the company's assets and property;
- the appointment of a liquidator, receiver, or manager.

Foreign companies with an established place of business in Ireland will have a file with the Registrar consisting of:

- a certified copy of a constitutional document, charter, memorandum, or otherwise, which, if not in English, must be accompanied by a certified translation;
- a list of the directors and secretary, with their nationalities, addresses, occupations, and any other directorships;
- the name and address of at least one person who is a resident of Ireland and is authorised to receive service of process and any notices required to be served on the company on its own behalf;
- The address of the company's main place of business in Ireland.

h) Accessibility of information

As a rule the general public can gain access to most registered information on companies, usually for a small fee. See sections d) and e) above.

Paper records, as well as computer records can be obtained. The search system allows for searches by name or number.

The information derived from the abovementioned sources can be used for criminal investigation purposes.

i) Privacy

All records are in the public domain according to the Companies Registration Office.
The EC directive on the protection of personal data (95/46/EC) has not yet been implemented by Ireland. However, a draft bill has been presented to the government in July 1998. The bill has to be approved by the government and submitted to Parliament.

j) Sanctions

Should a company fail to comply with the provisions of the Companies Acts its officers or the company itself can be prosecuted by the Registrar of Companies or the Minister for Enterprise, Trade and Employment. Which of these entities undertakes the prosecution depends on the section of the Companies Acts that has been violated.

Irish law has included several provisions relating to fraudulent and reckless trading which might be of interest in this context.

Where it appears in a winding up that the business of the company has been carried out with the intent to defraud creditors or in circumstances where any reasonable person would know that there is no real prospect that the creditors will be paid, the person responsible will be personally liable for all or any of the company's debts.
In the period of two years before winding up of a company measures are also taken to circumvent fraudulent behaviour. Any act relating to property which would qualify as a fraudulent preference in the bankruptcy of an individual, should be deemed a fraudulent preference of its creditors and be declared invalid accordingly.
Persons who are responsible for reckless trading can be held personally liable for all or any of the debts or other liabilities of the company. A person will be deemed to be reckless if:

- He was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or the company's would cause loss to the creditors; or
- He was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due as well as all other debts including contingent and prospective liabilities.

- **ITALY**

a) Forms of incorporation

The main forms of incorporation in Italy are:

Partnerships (*societa di persone*):
- *Società semplice* (private partnership);
- *Società di professionisti* (professional partnership);
- *Società in nome collettivo* (ordinary partnership);
- *Società in accomandita semplice* (limited partnership);
- *Società in accomandita per azioni* (limited partnership on shares);

Companies with limited liability (*societa di capitale*):
- *Società per azioni* (public limited company);
- *Società a responsabilità limitata* (private limited company);
- *Società cooperative a responsabilità limitata* (private limited co-operation);

Other forms of incorporation:
- *Ditta individuale* (single trader);
- *Associazone in partecipazione* (company by way of participation);
- *Società cooperative a responsabilità illimitata* (unlimited co-operation);
- *Società di mutua assicurazione* (mutual security company).

b) Use and misuse of legal entities

The *Società per azioni* (SpA; public limited company) is most widely misused in Italy.

❖ Sections c) to j) will mainly deal with the SpA and the SRL *(Società a responsabilità limitata*; private limited company).

c) Establishment of limited companies

Companies are mainly regulated by the Civil Code. Under Italian law, a company consists of three corporate bodies: *Consiglio di Amministrazione* (board of directors), *Assemblea degli Azionisti* (shareholders' meeting) and a *Collegio Sindicale* (committee of statutory auditors).
For the establishment and amendment of articles of companies the use of the services of a notary public is required.

A company can be established in two ways:
- *Costituzione simultanae* (private subscription)
  The founders draw up the articles of association before a notary public. The instruments of incorporation consist of two parts. The first, the *atto constitutivo* (deed of incorporation) represents the will to establish a company and some general information with regard thereto. The other part is referred to as *Statuto*

(articles of association, see below) concerning the operation, organisation and the winding up of the company.

- *Pubblica sottscrizione* (public subscription)
  In the preparatory stage the founders prepare a prospectus setting out the company's objectives, the equity capital, major provisions of the instruments of incorporation, the share on the profits, if any, which founders intend to reserve for themselves and the time limit within which the instrument of incorporation is to be executed. This information has to be filed with the notary public. Then the subscriptions are collected and the subscribers are requested to pay three-tenths of their subscription within one month.
  The second stage is referred to as the constituent stage. After the requirements for the formation of the company have been met the subscribers adopt the final version of the instrument of incorporation and appoint the directors and a committee of statutory auditors.

It should be noted that the founders are severally and jointly liable for all obligations assumed during the preparatory stage. Once the company is established all the costs will be reimbursed to the founders.

Regardless whether a company chooses private or public subscription certain general requirements have to be met upon establishment:

- The capital must be fully subscribed;
- A minimum share capital of 200,000,000 Italian lire is required for a public limited company and 20,000,000 Italian lire for a private limited company;
- At least three-tenths of the capital subscribed must be deposited with a bank. It will be returned once the company is officially registered;
- All governmental authorisations must have been obtained (this is relevant in particular in the field of banking, insurance, shipping and air transport.

The articles of association must contain the following data:

- Names, surnames, places and dates of birth, full addresses and proof of citizenship of the founders;
- The name of the company and the address of its registered office and branch offices, if any;
- The company's objectives;
- The amount of capital subscribed and paid up;
- The par value and the number of shares;
- The name, date and place of birth, domicile and citizenship of each shareholder and the number of shares subscribed by each of them;
- The value of any contributions in kind;
- Rules of distribution of profit;
- Participation, if any, in the profits granted to the founders;
- The number of directors and their powers and an indication as to which of them has or have the authority to act in the company's name;
- Duration of the company;
- The total amount of expenses foreseen for the incorporation of the company to be borne by the company itself.

Preventive supervision is purely formal. Pursuant to special laws consent may be required for the establishment of companies. For instance, companies with capital exceeding a 1000,000,000 Italian lire need the consent of the Minister of Finance.

According to Italian law a branch office is not a separate legal entity. The following information must be filed at the company register (*Registro delle Imprese)*:

- The instrument of incorporation;
- The annual balance sheet of the parent company along with a profit and loss account;
- The full names of the persons who act as permanent representatives to the company.

Until these formalities have been met, the persons acting on behalf of the company are fully personally liable for the obligations of the company.

d) Registration of limited companies

Within thirty days from the execution of the instrument of incorporation the notary public will apply at the clerk's office of the local chamber of commerce for it to be filed in the company register.
The following information must be submitted by the notary public to the company register:

- The deed of incorporation;
- Documents evidencing payment of three-tenths of the capital made in cash;
- Documents evidencing contributions of assets in kind.

A court will verify that the deed of incorporation is in compliance with the laws for the incorporation of a company and after having heard the public prosecutor, will order the registration of the company in the register. The deed of incorporation and the articles of association must be published in the Official Bulletin of Companies Limited by Shares and of Limited Liability Companies *(Bollentino Ufficiale delle Societa per Azioni e a Responsibilita Limitata*). Since 1997, the requirement to publish in the Official Gazette has been abolished.

The deed of incorporation may be amended if this is done in a special shareholders' meeting, the local court authorises the amendment and the amendment is entered on the company register.
The transfer of registered shares takes place through an endorsement authenticated by a notary public and a bank. All transfers must be registered in the shareholders register (*Libro Soci*; see below). Shares quoted in the stock exchange do not have any material support and all transfers are electronically registered.
Any changes in management also need to be registered in the company register.

e) Other registrations

Companies must maintain a shareholders register, in which the number of shares, the names and surnames of the holders of registered shares, the transfers and the charges on them and the payments made must be recorded. The CONSOB (national commission for the stock exchange) keeps a shares register for quoted companies.

Bankruptcies are recorded in the *Bollentino dei Protesti* kept by the registrar of the court and are published every fifteen days in the *Bollentino della Camera Commercio* (bulletin of the chamber of commerce). Bankruptcies are also registered in the company register.

Data on companies are maintained in several other files. From the registers of a fiscal nature the *Ufficio del registro*, the *Ufficio delle imposte* and the *Ufficio I.V.A.* (VAT office) may be mentioned.

f) Identification and investigation

In some cases a photocopy of the requested document is sufficient proof of identity. In other cases an authentic document of the notary public is required. The notary public must establish the identities of the parties appearing before him, either on the basis of proof of identity or by other sufficient means.

A background investigation of natural persons in connection with the activities listed in the questionnaire only takes place if special companies in the field of banking, insurance or companies with a public purpose are involved.

Some criminal convictions carry the added penalty of exclusion from the capacity to manage a legal person.

Data from official registers and other databases are used to investigate irregularities such as fraud, insider trading and money laundering. Such investigations are carried out by different police services (*Polizia di Stato*, under the responsibility of the Ministry of the Interior; *Carabinieri*, under the responsibility of the Ministry of Defence; *Guardia di Finanza*, under the responsibility of the Ministry of Finance) supervised by the judiciary. In case the investigation results in suspicion of criminal offences this is reported to the judiciary which will decide on possible prosecution. If fiscally relevant circumstances come to light, the judiciary may empower the *Guardia di Finanza* to give information to the *Registro delle Imprese*.

Mention may further be made of the use of the *CED* (see under g) for the execution of criminal audits.

g) Central registration

The *Registro delle Imprese* has been functioning since 19 February 1996. It is a central, nationwide and automated data file which may be inspected by anyone at any chamber of commerce. It contains data regarding legal persons. The information is gathered at the provincial level but is made available through a unique automated network at the national level.

The Ministry of the Interior keeps a central register: the *Centro Elaborazione Dati* (*CED*, Centre for data processing). At the *CED* data are registered which are needed by the police in the fulfilment of its tasks of protecting public order and safety and of prevention and

prosecution of punishable acts. These data are extracted from documents kept by the public administration and public authorities, from judicial decisions and from documents concerning police investigations. Information may be gathered on banking data (banks may not refuse the issue of information by citing banking privileges) and the *CED* is entitled to obtain information from police institutions in EU Member States, neighbouring countries and countries with which special agreements exist for these purposes. These police services may also be given information, insofar as the information is not subject to a duty of secrecy. No information on citizens may be assembled based on race, creed, political conviction or membership of trade unions, cultural societies or co-operations.
Data from the *CED* are available to the *prefetture*, the representatives of the central government in the provinces. These, in turn, may make these data available to local government, such as provinces and municipalities.

h) Accessibility of information

The information in the company register is accessible to everyone.

i) Privacy

The implementation of EC directive on the protection of personal data (95/46/EC) has been partially achieved through Law 675 of 31 December 1996 and has been completed by secondary legislation. This had no effect on the public character of the information maintained by the company register: it remains available to the public and is not subject to any limitations with respect to the protection of privacy.

j) Sanctions

As mentioned earlier the courts need to verify the compliance with laws for incorporation of the company. The decree of the court can be appealed within thirty days from the date of service in front of the Court of Appeals. Only upon registration does a company acquire legal personality.

Once a company has been registered the court can only dissolve the company in the following cases:

- Absence of a deed of incorporation;
- Failure to stipulate the deed of incorporation in the form of a public deed;
- Failure to comply with the provisions regarding previous control;
- The company's purpose is in violation of public policy;
- The deed of incorporation or the articles of association do not give any indication regarding the name of the company, or the contributions, or the amount of the subscribed capital or the company's purpose;
- Non-compliance with the requirement to deposit at least three-tenths of the subscribed capital with a bank;
- Incapacity of all the founding members;
- Lack of plurality of the founding members.

If the deed of incorporation is declared null, this does not affect the validity of the actions performed in the company's name during the time the company was registered in the company register. In the judgment declaring nullity the liquidators are also appointed.

If serious irregularities have been committed by directors and/or statutory auditors a complaint may be filed with the local court by as many shareholders as represent one-tenth of the equity capital. If it is found that abuses have been committed, the court may take the appropriate precautionary measures (e.g. sequestration) and call a shareholders' meeting or, in more serious cases, the court may remove the directors and/or auditors and appoint a trustee (*amministatore giudizario*). It has not been indicated whether there is a register of disqualification orders in Italy.

- **LUXEMBOURG**

a) Forms of incorporation

Partnerships:

- *Société en nom collectif*: Senc (ordinary partnership);
- *Société en commandite simple:* Secs (limited partnership);
- *Société en commandite par actions:* Seca (partnership limited by shares).

Limited liability companies:

- *Société anonyme:* SA (public limited company);
- *Société* à *responsabilité limitée:* Sàrl (private limited company).

Other forms of incorporation:

- *Société coopérative:* Sc *(*co-operation);
- Luxembourg Holding Company (governed by the 1929 Holding Company Act).

b) Use and misuse of legal entities

The public limited company (SA) and private limited company (Sàrl) are most often used.

Most often subject to misuse are private limited companies. In addition, companies where the shareholders can remain anonymous (public limited companies and partnerships limited by shares) are on some occasions preferred for reasons of secrecy. Furthermore, frequently misused are public limited companies under a holding regime. Finally, offshore companies have been known to enter into money laundering activities.

❖ Sections c) to j) mainly deal with the private limited company and the public limited company:

c) Establishment of limited companies

The abovementioned commercial companies are governed by the Companies Act 1915 (Article 2). The Act of 21 April 1928 provides for associations and foundations without commercial purpose (a.s.b.l. and f.s.b.l., enacted 22 February 1984 and 4 March 1994).

Other relevant legislation:

- The Company Register Act of 23 December 1909 (enacted 5 times);
- The Fiscal Regime of Financial Participation Companies (Holding Companies) Act of 31 July 1929 (subsequent enactments);
- The Money Laundering Act of 11 August 1998;
- The Companies Domicile Act of 31 May 1999.

In addition, there are a number of relevant acts concerning the financial sector.

To establish a limited company the following requirements have to be met:

- There has to be a minimum share capital of 500,000 Luxembourg francs for private limited companies and 1,250,000 Luxembourg francs for public limited companies;
- There have to be articles of association.

The articles of association must at least contain the following data:

- The company's objectives;
- The name of the company;
- The registered office of the company.

Limited companies can only be incorporated only by notarial deed (Article 12 of the Companies Act). The general and limited partnership and the co-operative corporation can be incorporated either by notarial deed or a deed under private seal.

Incorporation by notarial deed requires one or more 'promoters' (either natural or legal entities, both of whom are allowed to appear either in person or by proxy) to appear before a notary public and declare their intention to incorporate a company.

Nominative shares contributed in the company are checked by a notary public, on the basis of a bank certificate (no specific regulation exists in this respect).

In order to prove that the company exceeds the minimum capital of 500,000 Luxembourg francs, the notary public must verify that the money is deposited in a bank account. Showing the money in cash is not sufficient.

Article 15 of the Money Laundering Act of 11 August 1998 adds that the notary public must be aware of the true identity of the beneficiary of each transaction that exceeds the amount of 500,000 Luxembourg francs.

Capital other than nominative shares contributed in the company is submitted for inspection to a special 'inspector of shares', whose (independent) profession is regulated by an Act of 28 June 1984. The findings of this 'inspector' are recorded in the articles of association of the company. The findings are not recorded in the *Mémorial* (see below under registration).

Amending the articles of association of a limited company requires the co-operation of a notary public.

A transfer of (part of the) shares does not require consent or co-operation on the part of any governmental body or independent third-party (e.g., a notary public) (Article 42 of the Companies Act).

As to changes in management, if the directors are statutory directors, the articles of association need to be amended and the changes need to be made public.

Authorisation from any governmental agency prior to the incorporation of a company is not required. Therefore, the time required for incorporation is relatively short. Nevertheless, for companies that intend to operate in the financial sector (in particular banks and credit agencies), special legislation applies. Article 2 of the Act of 5 April 1993 concerning the financial sector stipulates that such companies need to obtain ministerial

consent. The minister consults a special commission, the *Commission de Surveillance du Secteur Financier* (Commission on the Supervision of the Financial Sector, C.S.S.F.), which checks a number of aspects, including the administrative and financial quality and the creditworthiness of the company.

A foreign company intending to establish a branch in Luxembourg must register the branch with the company register. For this, no prior government authorisation is needed.

d) Registration of limited companies

Companies incorporated in Luxembourg must register with *the Registre du Commerce et des Sociétés auprès du Tribunal d'Arrondissement*, maintained at the District Court where the company is located (Company Register Act of 23 December 1909, enacted). There are two districts: *Luxembourg Ville* and *Diekirch*.

Registration requires an application submitted by either director of the company or the notary present at the incorporation of the company. It should be addressed to the company register clerk. The company register registration number must appear on all documents emanating from the company.
Article 3 of the Company Register Act stipulates that each company indicates:

- The nature of the company;
- Its reason for commerce;
- Its objectives;
- Its social seat and its address;
- The amount of shares;
- Possibly, the names of its directors, shareholders, and of those that will represent the company before the courts.

This article also requires that each establishment, transfer, leasing out or cessation of a company be registered.

In addition, Article 5 of the Company Register Act prescribes the registration of, *inter alia*:

- Legal decisions prohibiting spouses to exercise a commercial profession;
- Bankruptcies;
- Suspensions of payment;
- Liquidation of companies.

The incorporating document of limited companies *(*and of the partnership limited by shares and the co-operative corporation*)* must be published in its entirety in the Luxembourg Official Gazette (*Mémorial*). In addition, the following documents must be published:

- Amendments to the articles of association;
- Liquidation of companies;
- Appointments, discharges, dismissals of directors, commissioners, liquidators, and trustees;
- Names of the partners;
- Convocations of meetings of shareholders.

Finally, Article 75 of the Companies Act requires that public limited companies publish within fifteen days after their approval: the balance sheet, the receipts and expenditures, the domicile of the directors, commissioners, as well as an overview of the use and

distribution of the entries. Non-compliance with the requirement to publish within fifteen days may result in the dissolution of the company. Publication is also required for branches of foreign companies.

For general and limited partnerships, publishing an excerpt of the incorporating document is sufficient.

All documents or excerpts of which publication is required must also be lodged with the appropriate officials, where they can be examined by any person.

For all companies except the general and limited partnerships, the powers of attorney attached to the incorporating document must be lodged, but do not have to be published.

All changes in management have to be published, according to Article 75 of the Companies Act.

e) Other registrations

The Luxembourg stock exchange lists copies of the prospectuses of the companies listed.

Public limited companies are required to keep a shareholders register. Any transfer of (part of the) nominative shares must be entered on that register or the transfer could not be legally opposed against the company itself and against third parties.

Disqualification orders are noted on the company register and are kept by the Minister of Trade. According to the *Service Central de la Statistique* (S.T.A.T.E.C.) no official study exists on the quantity and effectiveness of disqualification orders imposed in Luxembourg. However, copies of all disqualification orders imposed are at present being centralised by a service of the public prosecutor. Foreign requests for information on disqualification orders imposed in Luxembourg have not yet been made. Such information could be provided within the framework of international conventions on international legal aid to which Luxembourg is a party.

Bankruptcies can be found in the company regsiter. According to the respondent, suspensions of payment are not adequately registered.

Another public register contains details of all mortgages secured on immovable assets located in Luxembourg, whether owned by individuals or companies.

When petitioned in writing, the Minister of Trade will inform anyone about the name of any company, its directors, its authorisation to do business, as well as any disqualification orders imposed.

Other (commercial) databases also exist in Luxembourg, including a central register of (non-official) databases. One of the respondents reports that its institution (a ministry) does not use data from commercial databases, as they have no legal value.

f) Identification and investigation

Regarding the public limited company, the notary public must be aware of the identity of the actual beneficiary of each transaction (Article 15 of the Money Laundering Act).

This obligation is not in place if the funds needed for a transaction have been deposited in an agency in the financial sector, which in itself is also required to know the identity of the actual beneficiary.

Which proof of identity is required is not made explicit in the law. In practice an identity card, i.e. passport is required. A copy of the identity card or of its registration number will be kept during five years by the notary public.

Founders of legal persons do not have to appear in person, but may be represented by proxy.

The Ministry of Trade makes enquiries into the antecedents of persons requesting the establishment of a company. This is also true when that person is a foreigner, who has to submit proof of citizenship and adequate resources.

In the financial sector, the C.S.S.F. makes enquiries, *inter alia*, with respect to transactions (see above, under c).

The fiscal authorities make enquiries into the antecedents of persons who are directors or who are shareholders in more than one company.

The body authorised to perform the criminal background investigation (including money laundering activities) is the public prosecutor.

g) Central registration

The following central registrations exist:

- The company register (see above). The data registered in the company register are not available in the form of automated datafiles, except from references to primary publications on the companies;
- The C*asier Judiciaire* (criminal records), containing three different bulletins, which may only be consulted by specific bodies under specific circumstances. These data are not available in the form of automated datafiles.

The government does not have its own internal database (other than the abovementioned registers) in which data concerning legal persons are registered. Nevertheless, the various ministries maintain identity numbers and other data of private and legal persons, depending on the specific need and purpose of the ministry concerned.

h) Accessibility of information

The company register is open to the public. All documents relating to companies may be inspected and copied. The information may be obtained through telephone enquiry or in person at the company register, but not through the Internet.

References to primary publications made by the companies are accessible via the Internet and the publications themselves can be consulted in the C-series of the Official Gazette, which is automated and made available via the Internet since 1999.

The data registered in the criminal records are only accessible under specific circumstances (see above).

Only information derived from the official company registers may be used for criminal investigations.

i) Privacy

Specific legislation regarding the protection of personal data and regulating the creation and exploitation of databanks is in place. The Personal Data Act of 31 March 1979 (enacted 19 November 1987) establishes the right for each person to know if, and if so, where they have been registered. It also provides for a control mechanism on the creation, object and purpose, contents and ownership of databanks. The competent minister maintains a list of current national databanks. This list is available to the public (for a fee) and contains the abovementioned information regarding each databank. The collection of prohibited information (i.e. on the religion, politics or philosophy, or ethnic origin of persons) is penalised.

EC Directive 95/46 on the protection of individuals with regard to the processing of personal data has not yet been implemented in Luxembourg. The Ministry of Justice is finalising a bill to be presented to Parliament in March 1999.

j) Sanctions

A legal person that does not satisfy the legal requirements is declared void (Article 12 of the Companies Act). The four causes for nullity are the following:

- The absence of or faults in a notarial deed;
- The absence of an indication of legal personality, objectives, revenues and capital;
- An illicit purpose, threatening the public order;
- The absence of a reference to the legitimate founder of the company.

In addition, violation of the requirements for registration and publication can be sanctioned by the legal dissolution of the company (Article 203 of the Companies Act) on the instigation of the Public Prosecutor.

Amendments of the articles of incorporation violating the requirements of the shareholders meeting can be declared void.

Amendments of the articles of incorporation cannot be opposed to third parties if it has not been published.

Against a legal person who, over a long period of time, has not embarked on a single activity, no action can be taken, unless it has not complied with the requirements for establishment, registration, etc.

Activities developed by the legal person contrary to criminal law can lead to dissolution of the legal person through a decision by the regional court upon request of the public prosecutor.

- **THE NETHERLANDS**

a) Forms of incorporation

The main forms of incorporation in the Netherlands are:

Partnerships:
- *Maatschap* (professional partnership);
- *Vennootschap onder firma* (ordinary partnership);
- *Commanditaire vennootschap* (limited partnership);

Limited liability companies:
- *Naamloze vennootschap:* NV (public limited company);
- *Besloten vennootschap met beperkte aansprakelijkheid:* BV (private limited company);

Associations:
- *Vereniging* (ordinary association);
- *Coöperatie* (co-operation);
- *Onderlinge waarborgmaatschappij* (mutual security company).

Other forms of incorporation:
- *Eenmanszaak* (single trader);
- *Stichting* (foundation);
- *Europees Economisch Samenwerkingsverband* (European economic interest grouping).

b) Use and misuse of legal entities

The *besloten vennootschap met beperkte aansprakelijkheid (*private limited company) is both the most widely used and misused form of legal person.

Furthermore, the *stichting* (foundation) has also on occasion been known to have been used for criminal purposes. For the establishment of foundations, a certificate of incorporation concerning the draft deed is not required (see below).

Sections c) to j) will mainly deal with BV's (private limited companies) and NV's (public limited companies).

c) Establishment of limited companies

The principal source of Dutch corporate law is Book 2 of the Dutch Civil Code. The Ministry of Justice has issued guidelines as to the procedures to be observed in establishing companies and as to the contents of the deed of incorporation. These guidelines will soon also be incorporated in Book 2 of the Civil Code. Case law, especially the judgments of the Supreme Court (*Hoge Raad*) and of the Enterprise

Chamber (*Ondernemingskamer Gerechtshof Amsterdam)* of the Amsterdam Court of Appeal are also an important source of Dutch company law. The abovementioned list of sources of company law does not purport to be exhaustive.

For the establishment of a limited company a draft notarial deed of incorporation is needed. To establish a private limited company or public limited company the following requirements have to be met:

- One or more founders must establish a company;
- A draft notarial deed of incorporation (*notariele akte van oprichting*) must be prepared reflecting the articles of association (*statuten*) of the company (see below);
- A minimum share capital of 40,000 Dutch guilders is required for a private limited company and 100,000 Dutch guilders for a public limited company;
- A 'declaration of no-objection' (*verklaring van geen bezwaar*) must be obtained from the Minister of Justice.

The draft deed is subsequently submitted to the Ministry of Justice (together with financial and other information on the proposed shareholders and initial directors) including a payment of 200 Dutch guilders. The so-called 'declaration of no-objection' is constitutive. Without it a limited company cannot be established. The Minister of Justice can only refuse to issue the 'declaration of no-objection' on the following grounds:

- Given the intentions or backgrounds of the persons controlling or co-controlling the company there is a real risk that the company will be used for illegitimate purposes or that the company's functioning will be disadvantageous to its creditors;
- The deed goes against public order or the law (this ground will shortly be abolished);

Within three months after having obtained the 'declaration of no-objection' the deed of incorporation has to be passed before a notary public.

The notarial deed of incorporation should contain the following data:

- Articles of association (see below);
- The names of the first directors and supervisors;
- The amount of shares that have been paid up in cash or in kind;
- Agreements related to security interests, if any.

The articles of incorporation should contain the following data:

- Company name and seat of the company;
- The objectives of the company;
- The amount of authorised capital;
- The number and nominal value of the shares or each class of shares;
- The amount and type of shares subscribed to as well as the amount paid for (the names and addresses of the subscribers must be included).

Another tendency is the establishment of foreign legal companies to act in the Netherlands. The basic rule is that a properly incorporated company is recognised in the Netherlands as an existing company with legal personality.

The Foreign Companies Act *(wet op de formeel buitenlandse vennootschappen*) seeks to prevent the misuse of (formally) foreign companies. It imposes three requirements on entities that operate in the Netherlands only and do not have an actual link with their mother country. The following requirements have to be met:

- There has to be a minimum capital (see Article 2:178 paragraph 2 of the Dutch Civil Code);
- The company has to publish its annual accounts (see Article 2:10 of the Dutch Civil Code);
- Registration as a foreign company is required in the Dutch company register with the Chamber of Commerce.

In light of the recent decision of the European Court of Justice in the Centros case, the question arises whether the Foreign Companies Act goes against Articles 43 and 48 of the EC Treaty. These provisions deal in particular with the freedom of establishment, which includes the setting up of agencies, branches and subsidiaries.

d) Registration of limited companies

Prior to or immediately after their incorporation, limited companies must be registered in the company register, which are organised as departments of the local chambers of commerce. The Chamber of Commerce then makes an announcement of the registration which is automatically reported in the Dutch Official Gazette (*Nederlandse Staatscourant*). Limited companies also have to register with the tax authorities and social securities services.

Prior to incorporation legal acts may already be concluded in the company's name. These acts can only bind the company if it ratifies them after establishment. Persons who have performed the legal acts are jointly and severally liable for the legal acts until such ratification has taken place. Still, legal acts performed in the pre-establishment phase are less secure. The persons who have performed legal acts are liable for any losses sustained by a third party as a result of non-performance by the company provided that they knew or could reasonably have known that the company could not perform its obligations.

Upon establishment, all companies must submit the following information to the company register of the Chamber of Commerce of the district in which it has its corporate seat and registered office:

- Company name and address;
- Objectives of the company and the date of commencement of the company's activities;
- The number of persons that are employed by the company.

In addition, private and public limited companies must submit the following information to the company register:

- Deed of incorporation including the articles of association;
- Estimated amount of expenses resulting from the establishment of the company and the amount to be paid by the company;
- The names and details of each director, supervisor and any other person who may legally represent the company, including the commencement of their term of office;

Annual accounts are also to be deposited with the Chamber of Commerce.

The following information must be submitted to the company register by a branch office:

- Name and address of the foreign company setting up the branch including the registration number of the company according to the foreign company register;
- The deed of incorporation and articles of association of the foreign company;
- A statement from a chartered accountant that the requirement of Article 178 of the Dutch Civil Code has been complied with;
- Names and addresses of the directors of the foreign company including the date of their appointment;
- The legal seat in the Netherlands and the name of the branch office;
- The names and addresses of the branch manager(s) empowered to conclude contracts on behalf of the branch.

Any changes in the information submitted by the branch office to the Chamber of Commerce must also be registered in the company register.
Annual accounts are also to be deposited with the Chamber of Commerce (provided the company is required to publish its accounts; see Articles 396 and 397 of Book 2 of the Dutch Civil Code).

To amend the company's articles of association a notarial deed and a declaration of no-objection of the Minister of Justice is required. This declaration can only be refused on the grounds that the amendment will result in turning the company into one of an unlawful character, or when amendment will potentially result in use of the company for unlawful purposes. It may also be refused if the amendment or the manner in which it came about goes against public order, the law or legal provisions in the company's articles.

The transfer of registered shares, for the private and public limited company is effected by way of a notarial deed of transfer to be served on the company by a Dutch bailiff or acknowledged by the company in writing. An increase or decrease of the authorised capital requires an amendment of articles.

Any changes in management, such as appointment or dismissal of directors or supervisors, must be registered in the company register of the local Chamber of Commerce.

e) Other registrations

The directors of a private limited company are obliged to maintain a shareholders register which must be made available for inspection by public authorities at the registered office. This obligation is also in place for directors of a public limited company in so far as the nominative shares are concerned.

Interests in companies quoted on the stock market exceeding 5% have to be reported to the Foundation for the Supervision of the Exchange of Shares (*Stichting Toezicht Effectenverkeer*) pursuant to the Participation Disclosure Act (*Wet Melding Medezeggenschap*). The data concerned are not publicly accessible through automated databases.

The company register also contains information about disqualification orders and bankruptcies. Bankruptcies are further published in, *inter alia*, the Official Gazette and a publicly accessible bankruptcy register is kept with every court of law. This register not only contains excerpts of decisions declaring or revoking bankruptcy, but also details concerning a possible agreement, pay-offs upon liquidation and rehabilitation.

Most company data are not only registered in the company register, but also with other public authorities, such as the tax authorities. They are, however, not available to the public.
An important database is the 'Limited Companies Database' (*Systeem Vennoot*) kept by the Ministry of Justice. This system contains, *inter alia*, the following data on public limited companies and private limited companies:

- Details and occupation of natural and legal interested persons;
- Registration numbers with other services (e.g. company register number or '*SoFi-number'* (this combined social/fiscal identity number for Dutch residents is used by the tax authorities and social security services));
- Statutory trading name, and statutory place of business;
- Indications concerning the company (warnings);
- Moratoria, bankruptcies and suspension of payments of legal and natural persons;
- Data from the entire body of notaries public, including addresses and number in the central notarial wills register.
- Date of establishment;
- The entire contents of the company register.

On natural persons connected with the company the following data are, *inter alia*, registered:

- Name, date and place of birth;
- Bankruptcy details;
- Occupation and date of commencement and termination;
- Indications concerning the person (warnings);
- Branch code.

Also included are data on legal persons which are not themselves public or private limited companies, but which are in some way associated with such companies (e.g. foundations managing shares).

Data for the *Systeem Vennoot* database are obtained from various sources. Apart from sources such as the company and bankruptcy registers, information is obtained from notaries public involved in the establishment of companies and from answers to questionnaires to be completed on the occasion of establishment or amendment of articles of a company. Data obtained through criminal investigation agencies are also included.

Data from the *Systeem Vennoot* database are used:

- For preventive supervision of companies on the occasion of a request for a certificate of incorporation upon establishment or amendment of articles;
- For other preventive supervision regularly and independently carried out by the Ministry of Justice (on the basis of certain criteria companies in which possible irregularities exist are selected and subsequently investigated further);
- At the request of other public institutions with the aim of strengthening the position of information of the public authorities in preventing and combating crime by or with

the help of legal persons and with the aim of furthering the integrity of business (trade and industry) and financial institutions.

Data from the *Systeem Vennoot* database are made available to third parties in as far as this will serve the public interest. This is regulated in the privacy regulations for *Systeem Vennoot*.

f) Identification and investigation

In the Netherlands the law provides for a duty of identification in certain cases (*inter alia* when appearing before a notary public for the passing of deeds or when registering natural persons such as directors at the company register). Copies of ID-cards are only acceptable in exceptional cases and then only if they have been legalised by a notary public or other authority. Once directors or representatives of the company have been registered they may refer to the company register as proof of their identity during essential legal transactions or when amending the articles of association.
Prior to issuing a certificate of incorporation background checks are carried out into:

- Persons establishing a company;
- Persons to become shareholders upon establishment;
- Persons to be appointed directors;
- Persons who will otherwise control the company.

No checks are carried out into the antecedents of persons who become shareholders once the company has established of the company nor into the antecedents of persons who become directors once the company has been established.
The background investigation in question concerns:

- Criminal convictions;
- Other criminal data;
- Bankruptcies or moratoria.

Criminal and bankruptcy information is taken into account both concerning the person himself and concerning legal persons with which the person is or has been involved, insofar as such data may be retrieved.
The investigation is carried out by the Ministry of Justice, Directorate of Administrative Affairs (*Directie Bestuurszaken*). The following data are used: data from the Central Judicial Documentation Service (*Centrale Justitiële Documentatiedienst*), the *Systeem Vennoot* database, the central database of the chambers of commerce, tax authority databases, data from other public authorities and information appearing in the media.

Information from official sources is used to investigate irregularities in business (fraud, insider trading, money laundering, etc.) and to ascertain good faith, integrity and solvency of government trading partners.
The investigations are, *inter alia*, carried out by the police, the Economical Verification Service (*Economische Controledienst*), the Criminal Intelligence Service (*Criminele Inlichtingendienst*), tax authorities, customs, the Fiscal Investigations Bureau (*FIOD*), by trustees in bankruptcies and by the investigations bureau of the Ministry of Housing, Spatial Planning and the Environment (especially concerning environmental offences and procurements).
As a starting point only the public authorities and other persons or institutions working for the public interest may use the information obtained through such investigations.

g) Central registration

The company register and the tax authority register are both centrally and decentrally kept. The bankruptcy register is only kept decentrally. The *Systeem Vennoot* is kept centrally by the Ministry of Justice.

h) Accessibility of information

All abovementioned registers are automated.

Data from the *Systeem Vennoot* database are made available to third parties in so far as this will serve the public interest. This is regulated in the privacy regulations with the database.

Of the abovementioned registers only the company register and the bankruptcy register are freely accessible to the public. Access to the other registers is limited. In general Dutch public authorities have a more extensive right of access to these registers than the general public or foreign authorities. Conditions differ per registration. In general use of the registration must be necessary in the exercise of certain elements of public authority functioning.

i) Privacy

The Registration of Persons Act (*Wet Persoonsregistraties*) is applicable to the abovementioned registers insofar as they contain personal data, with the exception of the company register. The new Personal Data Protection Act (*nieuwe wet bescherming persoonsgegevens*) however, will also apply to the company register. In these cases privacy regulations are applicable. Also applicable may be provisions which confer a general duty of secrecy on the public authorities.
The EC directive on protection of personal data (95/46/EC) has not yet been implemented by the Netherlands. However, a draft bill has been presented to parliament on 16 February 1998. Plenary discussion took place on 15 March 1999.

j) Sanctions

Not meeting the legal requirements concerning establishment, amendment of articles and/or registration may in certain circumstances amount to an offence punishable under the Economic Offences Act (*Wet economische delicten*). In those cases criminal prosecution may ensue.

The Chamber of Commerce may dissolve a company in the following cases:

- Failure of payment to the Chamber of Commerce of the annual fee;
- No directors are registered in a given year;
- No annual accounts have been published in a given year;
- Failure to pay the annual company tax (*vennootschapsbelasting*).

The District Court may dissolve a company at the request of the public prosecutor in the following cases:

- The company's activities or its objectives go against public order;
- The formal legal requirements for establishing a company have been violated;
- The articles of association are not conform the law;
- The company does not meet the legal description of the legal entity it claims to be;
- The company is improperly managed.

A private limited company can also be dissolved on the grounds of Article 185 of Book 2 of the Dutch Civil Code:

- The company cannot achieve its objectives due to a shortage of capital;
- The capital of the company has decreased below the minimum required capital because:
    1. Profits have been illegally distributed;
    2. Capital has been illegally decreased;
    3. The company or daughter company has illegally obtained shares or certificates.

- **PORTUGAL**

a) Forms of incorporation

The main forms of incorporation in Portugal are:

Partnerships:
- *Sociedade em nome colectivo:* Cia (ordinary partnership);
- *Sociedade em comandita* (limited partnership);
- *Sociedade civil* (private partnership).

Limited liability companies:
- *Sociedade por quotas:* Lda. (quota company);
- *Sociedade anónima:* SA (share company).

Other forms of incorporation:
- *Empresário em nome individual* (single trader)*;*
- *Estabelecimento individual de responsabilidade limitada:* EIRL *(*single trader with limited liability);
- *Agrupamento complementar de empresas* (complementary grouping of companies);
- Foundations and associations.

b) Use and misuse of legal entities

The most frequently used legal entities are commercial companies, particularly quota companies and share companies. Of these two, the quota companies are most frequently used. According to the latest official data of 13 December 1998, there were approximately 347,203 quota companies in Portugal.

Corporations usually adopt the form of an SA (share company). There are more than 14,615 share companies in Portugal.

In addition, there are 1,044 sole entrepreneurs (EIRL) and 1,739,861 registered traders of no great economic relevance, used mostly for tax convenience. The owner of an EIRL has to submit his accounts for filing in the company register, accompanied by a chartered accountant's report.

Infrequently used are partnerships.

Regarding the misuse of legal entities, no statistical information was available.

❖ Sections c) to j) mainly discuss the quota company and the share company.

c) Establishment of limited companies

The general law governing companies is contained in the 1986 Companies Act (*Código das Sociedades Comerciais*). This act revoked several older ones and incorporates various Community Directives on company law.

In quota companies, each quotaholder is liable for the payment of the value of the quota subscribed, and jointly liable for the payment of the value of the quotas the other quotaholders subscribe. Quotas are always nominative.

In share companies, each shareholder's liability is limited to the payment of the amount of the capital subscribed. The capital is represented by nominative and/or bearer shares.

The partnership and the limited association are characterised by the co-existence of partners who all assume unlimited liability and other interested parties whose liability is limited to the payment of the amount of their own contribution to the capital stock. These companies can be incorporated as simple partnerships or as limited associations (*sociedade em comandita simples*) or as partnerships and limited associations by shares (*sociedade em comandita por acçoes*) where only the partners with limited liability may hold shares.

Companies are incorporated by means of a deed which must be executed before a notary public. For this, several documents have to be presented to the notary public, including a certificate of deposit from a bank as proof of deposit of the paid-up capital.

The following documents are needed in order to incorporate a company:

- **A certificate of approval (valid for 180 days) of the company name and objectives issued by the company register (*Registro Nacional de Pessoas Colectivas)*;**
- A provisional corporate body identity card (valid for one year) issued by the company register;
- The company's articles of association (in the deed of incorporation), which must contain at least:
    1. the complete names and trade names of all the founding members, together with details of all documents so identifying them;
    2. the type of company formed;
    3. the name of the new company;
    4. the objectives of the company;
    5. the location of the head office;
    6. the share capital subscribed and the amount paid-up, except in the case of commercial partnerships when all the partners contribute only with their labour;
    7. the distribution of the share capital and the amount held by each partner;
    8. in case of contributions in kind to the capital, a description of each item and its equivalent monetary value, certified by a chartered accountant.

For quota companies, the following must also be included:

- The total capital and the value of each quota;
- Each member's holding of quotas;
- Payments made in relation to each holding of quotas;
- Any outstanding payments.

For share companies the articles must also include:

- The total amount of shares and their par value;
- The type of shares (nominative or bearer shares) and the conditions, if any, for the transfer of shares; and
- The number of shares in each class with reference to all the rights attached to each class;
- Payments made in relation to each holding of shares and any outstanding payments;
- The authorisation for the issue of bonds, if it is the case; and
- The management and audit structure.

Companies must be incorporated with the minimum amount of the capital required by law. In case of quota companies and share companies, at least 50% or 30% of such capital, respectively, must be deposited in a commercial bank in an account opened in the name of the new company.

Where the company is engaged in the wholesale or retail trade or involved in industrial activity, it must register at the competent government's department before it commences business.

The location of the head office representing the company's official domicile must be given as a specific address.

The amendment of a company's articles of association requires:

- A notarial deed;
- The co-operation of the company register, in case the amendment refers to the company's name, corporate scope or transfer of head office to another municipality;
- Registration in the local Commercial Registration Department;
- Publication in the Official Gazette and local newspaper;
- A statement of amendments regarding the company's articles of association to the tax authorities;
- Notification to the social security services;
- Notification to the Foreign Investment Authority (ICEP), if foreign investments are involved.

For the transfer of (part of the) shares of quota companies the same requirements apply as for the amendment of a company's articles of association, with the exception of the publication requirements. For the transfer of (part of the) nominative and registered bearer shares in share companies, the company's intervention is required in registering the shares in the shares register (this is, of course, not the case for non-registered bearer shares). For listed shares, the intervention of a broker, Securities Market Commission, the stock exchange, the tax authorities and the Central Securities Service is required. Finally, for all types of shares, the ICEP must be called in whenever the transfer involves more than 10 % or increases of a participation involve more than 10% of the company's share capital.

Changes in the company's management require the co-operation of:

- The company register - the appointment or resignation of any director is subject to mandatory registration;

- The Official Gazette - publication in the Official Gazette of changes in management is mandatory under Portuguese law;
- The tax authorities;
- The social security services.

Foreign legal persons may set up branches in Portugal which are not incorporated in a form known under Portuguese law. Such branches must still be registered in Portugal, however, and must also comply with book keeping and tax requirements similar to those applicable to Portuguese legal persons.

d) Registration of limited companies

The deed of incorporation and the amendment of a company's articles of association (see above) must be registered in the *local* company register (*Conservatória do Registro Comercial*) within 3 months following the date the deed of incorporation is signed. It is only after registration that the company becomes a legal entity. At present, there are 308 local company registers in Portugal.

The data regarding the legal entities' existence, which are subject to mandatory registration under Portuguese law are, in general, the following:

- The company's by-laws (incorporation, amendment);
- Operations involving the encumbering of quotas (namely transfer, promissory sales with effects 'in rem', guarantees);
- Exoneration or exclusion of any quotaholders;
- Amortisation of quotas or shares;
- Issuing of bonds or warrants;
- Appointment of the members of the corporate bodies;
- Approval of the company's accounts;
- Liquidation, merger, transformation or splitting-up.

It should be observed that given the higher mobility of share capital in share companies, some data refer to quota companies only.

Furthermore, an application must be submitted to the *national* company register in order to obtain approval of the company's name and scope. The company register issues the company's identification number and card for all purposes (including tax purposes). The national register keeps a centralised database with the names and scopes of all commercial companies (including limited companies) as well as of branches of foreign companies.

e) Other registrations

Share companies must have a shareholders register containing information about shareholders in the initial share capital and about subscribers of share capital increases. In the case of nominative and registered bearer shares, transfers are also registered.

There is a criminal record of disqualification orders, containing information about the final judicial decision and the disqualification orders actually imposed. The information in such

databases is only available to the person involved, the public authorities and to the lawyers involved. Access is not direct: a written request has to be submitted in order to obtain the information sought. No statistical information is available about the number of disqualification orders imposed.

Bankruptcies and suspensions of payment (with regard to natural as well as legal persons) are registered at the local company register. In addition, the Bank of Portugal maintains a register of prohibitions on the use of cheques.

Furthermore, the company must register with:

- The local tax administration through filing a statement of commencement of activity (also in case of an amendment of a company's articles of association);
- The local social security services (after commencement of activity; also in case of an amendment of a company's articles of association).

The deed of incorporation and amendments to the articles of association (see above) must be published in the Official Gazette, and the articles of association must be published in a local newspaper at the location of the registered office.

The company must register at the local labour inspection department before commencing its operations.

In the case of foreign investment, the ICEP must be notified within 30 days following the incorporation.

There are also non-official data files (commercial files) in Portugal which render information on commercial companies, such as those managed by:

- *Dun & Bradtstreet Portugal, Lda;*
- *Infocomer – Informações Comerciais, Lda;*
- *MOPE – Informação para Gestão de Empresas. Lda;*
- *JURISERVE – Sociedade de Prestação de Serviços, Lda.*

Institutions, such as law firms, use these non-official databases, for example, before starting judicial proceedings, particularly for recovery of credits. These non-official data files are used in addition to official data files since they may contain information omitted in the official files (such as a company's assets or risk average).

f) Identification and investigation

Proof of identity must be given when registering data at the local company register with respect to a legal person. The application must contain the name, address and telephone number of the natural person filing the application, as well as the identity card number and expiry date. The identity card (original document) has to be shown upon request.

No official background investigation are carried out on natural persons who have established a legal person, become shareholders, been appointed director upon establishment, etc. Nevertheless, managers, directors, and shareholders/quotaholders of companies that carry out certain regulated activities (financial or insurance related)

subject to administrative approval, must fulfil certain legal requirements with respect to their credibility. The authority competent to grant the approval may conduct an investigation to check the information given by the applicant. In such cases a certificate of criminal registration is usually required, as well as a certificate of the company register.

Representatives and founders of legal persons have to prove their identity. They can do so by presenting their identity card or passport. Supporting documents must also be presented, such as the power of attorney or the company register certificate required as evidence of the capacity claimed by the person involved.

Founders of a legal person may either appear in person or by proxy.

g) Central registration

Some of the registers referred to above are available as automated data files.

There is no central registration. Each public entity involved in the procedure referred to above (under 'establishment' and 'registration') keeps its own files, which are not automatically interlinked, so that information concerning any one person cannot be requested in one search.

The local company registers are not centrally stored at the national level. There are now 308 local company registers in Portugal. The automated database containing the registrations of the national company register (namely, the name and scope of each company) is, however, centralised at the national level.

The police keeps several internal databases, one of which is aimed at criminal prevention and investigation, in particular of organised crime, drug trafficking, economic and financial infractions and embezzlement.

The national intelligence service, coming under the Minister of the Interior, aims at obtaining information necessary to protect national independence and security through the prevention of sabotage, terrorism, espionage and acts contrary to Portuguese law and order. Governmental agents with police functions may make use of the intelligence service's database upon ministerial approval.

h) Accessibility of information

The information registered in both the national and local company registers and at the notaries public is available to the public upon written request, either in the form of written certificates or certified copies, for a small fee (for example, certificates of the local company register costs 1,250 Portuguese escudos for the first five pages with 200 escudos charged per extra page). The information published in the Official Gazette is, of course, freely available.

Notaries public and local company registers keep files on the companies that have requested their intervention and that have followed the procedure referred to above. The national company register, the public body publishing the Official Gazette, the tax authorities and ICEP all keep automated databases containing information regarding the companies that followed the procedures referred to above. Some local company registers keep automated files for their own use. Banks ask their clients to complete a questionnaire before they open an acccount and they keep this information in automated databases (subject to privacy regulations). The information kept in the tax authorities' databases are not available to the public either.

Authorities have access to more registered information than the general public. The information derived from the abovementioned registers can be used for criminal investigations.

i) Privacy

Act 67/98 of 26 October 1998 regulates the protection of personal data in general. It has transposed EC Directive 95/46 of 24 October 1995 into Portuguese law. This law establishes the general principle that the processing of private data requires the consent of the person involved.

j) Sanctions

The actions that may be taken against a legal person depend on the type of requirement that was not respected. It may vary between the nullity and lack of effectiveness of all acts to a (simple) penalty.

If certain criminal activities are developed by a legal person the applicable sanctions are a penalty, a warning, or dissolution of the legal person. Accessory sanctions are the temporary suspension of activity, prohibition of participation in public tenders and of public subventions, closure of the establishment, and the publication of the condemning decision.

- **SPAIN**

a) Forms of incorporation

The main forms of incorporation in Spain are:

Partnerships:
- *Sociedad comanditaria* (limited partnership);
- *Sociedad colectiva* (ordinary partnership).

Limited liability companies:
- *Sociedad anónima*: SA *(*public limited company, share company or stock company);
- *Sociedad de responsabilitad limitada*: SRL (private limited company).

Other forms of incorporation:
- *Sociedad cooperativa* (co-operation).

❖ Sections c) to j) will mainly deal with the public limited company (SA) and the private limited company (SRL).

b) Use and misuse of legal entities

Until the 1990s, the public limited company (*sociedad anónima)* was most often used form of incorporation. Since the reform of Spanish company law in 1989, however, the legal entity most often used (i.e. in 90% of cases) is the private limited company (*sociedad de responsabilitad limitada).* At present, approximately 5% of all companies are public limited companies.

Generally speaking, public and private limited companies are most vulnerable to misuse. The reason for this is that the identity of the members is of secondary relevance. Therefore, it is easier to refrain from taking responsibility for one's actions within the framework of the company. This fact, together with the weakness inherent in the Spanish system that suspensions of payment frequently disguise bankruptcies, causes limited companies to be quite frequently subject to misuse.

Foreign legal entities can operate in Spain with a wide margin of discretion. They can freely invest in immovable goods situated in Spain. When they exceed the sum of 500,000,000 Spanish pesetas, they are subject to a limited procedure of post facto reporting. As a result, holding companies often operate in Spain in order to evade taxes, despite the fact that numerous regulations in Spain seek to prevent tax evasion. It must be noted that banking secrecy in surrounding countries like Switzerland and Andorra, may further money laundering practices and investment of a dubious origin.

c) Establishment of limited companies

The following legislation regulates the establishment and operation of legal persons:

- Royal Decree No. 1564 of 22 December 1989;
- The Limited Companies Act (Act No. 2 of 23 March 1995);
- The Royal Company Register Decree (No. 1784 of 19 July 1996).

The minimum share capital required for the establishment of private limited companies is 500,000 Spanish pesetas. For public limited companies, a capital of 10,000,000 pesetas is required, with an initial disbursement of 25%.

For the establishment and amendment of articles of companies the use of the services of a notary public is required. Without a deed passed by a notary public registration cannot take place and, consequently, the company cannot acquire legal personality. Examination by the notary public is limited to the recording of that which has been agreed upon by the founders.

The deed must include the following:

- The names and personal data of the individuals or legal persons issuing the public deed, as well as their nationality and domicile;
- Their intent to establish a share company;
- The cash, goods or rights that each shareholder undertakes to contribute to the company and the number of shares attributed to such contribution;
- An estimate of the costs of incorporation;
- The names and personal data of those initially in charge of the management of the corporation, and of the auditors.

The corporation is subject to the rules contained in the bylaws, which should include the following:

- The name of the corporation;
- The company's objectives, including a description of activities;
- The duration of the company;
- The date at which it shall start its operations;
- The social domicile;
- The share capital expressing, if necessary, its non-paid-up value, and the maximum term and manner in which it shall be disbursed; the number of shares into which it is divided, their nominal value, classes, series, and their representation;
- The structure of the body in charge of representation and management of the company and the appointment of the administrators to whom the power of representation is granted, stating their number or at least their minimum and maximum number;
- The duration of their appointment and the disciplinary procedure if they are entitled to remuneration;
- The procedure for discussing and adopting decisions by the company's executive bodies;
- The relevant date for end-of-year accounts and financial reports;
- The restrictions on transfer of shares, if any;
- The procedure for ancillary contributions, if applicable and any special rights the founders of the company may have reserved for themselves.

When the shares that are transmitted are quoted on the stock exchange and they exceed the legally established percentages authorisation by the *Comisión Nacional de Mercado Valores* (CNMV) is required.

Examination by the public authorities does not take place, with the exception of **certain industries, such as the banking and insurance industry.**

Branches of foreign companies have their own legal form. A branch must be established by a notarial deed specifying, *inter alia*, the branch's seat, its business objectives, and the capital assigned. A document has to be presented certifying that the parent company is incorporated and authorised according to the legislation of the country of origin. The Mercantile Registry Regulation states that the company and its branches must be registered separately, at the local company registers corresponding to their respective domiciles.

d) Registration of limited companies

The central register of companies in Spain is the *Registro Mercantil*. Companies are obliged to register with their local company register. Without this registration acts within the framework of legal companies may not be effected against third parties (with the exception of the transmission of shares).

The following data are, *inter alia*, registered:

- The identity of the founders who will also be shareholders and of the directors;
- Proxies
- Annual accounts
- The articles of association containing, *inter alia*:
  1. the name of the company;
  2. the objectives of the company;
  3. starting date and duration of activities;
  4. address;
  5. capital.
- Amendments to the articles of association, changes in the company seat, establishment of branches, increases or decreases in capital, mergers, division, dissolution, liquidation, and the emission of shares;
- Real estate owned, vehicles owned, number of persons employed, export data.

There is one register per province (always kept in the province's capital); islands have their own registers. In addition there is a central register kept in Madrid in which a limited number of data is maintained. These data, *inter alia*, concern the existence of the company, the seat, its share capital, amendments to the articles of association, the identity of the directors and bankruptcies. For the contents of the articles and amendments thereto, for further data concerning the directors, such as the terms of office, and for the date on which a judicial decision on bankruptcy was given, however, the provincial registers will need to be inspected.

In addition to registering with the *Registro Mercantil* new companies also need to record their name with the *Registro General de Sociedas*, with the Ministry of Justice.

The transfer of shares is not registered in *the Registro Mercantil*.

e) Other registrations

The *Sociedades de responsabilidad limitada* keep their own shareholders registers; the *sociedades anónimas* only keep shareholders registers insofar as nominative shares are concerned. These registers are not usually open to the public. Some companies do have a public shareholders register, such as companies of accountants and the company managing the stock exchange. Participations exceeding 5% in credit institutions are also officially registered, by the Spanish central bank.

Although disqualification orders exist in Spain, they are not registered. Nor are the imposed disqualification orders counted, nor do data exist with respect to the effectiveness of disqualification orders. Exchange of information on disqualification orders with other countries does not take place.

If a company goes into bankruptcy or if a moratorium is granted this will be registered in the *Registro Mercantil* alongside the data concerning that company already included in the register.

In the *Registro Civil* certain relevant data are registered, such as incapacity and insolvency. In addition, the Ministry of Justice keeps a register for internal use where penal antecedents are registered, and where every interested person can apply for a certificate with his personal antecedents.

Other databases in which information on legal persons is registered exist within different ministries keeping databases of limited scope and for limited purposes. Important examples are the databases of the tax authorities and of the agency registering investments by non-residents in Spanish undertakings. The tax authorities supply natural and legal persons with a fiscal number, to be used for a broad variety of transactions. Some examples of these are the opening of bank accounts and the passing of notarial deeds.

Other (non-official) registers exist in Spain mainly containing the identity of debtors of credit agencies and companies. Credit agencies use this type of registration in order to evaluate the solvency of their clients. Also, enterprises exist whose main activity is the creation of databases containing financial data of companies (solvency rates, etc.), as well as the existence of pending lawsuits against companies. All non-official registers have to comply with established requirements in the Personal Data Protection Act (Act No. 5/1992 of 29 October 1992; *Regulación del Tratamiento Automatizado y Protección de Datos de Carácter Persona*l).

f) Identification and investigation

The founders of a company are required to identify themselves with their ID cards when appearing before a notary public; the same goes for all changes which need to be recorded by notarial deed.

No investigation into the antecedents of founders and/or directors of companies takes place. Founders are, however, required to submit a declaration stating that they are not

incapable of managing the company and that they do not hold any public office incompatible with the management of the company.

Information from official registers is, *inter alia*, used to investigate irregularities. Data from non-public registers are used to investigate irregularities in the areas connected with these registers. For example: the registers of the stock exchange (*Comisión Nacional del Mercado de Valores*) are used to investigate offences in the area of trade in shares and the participation in credit institutions.

For investigations into the capacity (reliability and solvency) of potential contracting partners of the public authorities, data from official registers are also used.

g) Central registration

As mentioned, there is a central register in Madrid (the *Registro Mercantil Central)* alongside 61 local registers, kept in the capitals of each province.

The public may retrieve general data concerning registered companies via terminals installed at the *Registro Mercantil Central*. This information can also be accessed through the Internet (see below).

The remaining information may be obtained upon written request at the local registers. The answer will be provided through ordinary mail (Articles 77 and further of the *Reglamento del Registro Mercantil*). These decentralised registers are not interlinked. The public does not have access to these registers through automated data files.

h) Accessibility of information

The *Registro Mercantil Cetral* is automated and open to the public. Most of the information contained in it is available to the public via computer terminals. It is also possible to access this register through the Internet, at http://www.rmc.es (after the conclusion of a contract of access).

i) Privacy

The right to protection of privacy is contained in article 18.1 of the Constitution, elaborated by Organic Law 1/82. Concerning automated processing of personal data Organic Law 5/1992 is in force, elaborated by Royal Decree 1332/94. This legislation does not prevent the inspection (either or not through automated searches) of information in public registers.

Royal Decree 156/96 of 2 February 1996 implements European Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (24 October 1995).

A bill was adopted by the government in July 1999 proposing minor changes to the existing privacy legislation. Parliament is currently discussing this bill.

j) Sanctions

If a company has not been registered within a year of establishment, any shareholder may demand judicial dissolution.

Where a company has been registered, shareholders may in certain cases of irregularities claim judicial annulment of the company.

Failure to carry out any activities is not in itself ground for dissolution or nullity of the company. In cases, however, in which a company has not attained its objectives or is unable to do so, a shareholders' meeting may be convened for the purpose of deciding to dissolve; if this does not transpire any shareholder may claim judicial dissolution.

Legal persons are not subject to criminal liability according to the Spanish criminal code. Nevertheless, since 1995 the criminal code establishes a series of 'accessory consequences' of crimes committed within the framework of legal persons. These 'consequences' legally speaking do not constitute crimes. However, in practice they can be considered as such and they can result in the dissolution of a company or its activities.

In addition, the directors of the company carry criminal responsibility for acts committed within the framework of the legal person.

- **SWEDEN**

a) Forms of incorporation

The main forms of incorporation in Sweden are:

Partnerships:
- *Handelsbolag* (ordinary partnership);
- *Kommanditbolag* (limited partnership);

Limited liability companies:
- *(Private) aktiebolag:* AB prb (private limited company);
- *Publikt aktiebolag:* AB pub (public limited company);

Other forms of incorporation:
- *Enskild firma* (single trader);
- *Ekonomisk förening* (economic association);
- *Filial til utländskt bolag* (branch of a foreign company);
- *Ideell förening* (non-profit association);
- *Bostadsrättsförening* (tenant-owners association);
- *Stiftelse* (foundation);
- *Europeisk ekonomisk intresseförening* (European economic interest grouping).

b) Use and misuse of legal entities

The *aktiebolag* (private limited company) is the most widely used legal person (about 280,000 currently in existence) and also the most widely misused legal person.

❖ Sections c) to j) will mainly deal with the AB prb and AB pub.

c) Establishment of limited companies

The limited liability company is regulated by the Companies Act (*Aktiebolagslag* 1975:1385). Special legislation concerning the activities in banking companies, financial companies, stock market companies and other regulations regarding fiscal matters of limited liability companies may be applicable.

Two types of limited liability companies can be distinguished: a *privat aktiebolag* (private limited company) and a *publikt aktiebolag* (public limited company). Neither a notary public nor any preventive supervision or government consent is required for the establishment of a company, although supervision by an accountant is necessary.

To establish a limited company the following requirements have to be met:
- **There have to be one or more founders, resident in an EU country;**
- **The founders must have the Swedish nationality or be a legal person incorporated and operating in an EU country;**

- **A minimum share capital of 100,000 Swedish crowns is required for a private limited company and 500,000 Swedish crowns for a public limited company;**
- **There must be a memorandum of association (see below);**
- **There must be articles of association (see below).**

The memorandum of association is the agreement to form a company for the purpose of operating under a stated name in accordance with the provisions of the articles of association.

The articles of association must contain the following data:

- **Name of the company;**
- **Nature of the company's activities;**
- **The municipality in Sweden in which the registered office is located;**
- **Share capital or the minimum and maximum capital;**
- **Par value of the shares;**
- **Number of directors, deputies and auditors and their term of office;**
- **Procedure of convening the ordinary general meetings and the issues on the agenda;**
- **Number of general meetings to be held annually and the dates of those meetings;**

The articles of association may also include provisions on the redemption clause, the arbitration clause, the financial year, issue of bearer shares or other matters.

A branch of a foreign company may be established without the permission of the public authorities but will have to be registered with the register of branches kept by the National Patent AND Registration Office (*Patent- och Registreringsverket)*. As a rule, it is in practice preferred to establish a Swedish subsidiary rather than a branch.

d) Registration of limited companies

All companies have to register with the National Patent and Registration Office. A company does not acquire legal personality before it has been registered. Before a company can be registered the National Patent and Registration Office must make sure that it was established in accordance with the Companies Act and that the chosen name does not infringe the right of another person to the name in question.

Companies must submit the following information to the National Patent and Registration Office:

- Articles of association;
- A memorandum of association;
- Minutes of the statutory meeting.

Changes in the board of directors, issues of new shares and changes in the seat of the company also need to be registered at the National Patent and Registration Office. Also registered are: a change of managing director or deputies and persons authorised to sign for the company, the auditors and, if the company does not have a legal representative domiciled in Sweden, liaison officers.

e) Other registrations

The board of directors of each company must maintain a register of shareholders. The public must be abled to inspect the register at the company's offices. A shareholder is barred from exercising certain rights before correct registration in this register has taken place.
The shareholders register of certain companies referred to as 'VPC companies' are maintained by the *Vardepapperscentralen VPC AB* (Swedish Central Securities Depositary). The company law committee is examining the possibility to start such a register of shareholders of private limited companies.

There is a register of trade bans at the National Patent and Registration Office. At present, about 310 bans are currently effective while 336 bans have been imposed in the last five years. The tax and enforcement authorities carry out evaluations with respect to the effectiveness of trade bans. There have been 40 judgments in cases where bans were ignored. Data exchange concerning trade bans takes place between Sweden and some other countries, e.g. Norway and Finland. They are not registered in the European Business Register (the EBR-register).

Bankruptcies are registered at the National Patent and Registration Office and in the company's own files (i.e. not in a separate bankruptcies register). The *Riksskatteverket* does, however, keep a bankruptcies register concerning both legal and natural persons. Information concerning bankruptcies may further be obtained from private institutions such as *Upplysningscentralen UC* owned by banks and supervised by the Data Inspection Board and the Bank and Finance Inspection Board. It retains information during three years. In addition there is *Soliditet*, which acquires its information from *Riksskatteverket*. Bankruptcies are also registered in the accounting system for the enforcement authorities (the REX-register). There is no central registration of suspensions of payment.

Non-official data files are kept by, for example, *Ekoföretagsupplysningar AB* and *KreditFakta.*

f) Identification and investigation

Identification is required upon establishment of a private or public limited company, amendment of articles, registration of certain mutations (e.g. concerning the directors), and larger transfers of shares insofar as these are registered by National Patent and Registration Office.

The National Patent and Registration Office checks the identity given against the data contained in the population register (the SPAR-register) in order to verify the residency of persons in Sweden. Overseas residents need to present a copy of a passport or an ID card. If necessary, the Registration Office can request further documents.

Registration of the document number does not take place, but a copy of the documents is made.

Investigations take place into the antecedents of founders, directors, and managers, both upon establishment as with later alterations. No investigations are carried out into the antecedents of shareholders. The investigations concern criminal convictions resulting in a trade ban and bankruptcies of interested persons themselves as opposed to those of the legal persons they are or have been involved with. Nor does the investigation concern other criminal data such as suspicions. If a person has been declared bankrupt or a trade ban has been imposed against him, such person cannot be a director.

The investigation into the antecedents is carried out by National Patent and Registration Office, which uses for this purpose the data in the register on bankruptcies of natural persons and the register of convictions resulting in trade bans. This information is provided by the courts to the National Patent and Registration Office.

Data from official registers may be used to detect irregularities conducted with legal persons.

g) Central registration

The company register of the National Patent and Registration Office contains, *inter alia*: a registration number (exceeding the register), name/address/place of residence, capital in shares, directors, managers, auditors (accountants), powers, annual accounts and other finnacial data.

The abovementioned registers are available in the form of automated data files. The accounting system for the enforcement authorities, the Limited Companies Register, the Partnerships Register, the European Business Register and the population register are centrally stored at the national level. The registers are not interlinked, making it impossible to retrieve data from all registers at the same time in one search.

The national tax board, the enforcement authorities and the tax authorities all have their own internal database using the 'Lotus Notes System' (e-mail).

h) Accessibility of information

The registered information is generally accessible to the authorities, as well as to citizens with a few exceptions in the accounting system of the enforcement authorities. Authorities can have additional rights of access with respect to the population register.

The registers of companies, limited companies and partnerships will soon be available on the Internet. The registers can be accessed by company name and by company code (national registration number).

i) Privacy

General legislation regarding the protection of privacy is contained in the Secrecy Act (*Sekretesslagen 1980:100*) and the Computer Act (*Datalagen 1973:289,* replaced, on 24 October 1998, by *Personuppgiftslagen 1998:204;* it should be noted that the Computer Act remains in force up to 30 September 2001 concerning information processed before 24 October 1998). In addition to this there are about a hundred special regulations concerning registration, for example, the Criminal Records Act (*Lagen om kriminalregister 1963:197,* replaced by *Lagen om belastningregister 1998:620*). It is not allowed to include information on criminal behaviour in registers of the National Patent and Registration Office.
The EC directive on the protection of personal data (95/46/EC) has been fully implemented by Sweden as of 25 October 1998. The Personal Data Protection Act (1998:204) and Regulations (1998:1191) came into force on 25 October 1998.

j) Sanctions

The National Patent and Registration Office may order the dissolution of an *Aktiebolag* in different circumstances, for example, when the annual report is not deposited for registration within eleven months after the financial year has come to a close or when no board of directors, auditor, or executive director were registered if this was a legal requirement, or because of insolvency, or abuse of power by the shareholders.

If the National Patent and Registration Office receives no information from an *aktiebolag* for ten years it will start an investigation into whether the company is still active. If no information is received from which it may be concluded that the company still exists and carries out activities, it will be struck off the register and, consequently, cease to exist.

The provisions relating to the removal from the company register hardly bears any practical relevance any more. The company law committee has therefore suggested that this provision should be abolished through amendment of the Companies Act.

The enforcement authority, as well as other creditors, can apply for involuntary solvent liquidation.

- **UNITED KINGDOM**

a) Forms of incorporation

The main forms of incorporation in the United Kingdom are:

Partnerships:
- Ordinary partnership;
- Limited partnership;

Limited liability companies:
- Public limited company : PLC;
- Private limited company: Ltd.;

Other forms of incorporation:
- Single trader;
- Private unlimited company;
- Branch of a foreign company.

b) Use and misuse of legal entities

The most widely used legal persons are the public limited company and the private limited company. No information was provided on misuse.

Sections c) to j) will mainly deal with the PLC and the Ltd.

c) Establishment of limited companies

Public and private companies limited by shares are regulated primarily by the Companies Act 1985, which consolidated the various Acts passed between 1948 and 1983. The 1985 Act continues to be the primary Act governing company law although it has itself been amended by the Companies Act 1989. In addition, issues of solvency and liquidation of companies are regulated by the Insolvency Act 1986. While the law governing corporations is mainly statute-based, there is also a substantial body of case law in which the courts have interpreted and supplemented the relevant statutes.

No other services are required than those of the Registrar of Companies (Companies House). Along with the application the company must send the proposed company constitution, the memorandum and the articles.

To establish a limited company the following requirements have to be met:
- A minimum share capital of 50,000 pounds is required for a public limited company; there is no authorised minimum share capital for a private limited company;
- There has to be a Memorandum of association (see below);
- There have to be articles of association (see below).

Every registered company must have a memorandum of association, which is the registered company's charter. The memorandum establishes the basis of a company's statute for the incorporation and continued operation of the company.

A memorandum of association should contain the following data:

- The name of the company which must end with the word limited (or the Welsh equivalent) or an abbreviation thereof in the case of a private company, and with the words public limited company (or the Welsh equivalent) or an abbreviation thereof in the case of a public company;
- The seat of its registered office;
- The objectives of the company;
- A statement that the liability of the shareholders is limited;
- In the case of a company having a share capital, the amount of the share capital with which the company proposes to be registered and the division of that share capital into shares of a fixed amount. No subscriber of the memorandum may take less than one share, and the number of shares taken must be shown opposite the name of each subscriber.

The memorandum of a public company must also state that the company is to be a public company.

The articles of association should contain the following data:

- Share capital, and the rights and liabilities attaching to the shares;
- Alteration of share capital, issue, transfer and transmission of shares;
- Conduct of shareholders' meeting and exercise of voting rights;
- Appointment and removal of directors;
- Conduct of meetings of directors, exercise of their powers and their remuneration, expenses and other interests;
- General administrative and financial provisions for the keeping of minutes, notices, distribution of assets on winding up, declaration and payment of dividends, treatment of reserves and capitalisation of profits.

Overseas companies, wishing to establish a United Kingdom branch must comply with certain provisions of company law within one month of establishment, which require them to deliver to the Registrar of Companies:

- A certified copy of their articles of association or by-laws duly certified as true copies by an official of the government of the country where the company is incorporated, or by a notary public, or under oath by anyone empowered to administer oaths;
- A list of the directors and secretary, detailing their names, surnames, residential addresses, nationality, business occupation and directorship, together with the name of the secretary;
- The names and addresses of one or more United Kingdom residents authorised to accept, on behalf of the company, service of any notice to be served on the company;
- A formal notice of the balance sheet date;
- The date of establishment.

d) Registration of limited companies

The central register is the company register of Companies House. Companies are obliged to register here. No registration exists of companies other than PLC's or Ltd.'s. The Companies House is seated in Cardiff (for England and Wales), in Edinburgh (for Scotland) and in Belfast (for Northern Ireland). On which of these registers the company is to be entered depends on where the registered office is to be located according to the memorandum. At least two persons (or only one in the case of a private company) must subscribe the memorandum so delivered. They must each take at least one share.

The registrar may refuse registration (in which case the company will not acquire legal personality), *inter alia*, if the correct procedures for establishment have not been followed or if the company's objectives are illegal.

Companies must submit the following information to the company register:

- The memorandum and articles of association;
- A statement of share capital on incorporation;
- A statement of the first directors, first secretary or secretaries and intended registered office;
- A statutory declaration confirming compliance with the requirements on application for incorporation.

An amendment to the memorandum or articles of association must be submitted to the Registrar of Companies. Changes in the board of directors or the amount of share capital need also be reported to the Registrar of Companies.

e) Other registrations

The shareholders register is considered to be of fundamental importance as giving publicity to the identity of the shareholders and the extent of their liability, though shareholders are often nominees. The register must be readily available and must be kept either at the company's registered office or at some other public place. It must also be available for inspection during business hours by any shareholder, free of charge, and by any other person for a nominal fee.
The following information must be entered on the register:

- The names and addresses of shareholders;
- A statement of the number and class of the shares held;
- The amount paid up on the shares;
- The date of entry on the register;
- The date of cessation of shareholding.

The prohibition of the court to exercise the function of director of a legal person for a limited or unlimited period is registered in the disqualified directors register. This register can be consulted via the Internet at http://www.companieshouse.gov.uk/.

Company directors are obliged to maintain several statutory books which have to be kept at the company's registered office, such as the register of members, the register of directors and secretaries, the register of mortgages and charges, the register of debenture holders and the register of directors' interests. All these registers must be open to public inspection.

f) Identification and investigation

No identification is required prior to essential legal acts upon establishment or registration.
One of the respondents phrased a suspicion that investigations take place into the antecedents of persons to be entrusted with the management of companies, seeing as a register is kept in which data are included on disqualification orders through which a person has been barred from acting as director or otherwise as manager of a company. This register would be relatively pointless if it were not being consulted. Certainty on this point could, however, not be arrived at.

Regarding background investigation, direct evidence could not be obtained. In principle, use of the registers for investigation into irregularities is possible. It must, however, be taken into account that, if data are used which the relevant persons were obliged to submit, the use of such information in possible criminal procedures may go against the principle that no one may be forced to co-operate in their own criminal conviction (the *nemo tenetur*-adage).

g) Central registration

As mentioned above, Companies House is seated in Cardiff (for England and Wales), in Edinburgh (for Scotland) and in Belfast (for Northern Ireland). The branches register the information relevant to their region.

h) Accessibility of information

The information kept by Companies House is available to the public. Besides at the branches mentioned, the register may also be consulted in London, Manchester, Birmingham and Leeds.
It is a company's duty to keep at its registered office, or make available for public inspection there, any register, index or other company document.

l) Privacy

The EC Directive on the protection of personal data (95/46/EC) has been fully implemented by the United Kingdom. The Data Protection Act 1998 received royal assent on 16 July 1998.

j) Sanctions

Of every company whose activities have ceased during one year, judicial dissolution may be sought by certain interested parties, but not by an institution such as the public prosecutor. The judiciary examines whether the company has been abandoned. If this is not the case, it examines whether the company may possibly continue its proposed activities with sufficient means. The Secretary of State may demand judicial dissolution in the public interest, but in practice will only do so for active (swindling) companies.

Companies failing to pay their annual contributions or to deposit their annual accounts with the company register may be struck off the register by the Registrar of Companies, because it is suspected they do not (or no longer) carry out any activities. The striking off procedure does not only take place when companies are inactive. Also after conclusion of judicial winding up procedures (regardless of the ground for dissolution involved) striking off, and, consequently, dissolution takes place. The situation, which existed before dissolution, may be re-established quite easily by way of a restoration request or a request for annulment of the dissolution.

4. Tables

Table 1 **– Legal entities most frequently subject to misuse –**
according to our respondents:

COUNTRY	LEGAL ENTITY
Austria	Private limited companies
Belgium	Public and private limited companies
Denmark	Private limited companies
Finland	Public and private limited companies
France	-
Germany	Private limited companies
Greece	Public and private limited companies
Ireland	Private limited companies
Italy	Foreign companies
Luxembourg	Public limited companies (holdings), offshore companies
The Netherlands	Private limited companies
Portugal	Public and private limited companies
Spain	Public and private limited companies
Sweden	Public and private limited companies
United Kingdom	Public and private limited companies

Table 2- Registrating body

COUNTRY	REGISTRATING BODY
Austria	Company register, competent commercial court
Belgium	Competent commercial court
Denmark	Commerce and Companies Agency
Finland	National company register
France	Competent commercial court
Germany	Competent court
Greece	Court of first instance
Ireland	Minister of Enterprise and Employment
Italy	Chamber of Commerce
Luxembourg	District court
The Netherlands	Trade register, Chamber of Commerce
Portugal	Local company register
Spain	Central and local company register
Sweden	National Patent and Registration Office, Ministry of Industry
United Kingdom	Companies House

Table 3 – **(Public) access to (general) company register**

COUNTRY	ACCESS TO REGISTRY
Austria	Publicly accessible
Belgium	Publicly accessible
Denmark	Publicly accessible, but authorities have access to more information
Finland	Publicly accessible (also via Internet)
France	Publicly accessible
Germany	Publicly accessible
Greece	Publicly accessible
Ireland	Publicly accessible
Italy	Publicly accessible
Luxembourg	Publicly accessible (to a certain extent via Internet)
The Netherlands	Publicly accessible
Portugal	Publicly accessible (upon written request)
Spain	Publicly accessible (the national register is –upon request- accessible via Internet)
Sweden	Publicly accessible, authorities have wider access
United Kingdom	Publicly accessible

Table 4 – **Disqualification orders register**

COUNTRY	EXISTENCE OF DISQUALIFICATION ORDERS REGISTER	PLACE
Austria	No	Not applicable
Belgium	Yes	Courts of commerce (not accessible)
Denmark	No (in process)	Not applicable
Finland	Yes	Finnish Judicial Registry/ commercial database
France	Yes	Internet
Germany	Yes	*Gewerbezentralregister*
Greece	No	Not applicable
Ireland	Yes	-
Italy	No	Not applicable
Luxembourg	Yes	Minister of Trade
The Netherlands	Yes	Company register/court of law (publicly accessible)
Portugal	Yes	Not publicly accessible
Spain	No	Not applicable
Sweden	Yes	Internet
United Kingdom	Yes	Internet

Table 5 - **Requirements for the establishment of legal persons**

COUNTRY	PREVENTIVE AUTHORISATION PRIOR TO THE ESTABLISHMENT OF LIMITED COMPANIES	IDENTIFICATION PRIOR TO THE ESTABLISHMENT OF LIMITED COMPANIES	REQUIREMENT OF NOTARIAL DEED
Austria	For certain industries	Yes (original proof)	Yes
Belgium	For certain industries	Yes (copy of proof)	Yes
Denmark	No	No	No
Finland	Role for auditor	No	No (role for auditor)
France	**COB/commissaires aux apports**	Yes (copy of proof)	No
Germany	**Gründungsprüfer**	Yes (original proof)	Yes
Greece	No	Yes	Yes
Ireland	No	No	No
Italy	For large public limited companies	Yes/No (notary public decides)	Yes
Luxembourg	No	Yes	Yes
The Netherlands	Minister of Justice	Yes (original proof)	Yes
Portugal	No	Yes (original proof)	Yes
Spain	No	Yes (original proof)	Yes
Sweden	Role for accountant	Yes (original proof)	No (accountant)
United Kingdom	No	No	No

5. Summary

The country reports that were presented in this Chapter provided an overview of registration practices of legal persons in all EU Member States.

The findings in the country reports can be summarised as follows:

a) Forms of incorporation

The main forms of incorporation in the various EU Member States are all relatively similar. Generally speaking, the following three types of incorporation can be discerned:

- Partnerships (partnership with full liability for all partners or limited partnership);
- Limited liability companies (private limited company, public limited company);
- Other forms of incorporation, such as the single trader, cooperation, association, and foundation.

Partnerships are forms of business organisation where either all or some of the members are responsible for the liabilities of the firm.

Regarding limited liability companies, all countries provide for public companies (or stock or share companies) as well as for private limited companies. The main difference between the two forms of incorporation is that, while the share or public company may issue negotiable share certificates, the private limited company may not, nor may it offer its shares to the public or list them on the Stock Exchange. In addition, many countries are familiar with forms of legal persons for special purposes, such as the mutual security company for insurances. The foundation and the association, finally, are not found in all countries and, insofar as they are, do not play any role of importance in every country in managing enterprises.

b) Use and misuse of legal entities

In most countries, the private limited company is most often used, and to a lesser extent, the public limited company. The private limited company may be more often used since the procedures for establishment are usually somewhat less complex. In most countries the same legal person is reported as the one most widely misused, *i.e*. the private limited company, and to a lesser extent, the public limited company. One of the reasons of the frequent abuse of limited liability companies may be that the identity of the members is of a secondary relevance.

It is also observed that possible abuse could be made of the (equivalents of the) foundation and association, given the fact that these legal persons are less stringently supervised than limited liability companies. The Netherlands has reported that the foundation is increasingly used for criminal purposes since a certificate of incorporation concerning the draft deed is not required for the establishment of foundations. In Germany, on the other hand, no permission from the public administration is needed for the establishment of a private or public limited company, although such permission is, in fact, required for a foundation or association.

Furthermore, foreign legal persons are increasingly misused in the various Member States. Foreign legal persons are companies that are incorporated abroad under the laws of that

foreign country. Some of these foreign legal persons are offshore companies, implying that they are not allowed to engage in activities within the country of creation. With regard to foreign legal persons that are active in a country other than the country in which they were incorporated, two systems apply internationally. The so-called 'incorporation principle', on the one hand, implies that the foreign legal person is subject to the legal system of the country in which the country was incorporated. The 'real system' (or 'seat doctrine'), on the other hand, implies that the law of the country where the actual registered office is applies. Countries that apply the 'real system' are likely to be able to exert more control over the functioning and activities of foreign legal persons than those countries that apply the incorporation principle.

c) Establishment of limited companies

In several countries use must be made of the services of a notary public for the establishment of a public or private limited company (Austria, Belgium, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain). In the United Kingdom, Ireland, Finland, Sweden and France, the intervention of a notary public is not required. Nevertheless, in Sweden, supervision by an accountant is obligatory. In Finland, an independent auditor may refuse to sign an opinion or a certificate if the provisions of the Companies Act have not been complied with.

In some countries (Germany, France) persons may have to be appointed who will supervise the establishment of limited companies (*Gründungsprüfer, commissaire aux apports/commission des opérations de bourse, COB*). These officials are entrusted with the supervision of the deposit of capital and the value of contributions in kind.

In the Netherlands, the establishment of a limited company is subject to prior consent of the Minister of Justice. Expectations concerning possible abuse of the legal person for criminal purposes may constitute grounds for refusal of permission.

In most other countries studied (Austria, Belgium, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden, United Kingdom) the establishment of limited companies is not in itself subject to governmental supervision. In a number of countries, however, consent is required for the establishment of certain limited companies (*e.g*. banks, insurance companies). Such requirements exist in Austria, Belgium, Finland, Luxembourg and Spain. In Denmark, if the shares of a limited company can, in connection with the establishment of the company be subscribed for by investing other property than money in the company, one or more approved auditors acting as independent experts have to evaluate such property and issue a dated and signed opinion thereon. In Italy, finally, consent is required for the establishment of limited companies of which the capital exceeds a certain amount (10,000 million Lira).

All countries require that articles of association be drawn up for the establishment of a limited company. Such articles of association should usually at least contain the name of the company, the registered domicile of the company, the scope of the company's business activities, and the amount of the authorised share capital.

Other requirements for the establishment of a legal company are, *inter alia,* a fixed minimum share capital, a subscription of the shares of the company, depository of a certain percentage of the capital with a Bank, and a constitutory shareholder's meeting.

Furthermore, Denmark, Finland and Sweden require that one or more of the founders of the company are residents in a EU country.

In all countries, foreign companies may establish branches to carry out their business activities. They must adhere to the registration requirements of the host country. In Denmark, Finland and Greece, branch offices require permission of the Ministry of Industry or Trade. In Spain, a branch must be established by a notarial deed. These requirements are in line with the Eleventh Council Directive (see Section 2 of this Chapter), which concerns disclosure requirements in respect of branches opened in a Member State and which stipulates that documents and particulars relating to a branch shall be disclosed pursuant to the law of the Member State (Article 1 (1)).

As mentioned under b), Member States apply different doctrines in order to determine the law applicable to foreign companies, i.e. the `incorporation principle' and the `real principle' (or seat doctrine). As mentioned, the seat doctrine is essentially based on the criterion of principal administration. As a result, a foreign company which does not have its principal administration in the state of its incorporation is in principle treated as a nullity since the host state, where the company may aim to establish a branch will claim that it is a pseudo-foreign company, which should be treated as domestic. As, however, the pseudo foreign company is founded according to foreign law, it is said to be founded under the 'wrong legal order', with the consequence that its legal personality is denied. The application of the incorporation doctrine, on the other hand, leads in principle to the recognition of foreign companies. In the *Daily Mail* decision of the ECJ, the freedom of establishment was interpreted as being neutral in relation to these different national rules of conflict. In this context it is worthwhile to refer to a recent decision of the ECJ from 1997. In the case of *Centros Ltd v Erhvervs- Selskabsstylrelsen*, the Court decided that the establishment of a branch of a company not carrying out any actual business in order to 'circumvent' national law providing for a minimum capital requirement, does not in itself constitute an abuse of the right of establishment (C-212/97, ECR [1999] I-1459). Accordingly, European Union law does not prohibit such constructions. Nevertheless, the Court added that this interpretation does not prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud.

It should be mentioned that although Denmark is following the incorporation doctrine, its attitude towards pseudo-foreign companies comes close to the seat doctrine. This has raised a debate in legal writing as to whether the *Centros* judgment has caused a major setback to the seat doctrine and made it impossible to apply it as a means to deny the existence of pseudo-foreign companies.

Altogether, it is to be hoped that the EC will further harmonise national standards for the formation of limited companies.

Finally, as mentioned in section 2 of this Chapter, the Fourth Directive aims at attuning national legislation on annual accounts. Among other things, it requires that certain types of companies have to produce accounts. This Directive offers the possibility to obtain more information about branches of companies in overseas territories (e.g. the Dutch Antilles) which are often used by companies as 'tax havens'. In July 1999, the EC has referred the UK to the ECJ for failure to implement this Directive in the territory of Gibraltar (see section 2).

d) Registration of limited companies

The Second EU company law Directive provides for a system of publication in force for all limited companies. Member States are required to maintain publicly accessible official registers of limited companies in a central register, commercial register or companies register (Article 3). The data from these registers are to be published in a national bulletin.

Along the lines of this Directive, all Member States register data about their legal persons. This registration is done either locally or centrally and there is no uniformity in the type of bodies that collect these data. In some countries, the registrating body is a competent court (Austria, Belgium, France, Germany, Greece, Luxembourg). In Ireland and Sweden, the Minister of Enterprise and Employment and the Ministry of Industry respectively register information about legal persons. In other countries a special Trade Register is responsible for the registration of legal persons.

Usually, before registration the company register has to examine whether the company has been established in a proper way, corresponding to the legal rules. Some States report that a company does not acquire legal personality before it has been registered with the registration office (Austria, Sweden). Similarly, Spain reports that without registration acts within the framework of legal persons do not have effect with respect to third parties. Finland reports that persons who have taken decisions prior to the registration are liable for obligations incurred by the company as a result of those decisions.

The type of information that is being collected by the various registrating bodies differs. There is no common format under which the information on the establishment, management and funding of legal persons is registered in the various EU Member States.

In addition to the initial registration, several States report that amendments to the articles of association and the appointment or change of directors, members of the board and accountants must also be registered at the company register.

Alongside this company registration, the registration of limited companies is usually published nation-wide in an official journal.

e) Other registrations

In all countries limited companies are obliged to keep a register of holders of nominative shares. As a rule, this registration is only held by the limited company and is not open to the public. In some countries, however, the publication of larger shares in quoted companies is compulsory (the Netherlands, Belgium), or shareholders in certain kinds of limited companies need to be published (Italy, Spain). Denmark reports that the register of shareholders of private limited companies must be made available for inspection by public authorities. In Finland, the United Kingdom and Sweden, the shareholder's register is open for inspection by any interested party, including public authorities and the public.

Another important registration concerns the registration of disqualification orders. Such a registration exists in Finland, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Sweden, and the United Kingdom.

In Sweden and the United Kingdom, this 'disqualification directors register' is generally accessible via Internet. By entering the name of a person, one can immediately see if the entered name is listed in the register. In France, information on disqualification orders may be searched via the Internet page of the French Ministry of Justice.
A disqualification orders register is not yet kept in Austria, Denmark (although in process), Greece, and Spain. In Belgium, the pronounced disqualification order is registered at the court of commerce, but is not written down in the criminal registry.

For the official registration of bankruptcies there are in principle two possibilities: inclusion in the trade register (Belgium, Germany, Greece, Luxembourg, Italy, Portugal, Spain, Sweden) or the keeping of a separate bankruptcies register (Finland, France, the Netherlands). In France and the Netherlands, the main bankruptcy data are also included in the trade register. In Italy, the data are kept by the trade register as well as by the registrar of the court.

In addition to the official registers which aim to publicise information on limited companies, such information is contained by many other databases that are kept by public authorities, for example tax authorities and institutions entrusted with the execution of social security legislation. In principle, such databases are not publicly accessible. Whether and to what degree the public authorities are granted access to such databases differs per country. Other public databases that may contain data about legal persons are, *inter alia*, registers of vessels, land registers, and insolvency registers.

A growing tendency concerns the availability of private, non-official (commercial) databases containing data on legal persons. Examples are *Asiakastieto* (Finland), 'Help' (Belgium), ICAP (Greece), and the international site *Dun & Bradstreet*. Such unofficial databases are mainly accessible via Internet (see also Chapter II of this study and the Internet Sources attached to the Bibliography).

In this regard it should be observed that commercial databases will be increasingly affected by the scope of Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases, providing for the protection of the author's copyright. This Directive stipulates that databases need to observe privacy regulations regardless of whether data is being processed by a public authority or a private legal or natural person.

f) Identification and investigation

Identification prior to the establishment of legal persons can prevent the coming into being of entities with criminal purposes. Proper identification is, therefore, an essential element of the establishment procedure of legal entities.

In the Netherlands, Germany, Portugal, Spain and Sweden identification by way of proper proof of identity is required at one or more essential moments (establishment, registration). In Austria, an original proof or certified copy is required. In other countries copies of ID-cards or excerpts of the birth register (Belgium, France) will suffice, or it is left to the judgement of the notary public how the identities of the person appearing before him are to be established (Italy), or no identification at all is required (Denmark, Finland, Ireland, United Kingdom).

In none of the countries studied has evidence been found for the need for identification upon acquirement or transfer of shares.

In various countries it is reported that at least some investigations are carried out into the antecedents of persons establishing a limited company (Denmark, Italy, Luxembourg, the Netherlands, Sweden) or persons assuming a supervisory or managing position in the company upon establishment (Denmark, the Netherlands, Germany, France, Portugal, Sweden). Later assumptions of a director's position leads to investigations in Germany, France and Sweden.

Austria, Belgium and Ireland report that background investigations of natural persons do not take place in any form. Greece reports that background investigations take place only with respect to certain kinds of companies.

Belgium reports that special legislation can provide for licenses for the carrying out of certain professions.

Several countries report that data from official registers and other databases are used to investigate irregularities with business. Various examples are mentioned, either of use made of existing databases such as trade registers, or of use made of databases having been established for this purpose especially (for example, *Vennoot* in the Netherlands, *CED* in Italy).

In some cases a separate legal basis has been created for the carrying out of the investigations intended here – or for the establishment of a database for the purpose of such investigations (*e.g*. the *CED* database in Italy). More often the basis is found in existing possibilities: the information concerned is public or available to the public authorities through different means and no limiting provisions exist (*e.g. Vennoot* in the Netherlands, the *despitagediensten* (trade investigation services) in Belgium). Sometimes these investigations, even in the absence of a separate legal basis, are further regulated by privacy guidelines (*e.g. Vennoot* in the Netherlands).

Even where no direct examples are mentioned, it is still often reported that the use of registers and other databases is allowed when limited to the use of existing possibilities. In some countries it is noted that such use of existing powers is not unlimited. In Germany, for example, automated searches in trade registers are subject to a number of important limiting conditions (among which the condition that only the trade register itself may be searched and the condition that this method of gathering information must be the most appropriate one available). In the United Kingdom it is pointed out that use for criminal investigations purposes of data compulsorily given by persons involved may be in contravention of the principle that no one may be held to co-operate in his own criminal conviction (the *nemo tenetur*-adage).

The detection and prevention of punishable acts and the eventual investigation of criminal prosecution are mentioned as reasons for the use of registers in investigating irregularities. In the Netherlands, there is the additional reason that the establishment of legal persons for criminal purposes must be prevented. The guarding of the integrity of business (and of the public administration entering into agreements with the business world) is an aim of the investigations examined here; this becomes apparent from the various examples given of such investigations.

g) Central registration

As mentioned above, registers of companies are kept locally, provincially and/or centrally. In Belgium, Germany, Greece, Luxembourg, Portugal the registers are local or regional. Some of these countries are currently undertaking initiatives to establish a central registration of legal entities. In Austria, Denmark, Finland, France, Ireland, Italy, Spain, Sweden, the Netherlands and the United Kingdom, central databases exist.

h) Accessibility of information

The accessibility of information on legal persons differs in the various EU Member States. All countries report that the data in the trade register are publicly accessible. Denmark and Sweden report that the authorities have a wider access than the public. Finland, Luxembourg and Spain report that their information is (partially) accessible via Internet. In Portugal, the information is only available upon written request.

In this respect, it is also worthwhile to take notice of the EBR-II project (see Chapter IV), that seeks to make information on legal persons available at a European level.

i) Privacy

In most countries legislation for the protection of privacy exists. This protection of privacy, however, apparently does not constitute a barrier for the inspection of data from public registers. It may be assumed that the interests served by privacy and those served by public accessibility have in a number of cases been weighed by the legislative in establishing which data are to be included in the public registers.

As mentioned at the beginning of this Chapter, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 seeks to protect individuals with regard to the processing of personal data and with regard to the free movement of such data. The Data Protection Directive seeks to harmonise the different standards in the various EU countries. So far, only eight countries have notified measures (partly) implementing this Directive. It is, therefore, difficult to judge the overall positive or negative effects for access to data about legal persons and directors/beneficial owners.
Furthermore, as mentioned at the beginning of this Chapter, this Directive may have an impact on the existence and functioning of (the growing amount of) commercial databases, since it not only applies to public databases but also to commercial ones.

j) Sanctions

In all countries, once a company has been registered, the authorities have various possibilities to impose sanctions on the company. Grounds for sanctions are, *inter alia*, the lack of the deed of incorporation, failure to pay the annual contribution or to submit annual accounts, the fact that a company's purpose is in violation of public policy, incapacity of the founding members, etc.

Various possibilities are reported for action against empty companies and against companies who are in contravention of the law or public order. It may vary from the dissolution of the legal person, the nullity and lack of effectiveness of all acts of the company, the (temporary) suspension of all its activities, the closure of one or more establishments, imprisonment, to a (simple) penalty, confiscation, fine or warning.

Article 11 of the first Council Directive provides for a number of limitative grounds for nullity. Nullity must be ordered by decision of a court of law and is only allowed if one of the grounds for nullity mentioned in the second paragraph of Article 11 apply. In the 1989 *Marleasing* decision the ECJ ruled that these grounds must be strictly interpreted (see Section 2 of this Chapter).

Dissolution of limited companies is a possibility in all countries studied. For example, in Sweden an administrative procedure is in place; in the Netherlands and the United Kingdom there is both administrative and judicial dissolution, and in several other countries there is judicial dissolution.

Grounds for dissolution may lie in relatively easily establishable facts (such as the absence or default in a notarial deed, failing to pay contributions to the register or not depositing the annual accounts), but also in contravention of the law or public order (illicit purpose), the diminishing capital below a certain minimum amount or irregularities. Entitled to claim dissolution or annulment are usually interested parties (e.g. shareholders) and, in a number of cases, keepers of registers or judicial authorities, such as the Public Prosecutor.

From a number of countries it is explicitly reported that failure to carry out any activities does not constitute grounds for dissolution of a limited company (Austria, Denmark, Germany, France, Greece, Luxembourg, Spain). It is however possible to initiate investigations in these countries (as well as others), which may lead to dissolution in cases where the company has ceased its activities (France, United Kingdom, Sweden) or has achieved its aim or if its aim can no longer be achieved (France, Spain); the company holds no capital whatsoever (Germany); or it has not complied with the requirements for establishment, registration, etc. (*inter alia*, Finland, Luxembourg). Finland reports that if the business entity registered in the Trade Register has during a period of ten years not filed a single notification with this register, this register has to inquire whether the business entity is still conducting business, a procedure which may result in the dissolution of the business entity.

IV. THE IMPROVEMENT OF THE EXCHANGE OF INFORMATION ON LEGAL PERSONS

1. Introduction

The plan to fight organised crime within the European context first appeared on the agenda during the Dublin European Council of December 1996. During this meeting, it was decided "to create a high level group to draw up a comprehensive Action Plan containing specific recommendations, including realistic timetables for carrying out the work." (See V.2 of the Presidency conclusions of the Dublin European Council of 13 and 14 December 1996).

In April 1997, the Council adopted the Action Plan of the High-Level Group and the Amsterdam European Council approved it in June 1997. The Action Plan enumerates a number of recommendations which are highly relevant for the present Chapter.

According to the Action Plan, "[t]he Member States, and the Commission, should, where it does not already exist, set up or identify a mechanism for the collection and analysis of data which is so construed that it can provide a picture of the organised crime situation in the Member States and which can assist law enforcement authorities in fighting organised crime. Member States shall use common standards for the collection and analysis of data. The information so collected and analysed shall be organised in such a way that it is readily accessible for investigators and prosecutions at national level and can be effectively used and exchanged with other Member States" (Recommendation No. 2). It was also recommended that "Member States shall, with respect to legal persons registered in their territory, seek to collect information, in compliance with the relevant rules relating to data protection, with respect to the physical persons involved in their creation and direction, as well as their funding, as a means to prevent the penetration of organised crime in the public and legitimate private sector. It should be studied how such data could be systematically compiled and analysed and be available for exchange with other Member States and, where appropriate, with bodies responsible at Union level for the fight against organised crime (…)" (Recommendation No. 8).

A more recent development which took place was the adoption of another Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the establishment of an area of freedom, security and justice in the EU (see the introduction of the Action Plan submitted to the Vienna European Council). In June 1998, the Cardiff European Council had called on the Council and the Commission to submit the Action Plan at its next meeting in Vienna (December 1998).
The Action Plan recommended the extension of police and judicial cooperation in criminal matters. The need for further co-operation "of judicial, police and other relevant authorities in preventing and combating crime, organised and otherwise" was emphasised (Measure 43 of the Action Plan). The Action Plan also mentioned the importance of the exchange of information to fight and prevent various kinds of crime (Measure 48 of the Action Plan).
The importance Heads of State and Governments attach to this subject was further confirmed in Vienna by their agreement to hold a special European Council in Tampere, on 15 and 16 October 1999, on the establishment of an area of freedom, security and justice in the EU. With regard to the prevention of organised crime, the Council stated

that “a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union” (sixth Tampere Milestone mentioned in the Presidency Conclusions). The outcome of the European Council in Tampere also stressed the necessity of the improvement of the transparency of ownership of corporate entities (Conclusions No. 54). In addition, common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the Union in the hiding of criminal proceeds and in money laundering (Conclusions No. 57)

In this context, a conference was organised by Europol and the European Commission in November 1999 at Europol Headquarters in The Hague entitled “Forum towards a European Strategy to Prevent Organised Crime”. A number of the general conclusions of the Forum are relevant for the present research:

- A global policy to counter organised crime must encompass preventive and repressive measures. Whereas repressive measures are of a reactive nature, preventive measures can anticipate new risks;
- Any prevention policy must be based on a multidisciplinary approach, involving all public and private players able to contribute to reducing organised crime activities. Partnerships between public authorities and the private sector were seen as a priority in order to ensure the effectiveness of the implementation of preventive measures;
- Any comprehensive preventive policy must develop coherent measures at local, national and European level. Transparency and mutual information between these three levels have been considered crucial;
- Initiatives to raise awareness of the damage caused by organised crime are needed to increase public support of prevention policies.

Portuguese representatives stated that the future Portuguese Presidency of the Commission would pay significant attention to this subject. A follow-up meeting will most probably be held in June 2000 in Lisbon in order to deepen the issue of organised crime prevention.

With the above-mentioned European activities in mind, this Chapter will provide an analysis of the respondents’ answers to section II of the general questionnaire regarding the exchange of information (see Annex 3).

Hereafter, in Section 2, which deals with international conventions, the difference between repression and prevention in the context of the international exchange of information on legal persons will be addressed. Sections 3 and 4 deal with the suitability and the accessibility of the registers of various EU Member States, respectively. These elements – the legal, technical and political co-operative possibilities for the exchange of information – form the prerequisites for the actual exchange of information with the aim of preventing organised crime through legal persons, which is the subject of Section 5. Possible improvements of the international exchange of information and recent developments will be discussed in Section 6. The Chapter will be concluded by an overview of the most remarkable findings and by our recommendations to improve the exchange of information.

2. International conventions

As mentioned in previous parts of this Report (see Chapter II, Section 1), it is important to draw a clear distinction between repression and prevention of organised crime. This also seems to be an important matter with regard to the exchange of information on legal persons. From the information given by the respondents it became clear that they were merely focused on the international exchange of information with the aim of repression. This demonstrates that the professional practice of the respondents is probably predominantly repressive in nature, which corresponds with the only very recent attention to the prevention of organised crime.

The focus on the repression of organised crime is illustrated in particular from the reference made to conventions. Various respondents mentioned international conventions with regard to the exchange of police-related and juridical data, such as, the Benelux Treaty of 1962 on Extradition and Legal Co-operation, the Schengen Treaty of 1990 which also refers to police-co-operation (in Article 39), the European Treaty of 1959 on the Mutual Assistance in Criminal Cases, the Convention and Additional Protocol on Reciprocal Judiciary Help in Criminal Matters of 1959, the United Nations Convention against Illicit Traffic of Drugs and other Substances of 1988 and, finally, the Convention on Money Laundering and Apprehension of Crime Products of the European Council.

With regard to the international exchange of information, data on legal persons are especially requested from foreign parties in the framework of these treaties. For example, data are exchanged in accordance with the regulations of conventions on the exchange of information between financial information units of different countries in the battle against money laundering.

It is very important to realise that these treaty regulations on the exchange of information only apply with respect to the repression of organised crime. The conventions deal with different forms of legal assistance and are only applicable when a preliminary juridical inquiry is running and a public prosecutor or examining magistrate is involved. The public prosecutor or examining magistrate can order different registrating bodies to make certain – other than the general basic – data available.

Consequently, there are no problems with regard to the availability of information on legal persons in case of repression. There are, however, problems with regard to the exchange of information in situations regarding prevention. What is laid down in the conventions deals with repression only. In this sense, the conventions form instruments of international legal assistance in criminal matters. At the preventive stage, there are hardly any specific instruments available to prevent or reduce organised crime. In addition, there are hardly any legal regulations with regard to the exchange of information. It should however be noted that the Europol Convention of 1995 and the draft UN Convention against Transnational Organised Crime of February 1999 contain provisions specifically dealing with the prevention of crime. For the prevention of organised crime through legal persons, the instrument of conventions is not used, and therefore the responsibility of the exchange of data lies with the registration systems and similar foreign partners.

3. Suitability of the registration system

The aim of section II of the questionnaire on the international exchange of information on legal persons was to make an inventory of the possibilities of the actual, cross-border exchange of these data and to chart possible improvements for the future. For this purpose, it was first of all important to get information on the suitability of the registration systems of the various Member States of the European Union.
The respondents' were first asked if their registration system is 'equipped', or in other words 'suitable', for the exchange of information on legal persons in a technical sense. This forms the precondition for the exchange of information in the practical sense.

Although it seems almost self-evident that all databases are automated (and are therefore, technically speaking, suitable for information exchange), this is not the case in all Member States of the European Union. Respondents from Luxembourg, for example, mention that their trade and business register is not yet automated. In most countries, however, the registration system is equipped for the exchange of information on legal persons with other countries (only Greece reports that its system is not equipped for the international exchange of information).

In most countries the data are available on Internet. This medium is of utmost importance for the exchange of information on legal persons with the purpose of organised crime prevention. In various Member States electronic business registers are currently being developed.

Within this framework, the European Business Register (EBR II) project should be mentioned. In addition to the availability of data on Internet, a number of Member States explicitly mentioned their participation in this project. The EBR II project is sponsored by the European Union as part of the Telematics and Administrations Programme. At present, the EBR II provides information on ten national business registers (Austria, Belgium, Denmark, Finland, France, Greece, Italy, Norway (non-member State of the European Union), Spain and Sweden) on the EBR II web-site in standardised and partially translated form. The project intends to include the national registers of all states in the Single European Market in the future.

EBR II: Europe Business Register - phase II
The decision to create EBR II, the successor of EBR comes from the consideration that the absence of a fully integrated information service on European companies is a potential threat to the effective operation of the Single European Market.

The main objectives of the EBR II project are:
- the enhancement of EBR II in terms of service features;
- its implementation in all twelve countries involved;
- its demonstration and verification with users in a real-life situation; and
- the preparation for its launching as a pan-European service.

At present, the EBR II provides information on ten national business registers on the EBR II web-site in standardised and partially translated form.
The Internet-site of the European Business Register (http://www.ebr.org) explains that name searches can be executed in the member registers to identify companies. One can obtain a standard information package, called a Company Profile, containing the most important information on a business ranging from address information to registration

date and authority, type and status of the company, activity code and description, currency code and unit, last share capital and last annual account. Depending on the country, additional information may be available, such as a list of the company's board of directors, personal profiles and a list of shareholders.

The EBR II intends to offer the European Community a system facilitating the knowledge of the European market. A good knowledge of the market is said to assure the right policy making, the prevention of fraud and the infiltration of organised crime, the freedom of movement as well as the competitiveness of the market itself.
In the future, the EBR II will be enlarged to non-European countries and aims to facilitate the transparency of the non-European economy with mutual benefit.
The expectation is that all data on European businesses will be made available without any technical barriers to the international exchange of information due to different technologies, languages, registration systems, protocols, network, software, etc.

Although the web-site contains links to the chambers of commerce of the participating countries it is not yet possible to use a personal name as search-string and get all information on that person from all different countries. This should be stimulated because, according to detective officers, this could be exactly the most important improvement for criminal investigations.
Although the system was originally developed to facilitate companies by improving the efficiency of registration, by integrating different data into one European Business Register, it could also be very useful for crime prevention.

4. Accessibility of trade and business registers

If the registration systems prove to be technically suitable for the international exchange of information, the question arises whether the registration systems are sufficiently accessible for foreign users. As, for example, with the EBR, technically the system is successfully working, but the extent of access to information depends on the participating countries. Similar initiatives and measures for a better exchange of international exchange of information stand or fall with the co-operation of the Member States, thus with the accessibility of their systems. In this sense the accessibility is determined by the (political) willingness of Member States to share information on legal persons.

In all the countries, the (general) register is accessible to the public. Foreign governments also have access to these registers, which facilitates the international exchange of data. Although the system is accessible to foreign actors, in practice, hardly any requests for access to information are made. It also seems that the way in which information is exchanged varies between the Member States. A respondent from Belgium stated that the availability of information, provided for in the Fourth Directive, does not mean that it is always easy to obtain it from other Member States within a reasonable time.

As can be concluded from the responses to the general questionnaire, most of the registers are publicly accessible, although not all the available data is accessible. It is not exactly clear which types of data are publicly accessible and what kinds are not (in Luxembourg, for example, a punishmentbook exists, which is, unlike the general data on

legal persons and their directors, only partially accessible). In most Member States probably only basic data are available to the public and thus for foreign governments or other foreign actors.

It seems that the actual exchange of information is more likely dependent on the accessibility rather than on the suitability of the various registration systems. According to some respondents, as well as according to criminal investigators, the problems and constraints of the international exchange of information on legal persons are more related to the problem of state-sovereignty, than to (technical) problems with respect to the cooperation between states and their means. Member States do not seem to be very willing to share their data on legal persons.

Because of the sovereignty-issue, Member States may impose restrictions on the forms of cooperation as laid down in the international conventions (see Section 2). With regard to fiscal matters, Luxembourg, for example, has made a reservation limiting its European cooperation to fiscal swindle. Luxembourg has made a distinction between fiscal offences and penal offences, so that fiscal offences (except swindle) were depenalised. In the national legislation, the fiscal offences still belong to the penal law.

Since fiscal offences, among other offences, characterise organised crime (for example fiscal offences with the aim of money-laundering), it is of major importance to minimise these reservations of individual Member States to the consolidated treaties on international cooperation in criminal cases. Moreover, with regard to the prevention of organised crime, it seems important in light of concluding future conventions in this context. Without the collective willingness of the Member States of the Union, the exchange of information and the actual use of foreign databases may be obstructed.

5. Actual use of foreign databases and problems encountered

In the previous sections, the legal framework and the preconditions for the actual use of foreign databases, the suitability and the accessibility of registration systems of various Member States, have been discussed. This section will deal with the use of foreign databases and the problems that attend this.

Although there are various possibilities for the international exchange of data on legal persons and their directors, in practice, these possibilities are not always exploited. It seems that a number of countries do not use foreign databases at all (Belgium, Finland, Greece, Ireland and some respondents from Luxembourg). Only a few countries reported that they use foreign databases on legal persons and their directors (Austria, Germany, Luxembourg and Sweden). Language problems also influence the international exchange of information and in particular the actual use foreign databases.

Most of the foreign databases which are used by the Member States have a predominantly commercial, rather than an official, character. Portugal, for example, states that it uses commercial systems, such as (among others), Dun & Bradstreet. Spain mostly uses the special services of commercial databases which provide information on legal companies. It seems that the business and credit information system *Suomen Asiakastieto Oy* (known as “Finska” for foreign customers) is often consulted. This is a credit information system owned by Finnish industry, commerce and financial institutions.

By using commercial databases, one can mainly get hold of basic data which can, in general, be examined for the purpose of crime prevention. The data files of *Asiakastieto*, for instance, contain basic company information, including information on the management and, in some cases, shareholders of the company as well as information on the payment history and financial statements of companies, private persons' payment defaults etc. More information is only available from official registers in case of a juridical (preliminary) enquiry. This is not among the possibilities for the purpose of the prevention of organised crime (see Section 2).

Unfortunately, on the basis of the information from the general questionnaire, it is very hard to indicate to what extent the respondents need more profound information on legal persons at an earlier stage, and if these data are available from other than official sources. From the practice of detective officers, however, it is obvious that the availability of profound information on legal persons could also be very useful for the prevention of organised crime.

6. Possible improvements in the international exchange of information and recent developments

Most respondents were not able to offer specific solutions to improve the international exchange of information: whereas a few of the respondents answered that the exchange of information could not be improved in a sound manner, other respondents had no opinion at all with respect to possible improvements. However, some respondents referred to the development of an international database which would give access to different databases of different registers within the European Union, as a possible improvement of the international exchange of information on legal persons.

This database should be an electronic register, which would be accessible from anywhere through the Internet. Such a database would make it possible to confirm the basic information concerning a (foreign) company and its existence by means of an official, and thus reliable, link. Another benefit would be the use of other sources than their own to check information. In light of the establishment of such a database, the private data of natural persons need to be adequately protected.

Another possible improvement for the international exchange of information, mentioned by the respondents, would be the adoption of national and international (European) measures to establish freedom of information between similar authorities in all EU Member States.

The possible improvements mentioned by the respondents largely correspond with the actual developments with respect to the international exchange of information on legal persons in order to prevent organised crime. The developments can be summarised as the growth of the Internet possibilities and the increasing number of commercial databases.

The growth of Internet possibilities can be best illustrated by the development of the European Business Register. With regard to Internet, other electronic databases are about to be established in the near future. In Luxembourg, for example, a draft bill was

recently submitted, which foresees the preparation of the automatisation of the trade and business register which could facilitate the international exchange of information.

The number of commercial databases that have been established recently is enormous. The responses to the general questionnaire also indicate that the use of non-official data files is increasing. Because of the large amount of information available through commercial databases, such as, for example, those managed by Dun & Bradstreet and Lexis Nexis, less use is made of official foreign databases (see Chapter II Section 5 on the use of commercial databases).

Despite these developments, a lot needs to be done to improve the international exchange of information on legal persons. It is important that measures are taken at a European level to create instruments to prevent organised crime in the future. In this attempt, all legal aspects which arose in this Chapter (like the distinction between private and public registers, the issue of sovereignty, the importance of data protection, etc.) should be addressed in order to solve the difficulties referred to in this chapter. Attention should also be drawn to the positive developments and possible improvements.

7. Summary

Conclusions

On the basis of the above, the following conclusions can be drawn:

- Member States appear to be still mainly focused on the repression, rather than the prevention, of organised crime;
- The use of foreign databases on legal persons and their directors varies within the country itself and between the various Member States of the European Union. In fact, in several countries (Belgium, Finland, Greece, Ireland and Luxembourg) official foreign databases are not (very often) used;
- It seems that reason for the restricted use of (official) foreign databases could also be politically motivated;
- Member States occasionally use commercial databases which provide information on legal persons in other EU Member States.
- The legal framework pertaining to the international exchange of information in a preventive stage is not well developed.

Recommendations

This results in the following recommendations:

- The following three elements with respect to the international exchange of information have proven to be significant, and should therefore be taken into consideration:
  1. The use of commercial databases;
  2. The use of Internet;
  3. The development of the EBR registration system.
- To consider the establishment of a central European index system which provides access to all national business registers of legal persons and which will be accessible from everywhere. This index system should have a search entrance on the name of a person and of the company;

- To examine to what extent the EBR II project can be adapted in order to make it useful for crime-preventive purposes. To be able to use the system as an instrument for the prevention of organised crime, various changes should be made:
  1. First, it is important to note that such a register for the purpose of the prevention of organised crime should be accompanied by guarantees like, for example:
     - The protection of information with regard to privacy legislation (which should be unified at European level);
     - Far-reaching safeguards against unauthorised users of the system;
     - The information should be reliable and up-to-date;
     - A supervisory body should be established to monitor the database.
  2. Secondly, attention should be paid to issues which are important and relevant to the prevention of organised crime. In this respect, more substantial information on legal persons is needed than is available in the current register system. It should be tuned to the demands deriving from the practice of criminal investigation departments (crime opportunity detection). Further research (for example, in co-peration with Europol) should also be carried out into the factors that indicate increased risks of legal persons being involved in organised crime, the so-called risk-indicators.
- Serious endeavours should be undertaken to improve and develop the legal framework at national and international level.

V. SUMMARY

1. Conclusions

General observations

European society is increasingly experiencing transnational organised crime, including financial-economic crimes, such as money laundering and the use of 'shelf' companies. Legal persons are very frequently abused in the perpetration of this type of crime. Criminal enterprises behave like average firms, act among private industry and use the facilities of public administration.

It has been established on numerous official occasions that this type of crime constitutes a serious threat to the transparency and to the free and open competition of international trade. In addition, it affects society as a whole and, in particular, the integrity of, *inter alia*, the financial sector and of government authorities.

A striking example concerns the Italian duo Giancarlo Parretti and Florio Fiorini, who abused numerous companies for the purposes of money laundering and other types of fraud. Their actions caused billions of dollars worth of damage, affecting the public as well as private interests. Public authorities failed to deal adequately with these criminals and they were able to pursue their criminal activities for a long time without being caught.

Parretti and Fiorini and others take advantage of the low level of uniformity in administrative procedures, and of the lack of transparency, legislation and co-operation between bodies of public administration. It turns out that EU Member States do not co-operate adequately in order to prevent and repress criminal activities by legal persons. Although some initiatives have been taken to address these deficiencies, a structured system for the international exchange of information on legal persons between Member States does not yet exist.

The improvement of transparency in this area is therefore of the utmost importance. It is imperative that the Member States have adequate information regarding (national and foreign) legal persons who operate in their countries, the physical persons who are in charge of the legal persons (the beneficiary owners) and the relationships between legal and physical persons.

In view of the above, the Council of the European Union adopted the Action Plan to combat organised crime in April 1997, which recommended that Member States `(…) with respect to legal persons registered in their territory, seek to collect information (…) as a means to prevent the penetration of organised crime in the public and legitimate private sector. It should be studied how such data (…) be [made] available for exchange with other Member States' (Recommendation No. 8). Subsequent conferences organised within the framework of the European Union have reconfirmed this idea and stressed the importance of this aim. Amongst the projects that Europol envisages for the purpose of the 'Organized Crime Prevention Report' is the 'development of a Europe-wide structure of access to national directories of legal persons and related organised crime prevention and combating data'.

In addition to above-mentioned European developments, the United Nations is in the process of adopting a Convention against Transnational Organised Crime, which stresses the importance of the prevention of organised crime.

The present report seeks to contribute to improving the exchange of information on legal persons, between Member States as well as between the European Union and Member States. It has laid out the problems that are encountered by justice and investigation departments and the police when searching data about legal persons, and has inventorised current data collection and exchange practices at the national and international level.

Crime prevention and prosecution

The underlying notion of the current research has been the fact that the police and others need data on legal persons for the prevention and prosecution of criminal activities by legal persons. The challenge lies, accordingly, in identifying how the needs of police and justice and prosecution departments can be met by existing and new data collection systems.

The present research has focused on the prevention of organised crime, rather than on repression. Although many governmental authorities are continue to concentrate on the repression of organised crime, there is a growing awareness that repression has a short term impact only and that repressive action needs to be integrated in a preventive strategy.

An important question that has arisen is what information such bodies need for crime prevention. The following requirements need to be met:

1. *First*, the databases should be equipped to do general preventive checks and research, *i.e*., larger searches in which a number of data are checked (*e.g.,* the persons active in a certain branch);
2. *Secondly*, it has emerged that it is of the utmost importance to have information on legal persons and natural persons involved in their establishment, management and funding. This implies the availability of databases containing information on the name and domicile of legal persons, the name and identity of directors and shareholders, with the ultimate purpose of revealing who is the real or 'beneficiary' owner of the company. In addition, the penalisation of the acting 'frontman' of the legal person deserves consideration.
3. *Furthermore*, it is important to know in which businesses the corporation is active, on paper as well as in practice;
4. *Finally*, it is very important to know which persons have been deprived of the right to act as directors of legal persons (through so-called 'disqualification orders').

Another possibility concerns preventive supervision upon the establishment of a legal person. If companies and directors-to-be are screened to ascertain their reliability, the establishment of legal persons with criminal intentions could to a certain extent be prevented.

Legal persons, their establishment, registration, and misuse

In most countries, the main forms of incorporation are the single trader, associations of persons and legal persons. The most common forms of legal persons are, in most countries, public and private limited companies.

For the purposes of crime prevention, it is important to know which type of legal persons are most frequently subject to misuse and under which domestic jurisdiction they operate. Representatives of the police and of trade registers observe that private and public limited companies are most frequently subject to misuse. Furthermore, a growing problem concerns the misuse of foreign legal entities to act in one of the EU Member States.

Increasingly, Member States are adopting legislation that impede the establishment of branches of foreign companies to act on their territory in order to prevent the growing abuse of such branches for criminal pruposes. EC legislation, on the other hand, emphasises the freedom of establishment of legal entities and has on some occasions conflicted with domestic legislation (see the *Centros* decision). It is, therefore, to be hoped that the EC will further harmonise national standards for the formation of limited companies and in this respect, will take into account the growing abuse of foreign branches.

A number of requirements apply for the establishment of legal persons in EU Member States. Although they differ to a certain extent, some common characteristics can be discerned. In the majority of EU countries, the intervention of a notary public is required for the establishment of a legal person. Other countries require only that a memorandum of association be drawn up, including the articles of association of the company-to-be. The advantage of the intervention of a notary public is that this person can play a role in controlling the trustworthiness and creditworthiness of the company.

Some countries require that preventive authorisation is provided for the establishment of a legal entity. The Netherlands, for example, requires that the establishment of public and private limited companies is subject to preventive supervision, *i.e.,* to prior consent of the Minister of Justice. Expectations concerning possible abuse of the legal person for criminal purposes may constitute grounds for refusal of permission. Such preventive checks could make a contribution to the prevention of the abuse of legal persons for the purposes of organised crime.

A common feature is that all Member States register data about their legal persons, either locally or centrally. However, the purpose of such registration is not necessarily crime prevention and repression. Rather, most registers are aimed at facilitating trade.

The manner in which the various EU Member States collect and store data on legal persons varies dramatically:

1. *First*, there is no uniformity in the types of bodies that collect the various data. For example, whereas in some countries the major registering body is the Chamber of Commerce, in others it is a Ministry or a court (see Chapter III, section 4, table 2).

2. *Secondly*, the type of information that is being collected by those bodies differs. There is no common format under which the information on the establishment, management and funding of legal persons is registered in the various EU Member States. This complicates the international exchange of information.
    - For example, publicly accessible registrations of shareholders of limited companies do not exist in all EU Member States. Since information about the shareholders may reveal the 'beneficiary owners' of a company, the accessibility of such information is of the utmost importance for police agencies, justice departments, the financial sector (banks, insurance companies, etc.) and private persons who may want to enter into business with the company concerned.
    - Nor do all Member States register the imposed disqualification orders and make them publicly accessible. The advantage of a disqualification orders register is that third parties can check the reliability of their partners-to-be.
3. *Thirdly*, a major stumbling block to consistency in the practice of registering data in the various EU Member States is differences in the accessibility of the information. Whereas some countries, including the UK and Sweden, make certain types of information (such as a list of national disqualification orders) available to the general public via the Internet, other countries do not make such information accessible.

Access to certain types of information can be obstructed by privacy regulations that stipulate that this information is not accessible. States find it difficult to draw a fair and reasonable balance between the need to prevent organised crime on the one hand and to protect privacy on the other. Again, it can be observed that in this respect there is no consistency between the various privacy laws that apply in EU Member States.
Directive 95/46 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data has so far been implemented by only nine Member States. This lack of implementation is despite the fact that the period for transition to the new regime elapsed on 24 October 1998. The Directive, which aims, among other things, at harmonising the various national privacy standards, ensuring a high level of protection and due observance of the rule of law, could create consistency in the privacy regulations that the various EU Member States apply and could enhance the possibilities of registering data concerning legal persons and their directors.

Increasingly, non-official (commercial) databases are consulted by governmental authorities as well as by private institutions in order to obtain information about legal persons. Although such databases usually contain the same information as official databases, they are often more easily accessible.
It should be observed that commercial databases will increasingly be affected by the scope of the above-mentioned Directive, which stipulates that commercial databases also need to observe privacy regulations.

Regarding the international exchange of information, although the national systems are equipped for the exchange of information, in practice an effective international exchange does not take place. Our respondents have reported that States are insufficiently willing to share information on legal persons with other States. Without the collective willingness of the EU Member States, the exchange of information and the actual use of foreign databases will not improve.

The development of an international index system which would provide access to different databases of various registers within the European Union can improve the international exchange of information. The EBR-II project (see Chapter IV), which would need to be adapted to crime prevention purposes, could be used in this respect.

2. Recommendations

The above-mentioned conclusions result in the following recommendations:

General:

The overall recommendation is that efforts are made to improve the transparency of legal persons, especially of their directors, shareholders and eventually of their beneficiary owners.

To Member States:

Member States are recommended to establish a system of central registration with basic data which can be easily accessed by national as well as foreign entities. In order to meet this requirement, States parties are recommended:

- To make sure that the databases can be easily found and accessed by national as well as foreign entities (if possible, via the Internet);
- If possible, to develop a system for national databases that provides limited or more extensive access to information about legal persons depending on competence;
- To create uniformity in the type of information that is registered;
- To make sure that this information is up-to-date and reliable;
- To make sure that the following information in particular is accessible for national as well as international purposes:
    1. Information about the directors of a company,
    2. Its shareholders;
    3. Its beneficiary owners;
    4. Disqualification orders.
- To facilitate searches by (one or more) names in existing databases;
- To facilitate larger, general searches required for preventive purposes;
- To implement and apply EC Directive 95/46/EC (on data protection) and national legislation to its implementation.

And furthermore:

- To implement the EC privacy regulation and to ensure that information which is not protected by privacy regulations is publicly accessible;
- To consider the introduction of preventive screening upon the establishment (and possibly upon changes) of a legal person;

To the European Union:

Regarding the international exchange of information:

- To develop standards for the collection of data at a national level which will enhance the establishment of an effective index system on legal persons at a European level, and in this context:
  1. To support Member States in the development of national data collection on legal persons involved in organised crime;
  2. To introduce EU legislation that makes the delivery of the data compulsory for every entity that maintains a trade register in Europe;
  3. To develop, in close co-operation with Member States, a standardised *modus operandi* system and/or a databank containing 'best practices' regarding the investigation of crimes committed by or in connection with legal persons.
- To consider the introduction of a European-wide index system, along the lines of the EBR-II project, through which all the local trade registers are obliged to provide electronic information on legal persons to a centralised register on a daily basis, and:
  4. To make sure that this European-wide index system is sufficiently equipped for searches with the aim of crime prevention;
  5. To develop a method and framework for a periodical risk assessment to prevent the misuse of legal persons.

And more generally:

- To develop standards and procedures designed to safeguard the integrity of public and private organisations;
- To develop codes of conduct for relevant professions, in particular lawyers, notaries, tax consultants and accountants.

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