



universität  
wien

# MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Anglo-American and Continental European approaches of  
company law in cross-border regulations in the EU“

verfasst von / submitted by

Orkhan Afandi

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2016 / Vienna, 2016

Studienkennzahl lt. Studienblatt /  
Postgraduate programme code as it appears on  
the student record sheet:

A 992 548

Universitätslehrgang lt. Studienblatt /  
Postgraduate programme as it appears on  
the student record sheet:

Europäisches und Internationales Wirtschaftsrecht /  
European and International Business Law

Betreut von / Supervisor:

Univ.Prof. Dr. Dr. hc. Peter Fischer

# Contents

Introduction.....	3
Company Law in Different Legal Systems.....	5
<i>Formation of companies</i> .....	5
<i>Management and control</i> .....	7
Export of Company.....	10
<i>Real seat theory</i> .....	11
<i>Incorporation theory</i> .....	13
<i>Freedom of establishment under EU law</i> .....	15
<i>Transformation into a foreign corporate form</i> .....	20
Cross-border Mergers.....	23
<i>General Principles</i> .....	23
<i>Cross-border merger in domestic legislations</i> .....	25
<i>Employee participation</i> .....	27
<i>Taxation</i> .....	29
Business Establishments in EU Level.....	33
<i>The concept of unified company form</i> .....	34
<i>Application under national laws</i> .....	38
<i>Governance</i> .....	41
Conclusion.....	43
Bibliography.....	45

## Introduction

Companies are created by the virtue of law which involves its members into the joint activity. As a result of this fact their management is generally subject to that legislation which gives a birth to it. To follow this, the competency of a company to operate in external jurisdiction is also based on the legislation where it was initially incorporated, in the first phase. Consequently, numerous conflicts between national legislations as well as legal systems from those participating companies are deriving from could be disputable questions as regards to the cross-border regulations are concerned.

Nevertheless, nowadays this tendency has been changed to the direction which also allows referring to international or community legal framework as a source of establishing company. To illustrate, it was introduced by the European Union (EU) through establishment of business entities which are formed by and essentially subject to the EU legislation, in order to effect the law approximation on the governance of companies in the community to some extent.

However, the main obstacle in this harmonization process is existence of two law systems, Anglo-American and Continental European approaches, within the union which are distinct legal frameworks from each other in the corporate governance. Therefore, despite of enactment of company law directives<sup>1</sup> in the community level, establishing so-called "European Company" forms<sup>2</sup> and generating the considerable range of case studies in the field, we still do not have full harmonisation of company law in the EU level.

The most critical problems may arise out of the export of a company where recognition thereof becomes questionable in transferred state, clashes of governance features in two different legal systems and establishing subsidiaries or branches in one jurisdiction while the parent company of them locates in another one. As a result, controversies between the legal systems of home and host state that companies are involved into will be confronted.

Apparently, the EU-wide harmonization in cross-border co-operation of Member States is indispensable due to its positive contribution to proper operation of internal market which is actually, one of the fundamental targets of establishing the customs union. It would be contrary to the EU principles if a company from one Member State encounters several restrictions while having the cross-border attachment to its performance within the union, because this can lead to the infringement of freedoms set out in the community treaties by the host state. However, one point should be born in mind that freedoms in the EU legislation, differences in two legal systems and law

---

<sup>1</sup> There are thirteen directives enacted by the EU on the company law in the community-level. Moreover, the fourteenth directive, which is implied to regulate transferring of the registered office between Member States, has been proposed.

<sup>2</sup> The EU established several business organizations under the union law. One of the most essential forms thereof is *Societas Europae* (SE) that may soften the strict rules existing in the legislation of different Member States. However, the concept of "supranational jurisdiction" was firstly realized by setting up "European Economic Interest Grouping" (EEIG) which also functions as the key instrument for registering business entities in the cross-border cooperation.

approximation within the community have to be properly counterbalanced, because freedoms without harmonization can result in the race to the bottom.

Despite the necessity of law approximation in the EU on the company law, the full uniformity on this area in the community level could be viewed in another perspective. One can claim here that, there should be a proper competition of different legal systems that may be considered crucial aspect for the further development of them. In the absence of that, the increase in the quality of legal systems could be neglected as such. That is to say, in cases where interests of the third parties are on the question, they can base their determination on the selection of jurisdictions in, for instance, which state is more favourable to invest or give credits to the companies. This type of "selective" approach may lead to the legitimate competition between two legal systems in company law.

Generally, Anglo-American and Continental European approaches to the company law are discerned from each other due to having opposing views in various parts of corporate governance. Those disparities mainly are reflected in the ways how companies are formed, managed in the board and treated by home and host state when they leave or enters into foreign jurisdiction. As a result, national differences can easily embody themselves in the operations where there is an international attachment to the business.

Therefore, it is decisive for the sake of Single Market regulations to analyze the cross-border treatment of companies in two opposing legal systems. While strict German "real seat theory" requires the re-establishing of the company under its jurisdiction when the entity migrates there, the British "incorporation theory" approaches to this issue in more liberalized way that allows its company to operate in another member state as UK-based entity and therefore being subject to its incorporated law. This was extremely controversial dispute regarding to problems where home state dissolves the leaving company or where host state rejects to recognize foreign legal personality.

While freedom of establishment question may arise in the obstacles of recognition, the attempts to circumvent national legal requirements were put into the question which challenged aforementioned EU-principle in different perspectives.

Concerning that companies are subject to peculiar formalities under their national laws in incorporation process in these two legal systems, their management and approaches in the cross-border operation put forward discernable legal distinctiveness towards international company law. I will try to look into the question that how two legal systems set forth their characterized features in company law as far as EU principles and objectives are concerned.

# Company Law in Different Legal Systems

## *Formation of companies*

Although establishing the company by formation embodies some default rules within the union, there are number of distinctive sides in the legislations of states belonging to different legal systems. While in civil law systems the setting up a company has to go through strict formal proceedings in a general perspective, in common law states the process could be regarded as much more liberalized.

Generally, it is a formal requirement for civil law countries to establish so-called "pre-formation contract" which indicates the purpose of individuals to set up a company under national law. This agreement can remind the "Letter of Intent" in drafting M&A (mergers and acquisition) contracts that also puts forward the motive of parties to get involved into implied procedure. Concerning to the fact that pre-formation does not directly mean "incorporation" of a business entity, the one who act on behalf of the non-existing but prospective company can be held personally liable, regardless of the fact that the company is intended to be set up on the limited liability. To follow this, German law establishes that in the pre-incorporation stage of GmbH (Limited liability company in Germany), the potential formation is considered as BGB company<sup>3</sup> where members are provisionally considered as partners.

One of the most distinguishing aspects of Continental European approach is that in most countries the incorporation of the company requires a public notary deed where it checks the legitimacy of the charter of the company drawn up by incorporators. Subsequently, the respective national court effectuates the second scrutiny on the legality of the establishment which at the end of the day can result in granting incorporators the right of settling the company by judge. So, such a formality in civil law countries illustrates their approaches towards the establishment process of a company in both serious and conservative manner.

Another requirement that plays decisive role in setting up a company is on the contribution of a share capital<sup>4</sup> to the business entity. The amount thereof can differ from state to state<sup>5</sup>. While putting forward this precondition could be regarded as being outside of liberalized procedure in establishment of the company as such, that type of construction may rise the rate of reliability for the creditors when the directors involves them in order to receive some loans.

---

<sup>3</sup> BGB is an abbreviation of a German Civil Code (Bürgerliches Gesetzbuch). "BGB company" expresses the "Partnership under the Civil Code".

<sup>4</sup> It is the way how the individuals are attracted to invest into the formation of the company. In order to obtain a permission of getting legally incorporated, an intended company should have an amount which could be contributed both in cash or in kind and by shareholders. Each part of the sum put into the company's budget by shareholders signifies respective percentage of shares of them through which distribution of profits can be delivered.

<sup>5</sup> Some countries provide minimum share capital, whereas others put just a requirement of settling some amount. For private limited companies the minimum level of share capital has been determined as following in some civil law states: Germany: EUR 25.000; Austria: EUR 35.000; Belgium: EUR 18.550; Italy: EUR 10.000; The Netherlands: EUR 45.000 and etc.

On the other side, we can see entirely discerning view in the common law approach. First and foremost difference is that the registration of the company is mostly accomplished through the online application. For instance, in the UK to list the private limited liability company is proceeded by registering on the website of British Companies House. While in Continental European countries the registration takes place through several stages and notary deed plus court decision follows the establishment of the company, in the UK incorporators are just required to pay £ 15 for filling application form online which requests to put information on company's name, details on shareholders and name of directors<sup>6</sup> there. No further state approval are sought for settling the company on this case.

Under English company law, no minimum share capital for private limited companies<sup>7</sup> has been imposed. Therefore, it is possible to set up a corporation just for a £ 1. This approach was a revolution against the whole company legislation in the Europe which also had an impact to other EU member states which are governed under civil law. For instance, Bulgaria, despite of having converging mainly German and French systems in its legal framework, has already initiated online registration of companies for EUR 1. Following tendencies corresponding to this, it is believed that in the following decades company law systems maybe gradually "Anglo-Americanized" in the EU.

Another substantial difference between these legal systems is reflected in existing pre-control and post-control measures by registering authorities. As mentioned above, in the listing of a company in civil law system the inspection in the objectives of a company is effected twofold through the notary and domestic court. Contrarily, in the UK there is no any substantial scrutiny on the filing of the company, since the registrar is just a "computer".

Therefore, unlike in civil law countries where at the end the court decides whether statute of potentially incorporated company is in line with the provisions laid down in the domestic legislation, in Britain there is no notice is taken on this issue, even if the registering entity is void which is the question could be challenged after the lawsuit against it. That can be compared with the consumer protection approaches in between two legal systems. In Continental Europe consumers are protected from the potential detriments before the occurrence of damage, whereas in the UK and the US the safeguard measures are implemented after the detection of an injury that shall be proven by the state.

Several pros and cons in two approaches of the controlling measures could be challenged. In the first phase, the main advantage for the UK-US system on that is being fast and effortless to register. However, the post-control instrument maybe not so effective and adequate. Opposing to that, in most continental European jurisdictions there is a competence of the court for vesting the right to incorporators to establish of company which could be regarded as an asset, since the judge is qualified in corporate legislation of a state.

---

<sup>6</sup> In the UK the realization of registering companies, accomplishing the filing duties, amending the company data and winding-up applications are accomplished through the Company House section of the UK governmental website, <[www.gov.uk](http://www.gov.uk)>.

<sup>7</sup> UK private company limited by shares (Ltd.).

Besides, in some cases company could be established from the "shelf". In the UK, a lawyer of the potential director has already set this "off the shelf company" which could be put on the effect just altering the corporate statute thereof. Thus, in this approach the business entity could be constituted even without going through the registration process.

Apparently, the two approaches to the company law are extensively distinct from each other which puts the crucial question forward that how the cases should be dealt with while there is an interaction of both on a one issue. While in civil law countries the establishment of a company is a bit far-reaching process, in most common law jurisdictions it is regarded as a "fiction", where there is no substantial control and onerous filing stages. To that extent, the problems in the recognition of company in cross-border regulations may arise, since the one company immigrated to another member state has not been formed under the same or at least similar rules in comparison with that of national companies in the host state.

### ***Management and control***

Another main features which can easily affect to cross-border co-operation of members are national differences on the structuring and managing of corporations. The major particularities pop up essentially in differences on location of power, rights of directors and shareholders, interests of directors, monistic and dualistic approaches towards the construction of the company, and employee representation issues.

While in Anglo-American system there are some prerequisites which circumscribe the range of persons to get appointed as directors, most Continental European legislations do not put any limits on that. For instance, the person who was convicted criminally liable in the past could be brought to the board as a director which seems quite alien attitude to the UK-US legislation on this designation in the company.

Besides, in civil law approach the legal persons shall not be nominated as a director in the board. For instance, German law code only entitles natural persons to be the member of the management board<sup>8</sup>. That could be explained through existence of personal liability in case of the infringing director's obligation of the company statute even if the company where he is involved has limited liability. Opposing to this, in the Anglo-American legislation the position of the director can be granted to both natural and legal persons which is like to be considered as a type of circumvention from the personal liability in aforesaid circumstance. So, unlike civil law system, in common law countries a limited liability company can also be appointed as a director.

These two approaches can be more plainly seen especially in the question of who appoints the directors. In the UK system, the directors are designated by the majority votes of Annual General Meeting (AGM). Moreover, in a private limited companies they have to follow the instructions put forward by the shareholders, which is the binding rule for the operation of directors. That system is called "shareholder based management".

---

<sup>8</sup> German Stock Corporation Act (Aktengesetz), Article 76 (3)

Nevertheless, this manner becomes the other way around as far as German public limited company<sup>9</sup> is concerned. Here, it is not AGM that directly appoints the directors, but the supervisory board, if the number of the workers in company exceeds 500 people. Therefore, in Continental European system we have "two-tier management system" which make a clear division between "managing board" and the "supervisory board". The principal duties of supervisory board mainly are selection and discharge of directors as well as taking decisions on the accounts. They are appointed for their 5 years-functional period. This peculiar division establishes the concept of "dualistic approach". Thus, for large companies it is the supervisory board who votes for appointment of managing directors. That structure on regulating companies is considered as "management-based system".

In the dualistic system, based mainly on German way of company management, there is a strict partition between directors and the supervisory board. Moreover, they shall be kept separately from each other which establishes, for instance, the prohibition of designation the same person in both boards. The competence of the supervisory board is limited to scrutinizing the accomplishment of director duties and giving "veto" on that question when it is required. However, it cannot interfere the management decisions of directors. On the other hand, directors are independent board of a company and AGM is not entitled to revoke the competence of a director for any reason. The business operation has to be conducted not in the interest of the shareholder, but company which follows the stakeholder value principle.

Likewise, British company governance is based on "one-tier system"<sup>10</sup> principle. Although there is not a definite separation into the two branches in the management construction as it is the case in unitary board structure, the board of directors is divided into executive and non-executive ones. Nevertheless, that partition is regarded as a "subdivision" of the board, because the company is represented by the director's panel as a whole and all the decisions are taken by both group of directors which constitutes "monistic approach". The primary function of non-executive directors is to run the day-to-day business in the company. Although both supervisory board and non-managing directors controls the managing directors, the latter belongs to the unitary group unlike the former that is distinct branch of the company's structure.

When the question comes to the revocation of managing directors, the Continental European states provide stricter rules. In Germany, the annulment of director's authority could be effected through the respective decision of shareholders' meeting or supervisory board but only for a so-called "good reason". The events which can underpin the validity of this resolution maybe, for instance, fraud or bridge of company's statute. However, if the managing directors are not satisfied with the justification of the revocation decision, he can appeal to the court on this issue. As a result, the problem is concluded by the relevant court at the end of the procedure.

---

<sup>9</sup> Aktiengesellschaft (AG)

<sup>10</sup> One-tier system attributes to mostly Anglo-American law-based states. While most countries in this legal formation govern corporations built upon "shareholder-based management", the US corporations having unitary board structure are established on "management-based system" despite of belonging to the common law network.



Interestingly, Anglo-American company structure puts forward the possibility of disqualifying a director for any reason. In common law corporate governance the AGM is entitled to annul the whole board without facing the obligation to justify the cause of this step.

Besides, the key point is employee participation in the supervisory board. In Germany, as well as in Austria, it is determined that if the company has more than 2000 employees, at least 50 % of the supervisory board shall consist of the worker representatives<sup>11</sup>. Thus, the value to the company is not only contributed by the shareholders, but also by employees, the matter which undermines the necessity of having many workers' unions. Yet, that view is contrary to the US and UK systems where there are many unions of labourers which could be deemed as opponents to the companies, while in most Continental European states workers are regarded as partners to their corporation due to being the part of the supervisory board.

Eventually, some historic reasons could be classified for the clarification of why there are management and shareholder based formats in the corporate governance. Firstly, the Continental European system sets forth so-called "stakeholder interest"<sup>12</sup> that usually sets the obligation for the managing director to act for the favour of company's and public interest. This approach is based on the concept that the company is not only settled on the value of the shareholders, but also society. Nevertheless, UK system provides for the duty to managing directors to act for the benefit of the shareholders. As regards to the fact that here the distinction between company's and shareholder's interests emerges, the question on the perception of the property also becomes decisive<sup>13</sup>. Thus, this difference clearly affects the location of power in these two approaches.

Another reason may question the influence of shareholders to the company. Unlike Continental European system, UK and US companies mostly do not consist of the key shareholders. However, in the former the possible influence of key shareholders would be critical if the board would be based on shareholder-based structure. Therefore, it is considered as a rational manner to put the managing directors independent.

The last but not least reason could raise the dispute of democracy in economic decisions. British system intends to establish democratic governance also in the company structure. However, in most Continental European countries the company decision are mainly built upon the expert-based approach. Hence, that might also be contemplated as a historical or probably cultural approach to the question.

Ultimately, although there are several default rules for the corporate governance for both approaches, these two systems are distinguished from each other much more in their management structure and policy. Obviously, it could lead to a possible clash and conflict-based arguments when the situation is involved into the cross-border cooperation.

---

<sup>11</sup> German Co-Determination Act (Mitbestimmungsgesetz), Sections 1 and 7.

<sup>12</sup> Stakeholders of a company mainly encompass shareholders, employees, creditors, environment and the national economy.

<sup>13</sup> In continental European framework the property is rather in the public interest, whereas in Anglo-American system it is in the private interest.

## **Export of Company**

The differences in national legislations come up with the conflict of governing rules when the company from one member state immigrates to another. The disputable question arises on the recognition of legal personality when the registered office and place of business are not in the same country. To this respect, Anglo-American and Continental European approaches may contradict to one and another, since the incorporation, formation and management rules are dissimilar in these two poles of the law systems. Regarding to this fact, some states may require immigrating companies to undertake the same procedure of incorporation with that its national companies did. As a result, the argument of recognition interfaces with the realization of the essential community principles in the European Union.

The problem of recognizing the company moving-out its home state stems from different points. Firstly, some states keep the presumption that the cross-border moving of a company attempts to circumvent the national requirement of the state where it is willing to conduct the business operations. Perhaps, that could be a rationale attitude towards the issue, because in this case the nationals of the state could incorporate their company deliberately in another member country and establish so-called "quasi-foreign company" just for the purpose of avoiding, say, national taxation duties or strict incorporation procedures.

For immigrating companies, keeping its registered office at home state plays a significant role if the target country is in the Continental European system, because that is the question of retaining the legal personality. Otherwise, a company acting without having a legal capacity cannot be subject to re-registration, transformation or simply continuation of its business entity in the host state.

For that reason, a company needs to retain its legal existence while crossing the border of its incorporated state in order to be legally competent to undertake the further procedure that its host state may require. Here, the problem of dissolution by the legal system under which migrating entity was initially incorporated could become disputable to some extent. On the other hand, some legislations may freely allow its companies to move to the foreign state but at the same time to keep being subject to the law under which the first registration was achieved and recognized still as home state's company. Obviously, this method is more in line with the proper functioning of EU Internal Market.

The opposing views between the legal systems which put transferring of the companies to the foreign state on the issue are mostly based on dissimilarities of incorporation rules in between legislations of two countries. To illustrate, the requirement on the minimum share capital in Germany clearly differs from that in UK. While the former puts initial capitalization of the potential company with at least EUR 25.000 as an obligatory rule, British company statutes does not provide such standard and companies can be formed with just EUR 1. In these cases, the former may set forth argument towards the UK-based company claiming its recognition in Germany that despite of having legal capacity under the British legislation, German authorities cannot consider its legal personality due to not fulfilling the minimum share capital requirement here. If the home state still

maintains the status of its company, then the recognition should be effected through re-registration in the host state. Although the legal capacity may not be recognized in this situation, the business activity could be regarded as a valid operation here. However, with that consideration, if the company with limited liability immigrates to Germany and faces with the problem of recognition, it can be referred as a "partnership" but not a legal person which excludes the limited liability for the members of the company. Through this, the personal assets of the contracting parties may be liable for the acts of non-existing company.

The common law and civil law principles on transferring the company across the borders of the country where it was incorporated are divergent from each other. While Anglo-American legal system provides more liberal approach to foreign and immigrating national companies, Continental Europe embodies characteristic restrictions on this question.

### ***Real seat theory***

The real seat theory has been developed by France, Belgium and Germany in the XIX century which clearly exemplifies the Continental European approach in itself. This standard requires that the recognition of a company is only possible where the registered office and the de facto seat<sup>14</sup> must be in the same state. If they do not coincide each other, the foundation of the company is void and therefore, its legal capacity is excluded.

Moreover, a company could be liquidated or wound-up under this approach if it crosses the borders of the state where it was incorporated. That results for the state applying this standard in becoming less attractive for foreign companies to immigrate, because the rule simply restricts both moving-in and moving-out of business entities. The same applies to an immigrating entity that has to be de-registered in its home state for the recognition under the law of the host country.

Apparently, the real seat theory hampers the free move of companies between states, because the principle establishes the obligation to re-incorporate under the legislation of home state. The main reason of implementing such a strict theory maybe aiming at hampering the incorporators to circumvent the local requirements to establish a company. If a Continental European country requires minimum share capital while the UK announces free of that precondition, then company could be settled under the law of the latter while having main business activity in the former. The result of such endeavours is so-called "pseudo-foreign company". Actually, this purpose of the real seat theory made it widespread in civil law systems.

The criticizing and perplexing question can be arisen on the definition of "real seat" in the legislation of states adopted this principle. In most cases description of the phrase is referred to the "main centre of administration", "the state which closely relate to the operational jurisdiction of company" or just simply asserting "place of conducting business activity". Indeed, the principal sources of conflicts emanating from the theory on question are based upon the existence of discord about the definition of the "seat" to apply.

---

<sup>14</sup> Location of the head office from where the main business activity is operated.

The real seat theory is based on the question to recognize the legal personality of moving-in or moving-out company. For instance, if a UK-incorporated Ltd. company conducts its main business activity in Germany, the latter does not recognize it as corporation having legal capacity, because it did not fulfil German formal requirements for establishing a company. In the situation of other way around, if the company incorporated under German law conducts its main business in the UK, but also some parts of its activity in Germany, the authorities of the first state may put the legal personality of this company away from the legitimacy on the grounds that the place of registration and central management are not in the same state.

On the other hand, the real seat theory mostly concerns the problem of evasion from national requirements. In most cases, where there is a immigration questions, the circumvention problem becomes disputable. To illustrate, if the company is registered under the British law but manages its main business in Belgium, that could imply the intention of avoid strict Belgian company law requirements. Moreover, some entities may establish "letter box companies" in tax-heaven overseas areas and later claim its recognition while transferring its seat to the state where they are really willing to conduct the business activity. Under the real seat theory, if there is a division between states the head office and registered place locate, then the purpose of this position maybe attempt to obtain a more favourable circumstance for economic operation.

The real seat theory also excludes the transformation of a immigrating company into that under another jurisdiction where this principle applies, because in this case the crossing the border results in surrendering the legal continuity. As a result, the transformation may not be enforced due to the fact that the only way to enforce this process is re-incorporation anew. Otherwise, immigrating company is not recognized.

As regards to the fact that companies are bound to the law out of which it comes to an existence, the principles of states to the exporting of company are decisive for specifying the applicable law to entities. The applicability of foreign law to the company following the real seat theory is repudiated. If there is a requirement to be liquidated when the company moves-out, it may also cause problems for the host state even if exercising different theory, because consequence of winding-up can define the immigrating company as "non-existing entity" under the legislation of home state as well.

Seemingly, the real seat theory is somewhat traditionalist approach to the cross-border move of companies. Besides, it is aiming at taking reality on the status of a company into the consideration. However, as a result of legal harmonization initiatives by the European Union and broadly conferring the issue through numerous case procedures, the persistency of this principle has become much more undermined. Several Continental European states, such as France, Poland, Germany, Belgium, Austria, Luxembourg and Spain apply to the real seat theory to some extent. Nevertheless, the strict rule for private limited companies in German legislation has been softened after long-time case proceedings.<sup>15</sup>

---

<sup>15</sup> Dorresteyjn, A. (2009). *European corporate law* (2. Aufl. ed.). [Alphen aan den Rijn]: Kluwer Law International; at p. 33, par. 2.58

Undoubtedly, the Continental European approach to the transfer of the seat is the clear restriction of free movement in the European Union and discriminating attitude, merely due to the country of origin, to the foreign companies which prevents them to enjoy the same legal status as national entities deploy. On the other hand, its strict application could be investigated in the perspectives to the protectionism in the illegitimate evasions of incorporation requirements and creating the level-playing-field for its national companies. To follow that, this principle precludes foreign companies to operate in its jurisdiction through effortless process while the national companies have to go through the stricter rules. In this case, a member state either should alter its onerous requirements for the incorporation or to abandon its theory entirely in order to facilitate the proper functioning of EU Internal Market.

### ***Incorporation theory***

A more liberal and permissive way to the issue was developed by British legal system through the XVII century. Actually, the historic reason behind the theory was assisting the progress in the free flow of business activities of the UK companies in its colonized areas, because it was decisive for British corporations always to refer their own national law while doing business in its colonies.

Incorporation theory eliminates all serious barriers on exporting the company across the border. The principle lying back to this Anglo-American attitude is that the country of origin is not changed and damaged when it exports its seat to another state. To follow this, the applicable law also remains the same and re-incorporation both for emigrating and immigrating companies is not required for their recognition. That means, if an Irish company moves its entire business activity to the UK while keeping its registration in home country, its legal continuity shall still be considered being subject to Irish law but operating in the UK. Reversely, if the British company exports its seat to anywhere else in the world where incorporation theory applies, the UK legislation still will be applicable even if the moving-out company does not conduct any activity in its home state anymore. Additionally, the disclosure requirement could be called for the immigrating companies. However, unlike the real seat theory, no requirement of re-incorporation, liquidation, winding-up and any other barriers that may exporting company confront shall occur.

Nowadays, the purpose of the incorporation theory is mainly to effectuate the globalization process economically. Considering that companies are definitely one of the most crucial actors here, its decisive to lift preventive measures for exportation of business entities. Thus, the theory is aiming to allow companies to integrate and exchange their business places between different jurisdictions.

Since the companies are not going to face any barriers and pre-control before establishing their seat in the host state, in most cases they may tend to look for more favourable territories to settle. The incorporation theory somewhat opens the door for the company to establish its business in the state which provides more advantageous tax rules. That is the reason why the challenges for "letter-box companies" should have been taken into account. Nevertheless, the home state has full competency to impose some restrictions on its national company in transferring, if there are any evidence of fraudulent purposes such as intending to evade tax impositions.

The crucial problem may occur in the exchange of companies between states where one holds real seat theory while another one applies to the incorporation principle. In the first case the state will require the winding-up of its national company due to the fact that it has crossed the border and the division of jurisdictions occurred. Once the company is liquidated under its national law, it faces the problems of transferring its seat to the host state even if incorporation theory applies there, because according to home state legislation the company act is void.

In order to prevent hostile practices of immigrating companies, in some cases member states can impose their own restrictions on incorporation theory. For instance, if it is explicit that the company deliberately moves its seat for tax purposes, it may not be allowed to do so under the decision of its national authorities. Therefore, it may be necessary to enact special regulations in the whole EU level for determination upon the business conduct of "pseudo-foreign companies", because incorporation theory might open up these potential detrimental risks to the large area, which even can involve "overseas territories"<sup>16</sup> where are considered as "tax-heaven" lands.

To this regard, the interactions between real seat and incorporation theories is necessary for their interaction in the EU, because they hold completely different perspectives when the company involves the international attachment. If the country moves from the state of incorporation theory to that of real seat principle, then the former will claim its applicability while the latter will not recognize the legal personality. In other way around, the legal continuity will be ceased by the real seat theory applying state. That is the reason why the EU is consulting on the new directive for harmonization of this clashes in order to mitigate the problem<sup>17</sup>.

Different approaches to the company law may also have possibility to collide where competency of the bringing legal actions is in the question. In the famous "Barcelona Traction Case"<sup>18</sup> the International Court of Justice (ICJ) asserted the view that the legal claims shall be arisen through the state where the company is incorporated.

"Barcelona Traction, Light and Power Company" was incorporated in Canada supplying mainly electricity to Spain. The company has become to consist of Belgian and Canadian shareholders, the former with 88 % of shares, with having number of subsidiaries in Spain as well through the period. Besides its operation there, it had been issuing bonds to foreign stockholders. However, due to occurrence of civil war in Spain, the government ceased the company to issue the bonds for restricting the transfer of the currency out of the borders. Upon the petitions by Spanish bondholders to the domestic court, the company went to the insolvency and put into the liquidation, affecting its subsidiaries, due to the reason that it is unable to pay interest payments to its bondholders. When Belgian shareholders arose the complaint against this decision, Spanish courts denied their claim on the grounds that it is not legitimate to bring an action through Belgium in this case.

---

<sup>16</sup> " The Member States agreed to associate the Union with the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom"; Article 198, TFEU.

<sup>17</sup> 14th Company Law Directive on the cross-border transfer of a company's registered office (pending).

<sup>18</sup> "Case Concerning Barcelona Traction, Light, and Power Company, Ltd", International Court of Justice, 1970.

When the case brought before the ICJ, it was clarified by the court that holding the majority of shares does not signify the fact that Belgian shareholders are competent to arise the claim against to the Spanish government through their own state. Although the company has its main shareholders in Belgium and number of subsidiaries in Spain, its incorporation jurisdiction is in Canada. For that reason, Belgian shareholders are entitled to bring any legal action only through the state where the company is incorporated. In this case, Canadian jurisdiction was the only option to bring the claim against Spain.

Despite the ICJ had not mentioned plainly on "incorporation theory", its decision strictly follows the same principle, because the company had mainly been operating in Spain while keeping its registration in Canada.

Apparently, the incorporation theory grants companies the freedom to choose the place of their business while retaining its applicable law. That means, once a company is incorporated under one law, it is bound to be ruled with this legislation until the liquidation or winding-up. Actually, it may result in a competition between states that seeks for the opportunity to involve foreign investors and economic entities to their area by providing more advantageous conditions for them.

There are some assumptions which justify real seat theory as regards to the controlling of the company is concerned, because when the central management and the business activity operation are in the same state, it may give more qualitative approach for the state to supervise it rather than that when incorporation theory applies. However, the real seat theory is quite outdated for the current period as far as the EU Internal Market principles are on the issue. European harmonization on the region which has been partly realized and the launch of so-called "European companies" insights have moderately put it into the less significance nowadays.

### ***Freedom of establishment under EU Law***

Differences on company regulations in EU member states can also collide when the Internal Market principles are on the dispute. While the interaction between incorporation and real seat theories may cause problems in the recognition of company according to the complete distinct rules in each concepts, the most controversial debate arises out of whether the right of establishment in the EU area has been infringed by the member state who puts restrictions on foreign company to operate in its national jurisdiction. Here, two perspectives should be analyzed. On the one hand, companies exist resulting from the national law which gives an authority to home state to determine the status of exporting entity. On the other hand, member states shall follow the freedoms granted under the EU treaties which leads the prospect to reach a straightforward agreement on the transfer of the seat.

Treaty on the Functioning of European Union (TFEU) asserts the freedom of establishment for EU nationals by expressing that any prohibition which may be imposed on their legal status shall be excluded<sup>19</sup>. Additionally, it declares the requirement of the same treatment to the companies by

---

<sup>19</sup> Article 49, TFEU

member states with that to natural persons.<sup>20</sup> This simply indicates that companies shall not face any restrictions on their legal personality while transferring the seat to another state within the union.

According to the literal definition of the treaty, it simply suffices for companies to have registered office and central administration anywhere in the union for applying to the freedom. However, one factor has to be born in mind that, companies are not only subject to the EU legal framework but also their specific national law in the meantime, because in the first phase national legal systems rule whether the transfer of the seat is permitted or not. That is why, national and EU frameworks collide especially when the company transfers its seat to the state that applies to rather different rules on company law.

The disputable question is that whether the real seat theory could be considered being in line with the freedom of establishment. Obviously, since the incorporation theory does not impose any restrictions on companies moving in to and moving out from its jurisdiction, this concept is far from causing conflicts on the functioning of Internal Market. However, the argument arises upon the real seat theory which involves the fact that companies are also subject to national legislations and the approach of international private law to the clashes of these two concepts. While many states justifies their restrictions on the basis of defending their national economic area from fraudulent practices, the freedom of establishment excludes any constraints on the freedom of both primary and secondary establishments.<sup>21</sup>

Despite of the partly harmonized corporate law in the community level through EU Company Law Directives, challenging the establishment question through the cases before the European Court of Justice and introduction of European Company forms, the full law approximation on this field which could eliminate all barriers on establishment has not been achieved yet. In order to bring the successful conclusion to this issue, the member states should agree to recognize the companies operating in their jurisdiction while being subject to its own national law. To this consideration, still-existing real seat theory could be considered the main barrier to reach the throughout harmonization on companies to move freely across the borders.

The main question on the freedom of establishment is whether the EU applies to the "Delaware effect"<sup>22</sup> or the strict rules of real seat theory still causes dissolution of companies while they exit their national borders. It has been shown through the cases that, while the foreign companies shall not encounter any restrictions on their free movement, the national companies may be authoritative to decide on their companies to leave its borders. Despite of this fact, the EU got the "Delaware

---

<sup>20</sup> Article 54, TFEU

<sup>21</sup> Referring to transfer of the seat, the primary establishment exemplifies the export of registered office to the another Member State, whereas the secondary establishment implies the establishing subsidiaries and branches in a foreign jurisdiction.

<sup>22</sup> In the US, the most regularly used company law belongs to the state of Delaware. Therefore, most companies are incorporated under Delaware law, about 60% of corporations in the US are controlled by that legislation. Companies formed under that law can run their business in other states. By indication "Delaware effect", the free movement of companies within a regional community is meant.



effect" regarding to the freedom of establishment and obligation of states to recognize companies immigrating to their jurisdiction.

One of the first cases questioned the freedom of establishment was *Segers*<sup>23</sup> where the company incorporated in the UK was denied from enjoying social security provisions while moving its entire business activity to the Netherlands. The Court (Second Chamber) dismissed the justification of Dutch authorities on the grounds that rejection of providing social benefits was directly arisen out of discrimination between national and foreign companies.

More importantly, in the case of *Daily Mail*<sup>24</sup>, the Court of Justice of the European Union (CJEU) asserted the notion that companies are subject to its national law in the first stage. Daily Mail was the UK-incorporated company which determined to move its seat to the Netherlands. The main reason of this decision was the attempt to avoid taxation of its hidden reserves. As applying to the incorporation theory, the moving-out company was claiming the retention of its British registration. However, then-existing UK legislation<sup>25</sup> required the consent of Treasury<sup>26</sup> if the transfer of the seat concerns the tax objectives. Interestingly, both legal systems of states were applying to the incorporation theory which puts the question of recognition aside. Nevertheless, British authorities ceased the legality of transfer for Daily Mail on the justification that the export is being undertaken in order to evade the UK tax requirements on hidden reserves.

Daily mail invoked its claim based on the infringement of its freedom to freely establish its company within the EU and alleged that the transfer of the seat shall be allowed by the UK authority. The case was on the basis of primary and outbound establishment.<sup>27</sup> CJEU decided that companies should not expect the direct reliance on the EU freedom of establishment, because in order to apply to this principle the enactment of respective national regulation is due. Therefore, the conclusion by the court in this case also questioned direct effect of TFEU. However, the second decision on this case has been abolished through the further proceedings.

On the other hand, the main peculiarity of Daily Mail proceeding is the assertion of national rulings which is authoritative to impose restrictions on the company formed under its law. The court set forth that in order to provide freedom of establishment to companies, their national law shall ensure that the transfer of the seat is fair and legitimate. Here, the superior application of national law over the TFEU was on the question, because while the EU treaty requires from states not to establish any barriers on companies for moving-out its territory, the UK legislation, on the other hand, states that for tax subjects the official permission has to be fulfilled.

---

<sup>23</sup> Case 79/85, D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen.

<sup>24</sup> Case 81/87, The Queen and H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC.

<sup>25</sup> Income and Corporation Taxes Act 1970, Section 482 (1) (a).

<sup>26</sup> HM Treasury, UK government department.

<sup>27</sup> The transfer of the seat can be achieved in two ways: outbound establishment and inbound establishment. Outbound transfer is brought about by exporting the seat of company from incorporated state to another. On the other hand, the inbound establishment is when the national of one state opens the parent company abroad and then settles the branch or subsidiary in the country where he is domiciled.

Regarding to the fact that British authorities did not underpin the transfer and implemented the revocation of the legal personality holding by emigrating company, it could not claim its right on the freedom of establishment, since under its national law the company does not exist after crossing the border. That ruling was in the parallel with the real seat theory which also winds up the company if it exits the national jurisdiction and therefore cannot assert its recognition in the host state.

Notwithstanding, that establishes the conduct of a country on safeguarding its public policy and public security. Thus, the restriction was justified, because it was against to the purpose of evading taxes on hidden reserves that entailed the limitation on the transfer. From this case it can be concluded that applying to the incorporation theory does not completely mean that there shall be no restraints to impose on transfer of the seat. Since in Anglo-American approach to the export of company lays down that the company is still controlled by its incorporated law, limitations under the justification of national requirements may still be possible in the EU, because otherwise, the incorporation theory would simply mean allowing any export of the seat even if the movement is on fraudulent action under the national legal framework.

Another restriction on the freedom of establishment between two states both applying to incorporation theory was argued in the *Centros* case.<sup>28</sup> Here, the main arguments were based on whether setting up branch of "letter-box company" could be the subject to the freedom of establishment.

"Centros Ltd." was established by two Danish nationals in the UK. After the incorporation the company opened a branch in Denmark and moved its entire business conduct there while keeping its registration abroad. Danish authorities argued that in this case the freedom of establishment is far from being evoked, since the move-in the "Centros" is done for the purpose of circumventing minimum share capital requirement under the Danish legislation. Moreover, regarding to the fact that the company does not do any business in the UK, it was claimed by Danish authorities that the institution of secondary establishment has not been achieved. Instead, the primary establishment is actually the branch in Denmark.

CJEU denied the claims of Danish restrictions on the basis that in order to be subject to the freedom of establishment, it is not necessary to have main business activities in the state where the company is incorporated. Furthermore, any circumscription on the freedom shall be justified on the grounds of securing the general interest and have to be applied in a non-discriminating manner. Since companies are the subject of the legislation under which it has been formed, the restriction on the claim that it has to conduct business in its home state is out of rationale. Thus, the Danish branch of the UK company shall enjoy freedom of establishment as other companies do.

While in Daily Mail case the court denied the application of freedom, in *Centros* any limitation was prohibited under the Article 48 of TFEU. However, one factor should be born in mind that in the first case, the company was not allowed to move its seat under the law of incorporation, whereas in

---

<sup>28</sup> Case C-212/97 - *Centros Ltd v Erhvervs- og Selskabsstyrelsen*. - Reference for a preliminary ruling: Højesteret - Denmark.

the second factually, transfer of the seat was denied by the host state. For this reason, the Centros decision was fair and equitable.

Nevertheless, it did not undermine the power of the real seat theory, since in both cases parties to the proceedings did not have such a requirement of re-establishment for the recognition of the company. The first impact against to the application of the real seat theory was put forwards in *Überseering* case<sup>29</sup>. It was the first crucial challenging the interface between real seat and incorporation theories.

*Überseering* was a company established under the jurisdiction of the Netherlands. The part of shares were acquired by German investors which provided them to manage the economic activity of the company. German court - Bundesgerichtshof declined the competency of Dutch company to sue on its debt contract on the grounds that it lost the legal status while owning by Germans which resulted in moving its seat from Netherlands to Germany. Because of not re-establishing under German legislation for the transfer of the seat, *Überseering* was declared void as a limited liability company. Bundergerichtshof declared that the company can sue its debtor in Germany not as a Dutch B.V.<sup>30</sup>, but instead as German BGB company which has legal capacity in certain matters.

When the case was brought before the CJEU, the court held that no restrictions shall be applied to, except in special circumstances, the freedom of establishment within the community. The legitimate incorporation in any member state simply suffices being granted with the right to move the seat of a company to another jurisdiction in the EU. Therefore, German authorities is bound to recognize Dutch company, since no restrictions shall be imposed on its transfer of the seat. Moreover, the court ruled that there is a big difference to recognize the company as a German partnership and Dutch B.V., because when it loses the claim, for instance, the shareholders will be personally liable for the consequences of the proceedings in case of having legal status before the court as the former.

This judgement of the court can be considered as a revolution regarding to the application of real seat theory for immigrating companies. It explicitly revealed that the union principles tend to bring the legislation of member states upholding rather strict rules into that which is in line with the incorporation theory. Thus, it was concluded out of this adjudication that the immigrating corporation has to be recognized as a foreign company irrespective of whether it fulfills the national requirements of the host state or not.

The decision on the Centros was more clarified in the following *Inspire Art case*<sup>31</sup>. The Dutch authorities have analyzed previous ruling accurately. Consequently, the Netherlands enacted the particular law on the formal foreign companies that put several requirements for recognizing their legitimacy. In order to enjoy the full legal capacity, the immigrating company shall have minimum share capital compared with that of local companies in the Netherlands and publish their balance sheet in accordance with the Dutch law. If these requirements are fulfilled, then the legal personality of moving-in company will be thoroughly recognized as a foreign corporation.

---

<sup>29</sup> Case C-208/00 - *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*

<sup>30</sup> Dutch version of private limited liability company

<sup>31</sup> Case C - 167/01 - *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.*

The same scenario with that of Centros happened in the facts of this case. The "Inspire Art" has been incorporated under the UK law. Subsequently, it opened a branch in the Netherlands as well as moved its entire business activity there. However, in this time Dutch government accepted the freedom of establishment principle while putting forward the provisions of its newly enacted law which establishes several requirements for immigrating corporations in order to be legally recognized as a foreign company.

Apparently, Dutch legislators acted in this way in order to prevent foreign companies to avoid to accomplish the national company law requirements by not infringing the freedom of establishment. However, CJEU again ruled for the claim of the immigrating company on the bridge of the freedom where the government of the host state puts national legal requirement against to it. The decision followed that it is outright negation to implement the domestic principles into the foreign companies.

Eventually, immigrating companies shall be recognized in the host states if they have been legally registered anywhere within the EU. Besides, Member States still may dissolve exiting companies on the grounds that corporations are bound to its national law and creatures thereof as holding its legal personality. Moreover, the differences between common and civil legal systems in the EU may lead to the long-time proceedings on the export of company, since not all judges in the community maybe competent on, say, the UK law unlike the situation in the US where Delaware law can apply to any state of the federation. Probably, it is also out of the fact that the political governing systems of the EU and the US are different to each other.

### ***Transformation into a foreign corporate form***

While member states in certain cases are allowed to dissolve their national companies exporting to another state, in most circumstances transformation into the foreign entity does not face with this problem. Transformation could achieve both in changing one corporate form into another and merging a company into a foreign entity.

The main advantage in the process of transformation is that company can convert itself into foreign corporate form in a foreign state without being liquidated unlike the consequence of moving the registered seat abroad. It signifies that the company converts its nationality and corporate form into another while still maintaining its legal capacity.

However, conversion of a foreign corporate form has not been developed in many Member States. Firstly, unlike transfer of a company, the transformation into a foreign entity is not harmonized in the community level. Nevertheless, few members implemented such measure through their national code. The Netherlands, applying to the incorporation theory, provided in Book 2 of Dutch Civil Code<sup>32</sup> the "conversion of legal persons" subject to certain requirements and ensures that the converted company shall not damage the existence of legal personality.

---

<sup>32</sup> Civil Code of the Netherlands consists of 10 Books regulating different specific fields thereof for each.

Transformation of company into a foreign entity was mainly challenged through two cases where Hungarian and Italian legislations on cross-border regulations were concerned. In the first case, "Cartesio", the company established under Hungarian law filed an application to its registrar for transferring its seat to Italy intending to run its business there while still being subject to Hungarian law<sup>33</sup>. Hungarian legislation provides the real seat theory for companies in order to be operated under its law. To that respect, registering authorities rejected this application on the grounds that under the national legislation Hungarian companies cannot be established outside of the state while keeping to be subject to the law under which it was incorporated.

While the question was referred to the CJEU, the decision taken on "Daily Mail" case was not overruled. Through this, the right of Member States to cease the legal form of its national company has been retained to the regard that companies exist out of the law through that it was established. Thus, Cartesio case clarifies anew that national authorities are not obliged to give a permission on the company to export its central management, which puts the possibility for entities to be liquidated as an outcome of transferring the seat.

The cross-border transfer of the company could be ceased to exist by its national legislation unless it intends to convert itself to the new corporate form. That was proved in *Vale case*<sup>34</sup> where the reverse situation of the Cartesio scenario came to the issue. "Vale Costruzioni", established in Italy with limited liability, applied to its registry for the intention of converting its legal form into Hungarian entity and being established under the legislation of that law which constitutes the inbound transformation of a company. Italian authority withdrew the registration of this company from the list and recognized its objective to transfer its business to Hungary with being subject to Hungarian law from the time of registration there onwards.

Before filing to the Hungarian registry office, the board of "Vale Costruzioni" was reconstructed. Moreover, several requirements provided under Hungarian law, such as minimum share capital, was fulfilled. Besides, it was mentioned in the application to the Hungarian registrar that the company is the predecessor of that which was previously formed under Italian law in order to indicate the intention of transformation.

Despite of accomplishing necessary prerequisites, the application on transformation was rejected by Hungarian courts on the grounds that legislation of Hungary only allows conversions between its national companies. Thus, transformation of a foreign company into its national corporation is prohibited under the law of this state.

CJEU ruled this argument as the breach of the freedom of establishment under Article 49 and 54 of TFEU, since no Member State shall prohibit free transfer of foreign company originated from another member. Moreover, if the conversion of companies apply to domestic companies, the same treatment has to be granted to the immigrating ones, following the national treatment in the union.

---

<sup>33</sup> Cartesio Case - Case C-210/06 - Cartesio Oktató és Szolgáltató bt.

<sup>34</sup> VALE Építési kft - C-378/10

Therefore, restriction on conversion due to the fact that it is not the company incorporated under the national law is also a discrimination of companies based on the country of origin.

That means, there are no crucial restrictions on conversion into the foreign form for companies immigrating from states applying to the incorporation theory. However, the national legislations who follow strict Continental European principles may constrain mobility of moving-in entities. This approach is softened by EU principles as well as company law directives in the community level.

While the case of "Cartesio" affirmed the right of Member States to set forth restriction on its national company to transfer its seat, the "Vale" case confirmed that cross-border conversion of companies must be allowed if the transferor follows the requirements for establishing company under the host state. Moreover, it has been concluded that once the conversion of companies are allowed for domestic entities, it would be negation to the community principles to prohibit immigrating companies to enjoy the same rights with them.

Due to the lack of existing legislation on conversion of companies within the EU, it is still uncertain how registering authorities of different Member States will deal on this question. The main conflicts may arise out of applying different theories on the transfer of the seat and restrictions may be put on domestic companies while they are intending to cross the borders of their home state.

Concluding Cartesio and Vale cases the consequence is that within the EU the Member State may restrict the company to transfer its seat to another jurisdiction unless it intends to transform its corporate form into the entity of the host state. Companies intending to transform themselves into the foreign entity are required to fulfil national requirements for establishing of companies under the legislation of the host state. If so, the target state shall not prohibit inbound conversion of company originating from different Member States. Thus, the last case has eliminated the another barrier for free corporate mobility in the EU.

# Cross-border Mergers

## *General principles*

In cross-border mergers the differences in the national legislations may hurdle the process, because all liabilities and the assets will be transferred to the transferee located in and subject to the other jurisdiction. To this regard, management structure, taxation issues and status of employee representation are becoming critical questions to agree between the parties the merging procedure.

"Cross-border Merger Directive"<sup>35</sup> has been enacted by the EU in order to simplify the merger procedure of companies located in different Member States. Article 2 of this directive specifies three possible mergers subject to the regulations in the community level which are acquisition of transferor to the transferee, merging to companies to create a completely new entity and absorption of secondary establishment by the parent company. The directive is an additional harmonization to the merging consequences while they are still kept to be bound to their national legislation. The main goal of this law approximation was to prevent the clashes of different legal provisions in national legislations and legal systems.

The cross-border merger regulation closely relate to the transfer of the seat and freedom of establishment issues, because in some cases the output factually does not differ from export of a company. This can happen, for instance, the merger procedure between parent and subsidiary companies located in different Member States. When a parent company settles its subsidiary in a foreign jurisdiction, it can merge to that second establishment thereafter. Although the practical point of this process is not the same with that of transferring the company abroad, in both cases the entity moves its seat to the foreign state and thus, reaches identical consequences.

Concerning that the cross-border mergers involves companies resided in different Member States, it has the direct link to the subject of freedom in corporate mobility within the EU. That was the main concern in *Sevic case*<sup>36</sup>. The proceeding was on the dispute that Germany rejected to allow the registration of merger between its national company and one incorporated in Luxembourg on the grounds that German legislation only recognizes merger between companies established under the local jurisdiction.

The CJEU concluded that no company from one Member State shall be excluded to merge with other company anywhere else in the EU which is contrary to Article 49 of TFEU concerning the freedom of establishment. The foreign companies must be treated equally in a state with those incorporated under the national law. Thus, "Sevic case" clarified that the national treatment shall be applicable to the cross-border mergers in the community.

---

<sup>35</sup> "Directive 2005/56/EC of the European Parliament and of the council of 26 October 2005 on cross-border mergers of limited liability companies".

<sup>36</sup> Case C-411/03 - SEVIC Systems AG

When one company is absorbed by the other or two companies merge into creating the new entity, one of the most vital questions is the protection of creditors. Mainly, this process is considered as a share deal that transfers all the liabilities of both companies to the merged corporation. Although protection of creditors is regulated by the domestic law of each state, Merger Directive provides a minimum harmonization on this question in the union level.

This issue may arise out of the danger in insolvency. Since all liabilities are going to be transferred to merged company and all creditors of different entities will locate in one place, the parties to the process that are solvent maybe affected by the possibility of bankruptcy that may incur to the transferee. In this case, the creditor of the company that runs well should disclose information on the prospectus of insolvency to the court for getting paid off before the merger comes about.

Furthermore, another point to consider in this process is protection of shareholders. The decision on the cross-border merger is decided by the general meeting where the shareholder could vote against to it as provided in Article 9 of the Cross-border Merger Directive. Shareholders who disagree on the merger have the right to exit the company by being paid off with fair price of their stocks. The financial value of their share is calculated in accordance with the average of stock prices. Otherwise, the court has the right to determine on this compensation amount.

Another issue which has the necessity here is ability of the court of the country, to which companies from different states deemed to merge, to inspect on number of questions such as safeguarding measures for creditors, regulation on fair stock exchange rate and proper amount of reimbursement for shareholders. The problem arises on the fact that each national legislations provide different provisions on these fields and the court of absorbing country is unable to examine the laws of states where all merging companies are originated from.

In order to effectuate the scrutiny on these questions precisely, the rule for "pre-merging certificate" is applied. To this regard, each Member State investigates their circumstance on the completion of requirements and issues the certificates to the court of the country for recognition thereof where the merger will take place. The merger process is regarded void if the certification process has not been complemented adequately. As a result, the process involves also the cross-border co-operation of courts.

The main dispute emanates from the question of employee participation in the merged company. Obviously, that happens when different legal systems provide distinct rules on the role of worker co-decision. In cross-border mergers, workers of acquired company are not transferred to the absorbing state, but operate as those of merged foreign entity, resulting from the process, in their home state. The problem may arise, for instance, if German company merges with British company in the UK, because their approach to employee participation is quite dissimilar.

In Germany, workers have 50 % of co-decision right in the supervisory board which is the governing structure not applying to companies in the UK. Considering that the employee participation is regulated following respective rules in the host state in the cross-border merger, there may be no more representation of workers in this example. Although workers of German



company will stay in their home state, they still shall be subject to the UK law which results in losing their co-decision rights.

In order to counter with this practice that may happen quite frequently, the EU has introduced "Special negotiating body" (SNB)<sup>37</sup> which facilitates the process to come to an agreement between directors of participating companies and workers unions on employee participation in cross-border merger procedure. This is also the integration of legal systems, because in that type of mergers the system of one state could be taken to the other while finding middle point between approaches of each legal structures. SNB plays a definitive role for parties to find a solution in worker co-decision rights. Otherwise, allowing the dissolution of employee representation rights without any regulation would simply mean that any company can circumvent its national standards on this point just through merging to a foreign company under a different legal system where workers' rights are provided in a different way. Thus, SNB especially serves for the preventive measures on the attempts of circumvention from national requirements of company law.

### ***Cross-border merger in domestic legislations***

One of the main points for the application of Merger Directive in the EU is the governance rules on cash payment. In most states following Continental European approach, the 10 % threshold of cash payment may be required. For instance, in Germany, followed also by Austria and The Netherlands, this limit is set up on the parties to the merging companies on the nominal value of their stocks. German law stipulates that, the threshold is due in case the merged company is established in its jurisdiction, whereas this restraint could be eliminated in the cross-border merger process if a Member State, where one of the merging companies belong to, approves to exceed this threshold.

In contrast, there is no such a limit in the UK approach setting forward possibility of cross-border mergers in this situation if there is no contradictory remark in the legislations of other participating states. Through fulfilment of this standard, the process is open both to merging through settling the new establishment and absorption. Moreover, Belgium, Hungary and Denmark adhere to this principle by laying down the permission of cross-border merger even if in excess of cash payment exceeding 10 %. That means, in case German company merges with the company originating from one of these states, the threshold may not apply to the consequence of the process, because while the statue of one jurisdiction has the imposition on the cash payment, the other does not. Nevertheless, Belgian law provides that admissibility of shareholders to benefit from the cash payment, the application of the same rule in other legislations of participating states is prerequisite.

The time when the cross-border merger is enforced may differ from state to state, according to the provisions on that in national legislations. For instance, in some Member States, such us Germany, the merger is officially empowered to operate upon its registration in the national authority. This date could be the time when parties conclude an agreement on establishment of merger. In every case, the date of enforcement is regulated according to the law of the Member State where merger-resulting company locates.

---

<sup>37</sup> Directive 2005/56/EC , Article 16(4)(b).

The Cross-border merger directive sets forth in Article 11(1) that Member States shall appoint an authoritative body to officially approve the consequence of this transfer. In Austrian legislation, the cross border merger is enforced through its registration in the governmental registry following the respective provision of the directive. However, according to British point of view, the proof of the effect on the accomplishment of the merger is approval by the UK court which scrutinizes the fulfilment of requirements on the process.

The cross-border merger is accomplished on the day that the court order authorizes the result of that. However, if the transferee company locates in other state, then the rules on enforcement of the merger is regulated under that legislation of the state. Likewise, the enforcement instruments of the merger is regulated differently, such as according to Hungarian and Belgian law, it is brought about through the publication thereof in the official newspaper.

In the UK-US system, the protection of stakeholders is implemented by information which is distinguished from that in Continental European structure providing the protection through forms such as a notary deed. For this reason, in most civil law states in the EU, including Germany, Austria and Belgium, draft of the cross-border merger statute has to be approved by and its scope must be confirmed in a public notary. Contrarily, no notary affair is obligatory for respective draft in the British legislation.

The formulation of statement relating to impact of draft terms on stakeholders of merging company is mandatory prerequisite for the management body which is the duty of directors in the UK companies. All information with regards to parties to each company has to be specified in the report and copies thereof are to be delivered by directors and employees.

The draft statute on cross-border merger is required to be examined either by number of experts or by an auditor. In Continental Europe the court, in the UK either that or company itself is authoritative in appointment of such professional to draw up the report on the process. Moreover, British legislation provides the possibility of avoiding such report on the condition that shareholders of the merged company take a decision in an unanimous way on this case.

All approvals are mainly provided in the meeting convened by mainly the court where all relevant information on the merger is supplied and disseminated to the participants. Moreover, shareholder and creditor approvals are also realized through meeting assembled by the court, subject to the majority voting system. In most Continental European systems, namely German, Austrian and Belgian legislations, the approval by shareholders is subject to the confirmation of the notary.

After the completion of drafting the cross-border merger terms, pre-merger certificates has to be issued by Member States of merging companies in order to transfer the approval to the target country on the fulfilment of necessary requirements of the process. The competent authority on this issue may change from state to state.<sup>38</sup> Under British system, issuance of pre-merger certificates is achieved by the court which validate the accomplishment of all mandatory provisions on the

---

<sup>38</sup> Directive 2005/56/EC, Article 10.

merging procedure. Under German legislation this scrutiny is the responsibility of the trade register court. The companies have to provide the accurate data before the authorities which arises criminal offense in the occurrence of the contrary situation.

Once the cross-border merger statute is on the agenda of general meeting for its approval, the opposition of minority shareholders becomes the crucial question to come to an agreement. Under the British legislation, the decision of the merger is binding to them and their stocks are transferred to the transferee company. Nevertheless, minority shareholders have rights to claim the supplementary payment for compensating their share value according to civil law systems. In Austria, they are furnished with the exit right in exchange for paying-off their value of stock. If the minority shareholders do not consider share-exchange rate as accurate estimation, they are enabled to plead for it before the court proceeding. Their shares could also be offered to absorbing company for the acquisition. Moreover, shareholders are entitled to argue on the terms of the cross-border merger with which they disagree. Thus, minority shareholders are much more concentrated in the Continental European system for the cross-border mergers.

In most Continental European legislations, the creditors have right to ask for securities if the threat of the merger on their status is proved. Under Austrian law, the pre-merger certificates cannot be issued if the requested securities for creditors have not been provided. That means, the position of creditors is decisive in the cross-border merger, since it has the influence on blocking the process in case the existence of opposition is on the question. Following this, UK legislation grants creditors the right of addressing to the court for the convening the meeting for the solution of their position. Through this way, the creditors can rule out the merger process by voting against thereto in the summoned gathering.

### ***Employee participation***

The involvement of employees into the co-operation of companies is regulated in various ways which causes the issues to come to an agreement for merging entities. In general, the employee participation is subject to the rules of the Member State where the resulting company establishes its registered office, as stated in Article 16(1) of the directive. However, that should not mean that if one jurisdiction does not provide worker co-decision rights mandatorily, employees in the transferor companies will not deploy their entitlements anymore.

Domestic companies incorporated or merged under British law does not furnish employees with the co-decision rights which is due to the existence of different corporate governance structures. However, worker participation rules on the jurisdictions, where merging entities are coming from, have to be taken into account in the merger established under the UK law in specific cases. In this way, British approach must be harmonized according to those legislations.

Ordinarily, there is a threshold on number of employees for participating entities which as a result the company resulting from the merger is required to follow worker participation rules. That is to say, the range of the employee staff in one of the merging companies has to exceed 500 workers in the time before the completion of draft terms on the merger. This term is set forward for cross-

border merger procedures in most of Member States. Thus, if the merger company is settled in the United Kingdom, where no mandatory provisions on employee participation exist, this right must be granted only if one of the transferee companies has more than 500 workers prior to the accomplishment of the full draft on the merger statute.

However, if the employee participation is on dissimilar terms between the legislations of transferee and transferor jurisdictions, that has to be conciliated by members of merging companies. In the other case, the rules of the legislation under which the merger is established will apply which means that no participation maybe granted even if transferee entities have the respective rights.

In order to assist the progress of coming to an agreement between the conflicts of legal systems on employee participation, Special negotiation body (SNB) has to be instituted. The members of this establishment are appointed in the number corresponding that of employees in the merging companies<sup>39</sup>. Each transferee should appoint at least one delegate in the board of the transferor. Moreover, workers' union representatives can also be designated as a member of the negotiating body. In the failure of coming to conclusion on the terms through SNB, the participating companies may decide either not to establish the merger or apply to the standard rules<sup>40</sup>.

Negotiations conducted by SNB shall involve the participation of members in its board and representatives of workers. The process has to be carried out within six months, but under certain conditions and through the consent of participants to the process.

The members of negotiations body in the number shall be proportionate with complete volume of employees in merging companies, their secondary establishments and workers' union delegates. In German approach, the number of male and female workers of merging entities has to be taken into account in the designation of SNB members.

British law provides peculiar system for the formation of SNB team. It is managed through voting method with confidential structure. Workers of British companies party to the merger and union members are entitled to be engaged in this appointment process as applicants. Furthermore, if the candidates are not satisfied with the procedure of this election, they are enabled to lodge the complaint to the Central Arbitration Committee, where the settlement of voting process is controlled.<sup>41</sup>

If the merger results in establishment of Societas Europaea (SE), then the employee participation rules will be regulated by the SE statute<sup>42</sup>, because in this case the transferor company is not subject

---

<sup>39</sup> Article 16(3)(a), which refers to the number of paragraphs of Article 3, provides that the dimension of seats has to be designated as one place for 10 % of workers in one merging company. While the allocation of seats in the merged company is determined, the second establishments of merging entities shall be taken into account as well.

<sup>40</sup> Standard rules are exercised if the merging companies cannot agree on the conditions with negotiating body within 6 months. They are laid down in the third part of the annex to "Council Directive 2001/86/EC - supplementing the Statute for a European company with regard to the involvement of employees".

<sup>41</sup> Van Gerven, D. (2010). *Cross-border mergers in Europe. 1* (1. publ. ed.). Cambridge: Cambridge Univ. Press, page 301, paragraph 46.

<sup>42</sup> "Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)".

to the national law of the state where its registered office locates. SE maybe formed either through the acquisition, where the company is transposed into the European company, or forming the new company by way of merging several entities into it.

Eventually, employee participation is mainly regulated referring to the legal system of the Member State where the merger is established. Therefore, all merging companies have to follow this applicable law and the structure will be governed under it as well. However, the approach to worker co-decision rights is discerned in Continental European and Anglo-American legal systems. While the former provide broad scope of rights for the workers in the supervisory board, such as being entitled on the appointment of members there, the latter sets forward that employees are represented via workers' union which put them distinct from the governing structure of the company to some extent. The problem arises when the transferor companies belong to both systems that settles the question of ways to regulate employee participation in the merger.

This issue can be regulated in two perspectives. First, the rules existing in the state of establishment can be set aside under certain conditions. Otherwise, workers would lose their co-decision entitlements just through the merging to the foreign entity. The main purpose in the institution of SNB is to facilitate existing dissimilarities between legal systems in the merger procedures. Another way is the application of the provisions under the legislation where the transferee entity is established.

Apparently, regulation of worker co-decision rights in the cross-border merger has the involvements of differences in the corporate governance structure of legal systems. While one company with two-tier system, where the workers are provided with participation rights in the supervisory board, merges to the UK company where domestic companies are regulated by one-tier system and employees are represented in the board through the workers unions, then the conflicts of governing methods will arise. To this regard, the EU has established the type of "European Company", such as SE, which could be governed with both board structures.

The cross-border mergers are another way to achieve the high level of approximation on regulating Internal Market principles, because they mainly provide with better conditions for free movement within the community. Although cross-border mergers do not directly refer to the transfer of a single company to the foreign state but creation of joint establishment anywhere else, the procedure draws into different jurisdictions from both legal systems through which they will integrate and coordinate to one another.

## ***Taxation***

Another critical question arises out of the cross-border merger is the taxation rules applied to both state of receiving company and that of transferor. The essential point for the country of merging company is the consequence of losing a tax payer, because the process will result in discontinuation of one entity while being absorbed in another one subject to different jurisdiction. Comparing with mergers within the state where the tax payer is still maintained as such, this has some detrimental effects for governments of home countries.

Continental European approach sets forth that company moves its seat to another state will be subject to the taxation rules in that jurisdiction. Therefore, most home states are inclined to put restrictions to some extent in order to retain the number of taxpayers within the state.

Therefore, the differences on the rules of taxation for mergers in each member state may come up to the problem of disagreement on mutual regulation in this field. To this regard, the EU enacted "The Merger Tax Directive"<sup>43</sup> establishing uniform standards on governing taxation issues in the cross-border mergers. However, its scope is restricted to the company forms enumerated in the Annex to the directive. The main reason on this limitation on the application is facing obstacles to consent on the national tax rules in Member States. European company forms are also covered by the scope of the directive.

In the cross-border merger, the resulting company is subject to tax provisions of the Member State as a corporate tax payer where it is instituted. According to states where transferee companies are originated from, the merged establishment may be considered as a pass-through entity<sup>44</sup> which signifies that the stakeholders of the latter are individual tax subjects to their home country. That means, shareholders of merged company transferred from foreign state, to illustrate, maybe taxed in their country of residence out of their gains, although the transferor is a corporate tax payer in its home state.

To prevent this practice, the Merger Directive stipulated that the transferred assets and liabilities shall be considered bound to merged company in the host state.<sup>45</sup> To this regard, the transferring companies considered as pass-through entities in their home country cannot be the part of merger which falls into the scope of this directive.

Before the enactment of this directive, the taxation rules for cross-border mergers were regulated in accordance with the domestic laws of Member States. The essential influence on the application of standard rules within the union was the introduction of European Company forms which simply required to be regulated with common rules within the union. Accordingly, the taxation of these corporate types was genuinely decisive as well, because they always involve two or more Member States which refer to their national laws in different ways for domestic measures.

The standard rules on the taxation for the cross-border mergers are established for the provision of tax neutrality for transferring entities. Although the uniform rules apply to intra-EU mergers entirely, Member States still retain their particular approaches to these deals.

---

<sup>43</sup> "Council Directive - 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States".

<sup>44</sup> Pass-through entity (fiscally transparent entity) is not subject to taxation as a whole. Instead, the profits of the entity are taxed from stakeholders separately.

<sup>45</sup> Council Directive 2009/133/EC - Article 4(2)(b).

Under Austrian legislation, tax neutrality for cross-border mergers has been introduced on certain conditions<sup>46</sup>. The main requirement in case of outbound merger to fulfil this provision is non-transferring of assets from tax jurisdiction of Austria. That is to say, tax neutrality can only be granted to the transferring company if assets thereof remain being subject to the taxation regulations in its home state.

The applied rate for the transferred assets in exercise of tax neutrality is book value<sup>47</sup> for outbound mergers. Therefore, once the national entity is transferred to the receiving company and Austria loses its taxation rights thereon, then it may not be treated with neutral tax in the book value of its assets. However, for inbound mergers the assets may be taxed based on their market value. In this case, the book value is applied to the assets upon their disposal from being reserved in the deferral regime<sup>48</sup>.

Similarly, German legislation also sets forward the standard on the balance sheet for transfer of the assets in the cross-border merger taxation. The main precondition for implementation of this rule is that the Member State of resulting company shall ensure the applicability of corporate tax on transferred assets. Moreover, the cross-border merger must not result for Germany in the lost of taxation rights entirely. The value on the balance sheet has to be recognized by tax authorities which decides the status of German transferor company on taxation in its home state.

Taxation on the cross-border mergers is dealt with in a rather different way in Denmark. Under that law, the company transferred to the receiving state is considered as dissolved entity with discharging all its assets in its home country. In this case, the shareholders of the company ceased to exist as a result of merger could be considered contingent on Danish taxation rules. However, tax exemption is provided in case the dissolved company resulting from the transfer is not considered being subject to tax rules under its national law. Thus, Danish entity merged to foreign company may be subject to the tax or exempted from it in its home state after the transfer.

Hungarian legislation provides certain conditions on the exclusion of value added tax (VAT) on cross-border mergers. The most essential prerequisite for this type of tax-exemption rule is that the successor has to hold liabilities and rights of his assets when the company is transferred. Consequently, VAT will not be paid by national entity after it merges to the foreign company within the EU and being dissolved as a result, although this tax is imposed on domestic mergers under Hungarian law. However, the transfer tax is discharged from the levy only as far as European company forms are concerned.

The UK legislation is distinguished mainly by its provision so-called a general anti-abuse rule (GAAR). This principle has been initiated for realization of counteracting measures against perils of

---

<sup>46</sup> It has been implemented through adapting "Umgründungssteuergesetz" into the Merger Tax Directive.

<sup>47</sup> The value of an asset of the company is calculated in two ways: 1) Market value 2) Book value. The first is the value of an asset in which exchange rate is fixed by competitors in the market. Book value is the assessment of an asset according to the balance sheet of the company. It is calculated as original price less the rate of devaluation.

<sup>48</sup> The particular measure for income tax. It applies when the taxation on the value of gains is postponed for certain situations. Paying taxes for retirement accounts could be given as an example for this rule.

tax avoidance. To this respect, the rule is also concerned in cross-border merger procedure, since the taxation rules where the resulting company is located shall generally apply. GAAR tackles with the problem where the company can benefit from the tax issues through illegal instruments. However, the UK legislation does not provide a statute on anti-abuse rule. Therefore, this principle is governed through the court resolutions, where judge decide on the existence of inconsistency with GAAR. Thus, setting forward that operation of this rule is self-determined and judge-made.

Besides, the Dutch way of regulating cross-border mergers establishes the tax-exemption measure applying for companies transferred from the Netherlands to foreign jurisdiction. However, certain conditions should be regarded as whether concerning assets of transposed entity shall be subject to book-value or market value. The taxation on gains can be triggered in cases when the company sells its assets and receives earnings as a result. In fact, taxation maybe realized on capital gains in this case due to the fact that the company increases its financial assets. However, the increase on the capital is not taken into account as far as merger procedure is addressed to. In this respect, the resulting entity receiving assets of transferors will subject to taxation on book value thereof in its established state.

This rules are also effected for the taxation questions of shareholders. Upon merging to the foreign entity, shareholders of the transferred company shall not be subject to Dutch corporation tax, because they have already moved their assets and liabilities to the merged establishment. Similarly, the financial worth of assets belonging to those shareholders will be estimated in their book value of those existed in the company before merger.

Nevertheless, in order to get an exemption of tax on the capitals, the transferring company shall retain its connection with home state. This can be achieved by maintaining the establishment of merging company in the country from where it is transferred, such as a real estate of that residing there. If so, the receiving entity shall not be required to pay taxes on profits attained through selling assets, but Dutch authorities may impose transfer tax instead. However, the merging entity may be subject to the capital gains tax in the absence of maintaining the establishment in transferor state, in accordance with the law of the Netherlands.

In case of the cross-border merger where Dutch surviving company is involved, an entity can be revealed from its national corporate tax on the condition that it has an establishment in the Member State where that of transferring entity locates. However, regarding to withholding taxation on dividends, the Dutch authorities will defer the tax liability for disappearing company in the cross-border merger because of the fact that earnings are realized in a foreign state. Eventually, the dividend taxes can be levied in case the merger terminates its continuation.

Existing law approximation on tax rules for the cross-border mergers binds Member States to apply to the uniform standards and provide rather similar regulations on this question. To this respect, the Merger Tax Directive has been implemented in national levels within the community as a main legal instrument for this type of regulations.



## Business Establishments in EU Level

Companies involved into cross-border regulations within the union are originating from distinct incorporating standards. Although there are some uniform rules on the formation of a company, each state can be distinguished out of its peculiarities.

Unfortunately, the common business register currently does not exist in the community due to the different roots of national companies of Member States. For instance, in most Continental European countries, judges are competent for company who is deciding at the end the on compatibility with national requirements of registering the company or appointment of, say, directors thereof. Unlike this, in the UK a computer is the only mean that is "responsible" for the registrability of a company. That could be regarded as a disadvantage of British system, because in the involvement of the court the statute of the company is fully scrutinized, while in the other case no substantial control is taken up.

In order to overcome those hindrances on the company law within the union, the EU has been negotiating on establishing "European private limited company" ("Societas privata Europaea-SPE), in which the registration in any Member State would suffice in the fulfilment of requirements on the formation of the company. If that initiation succeeds, it can for sure soften the rules on the transferring of the seat within the union. That means, if the company is registered in the UK and then transfers its seat to Vienna, that may cause a conflict. Since the pre-control on the validity of the company is not applied in the UK and it is possible to register the company that is purporting to deal with even an illegal activity, signified in its statute, forbidden in the state to where it is intending to move, the host state shall approve the transferring company without a further control in this case.

In the EU Internal Market the country of origin principle has been set forth which stipulates that any discrimination on this ground shall be prohibited within the union<sup>49</sup>. On the other hand, it also attributes to international private law issues in the EU<sup>50</sup>. That also connects with "single-control principle" which declares that once the legality of establishing the company is controlled in one member, it shall not be done in the other anew. In this case, company coming from the UK shall be deemed to have already been checked, because it has got registered, although pre-control is not implemented in its home state. As a result, the host state, for instance, has to authorize the transfer of the company which comprises illegal activity in its operating direction according to the legislation of transferee country. Obviously, that concerns are main challenges which pull back the idea of European private limited company.

For these reasons, business register within the EU still remains for national legislations. Nevertheless, that becomes quite cumbersome when more than one companies are involved in cross-

---

<sup>49</sup> Article 95(1) of TFEU

<sup>50</sup> To this regard, country of origin principle lays down that if one activity is carried out in one Member State while its consequences are directed to another, the action is still considered the operation of the first state.

border regulation in the union, because there are 28 different jurisdictions with all their particularities.

That may also be quite time-consuming when it comes to searching the company filings in international attachment to a case. In that situation, different jurisdictions shall be addressed in order to find the record of the company. Unlike this system, in the US they have federal authority for finding company files which is "The US Securities and Exchange Commission", although there are also particular state registries. The essential target for the EU in attempts to establish common business registry and private limited company in the union level is to interconnect national authorities and put them accessible in cross-border level.

Although setting up a single business register in the union was still on the question, the EU could succeed to a certain extent to launch "European company" forms which facilitated cross-border co-operations of Member States in this regard.

### ***The concept of unified company form***

The most remarkable law approximation in the community stage has been achieved in initiation of so-called "European company forms". Although this approach eliminate national boundaries in cross-border regulations, it is not yet governed fully by European statute but leaves most parts of issues for national laws of Member States.

The first step instituted in this respect was the establishment of European Economic Interest Grouping (EEIG)<sup>51</sup>. The concept of that is forming the European company in addition to the national laws in cross-border cooperation while excluding the business activities in its direction. Its main advantage for that period was providing some solution into the problem of applicable law choice in case the international attachment to the corporate governance is on the issue. EEIG furnishes the cross-border co-operation with neutral statutory provisions which involving company can benefit from.

Nevertheless, several disadvantages may arise for Member States out of establishing their entity in that corporate form. EEIG is regarded as group of partners involved into the co-operation and the question whether it can obtain legal personality is up to the national laws. For that reason, the main drawback comes out on the joint and several liability of parties to the grouping.

The much more influential approach on harmonization of company laws in the EU has been taken by launching "Socieates Europaea" company form which embodies "European public limited company". However, the scope of its harmonization is exhausted which leaves the space for the implementation of national laws in Member States.

When the idea of forming European public limited company was come to a conclusion in early 1950s of the last century, the aim was setting forward "full statutes". That means, every issue of establishing European company shall be regarded as unified law and Member States have to be

---

<sup>51</sup> Council Regulation(EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

bound in applying single regulation of statutes in the community level. Nevertheless, the lack of agreement on different provisions among Member States barred to reach complete uniform standards. For that reason, the application of an SE statute involves the national legislation of each Member States. It concludes that there is not a single European public company in the community, but 28 SEs referring to the law of each members.

According to Article 2 of the SE statute<sup>52</sup>, the formation of this company form can be carried out in following ways:

(i) Merger; Two already existing public limited companies having their seats in different Member States can merge to the European public limited company.

(ii) Transformation; the company established in one Member State while operating the secondary establishment abroad within the union can transform itself from national public limited company to the SE under the condition that its subsidiary in another Member State exists within at least two years.

(iii) Founding subsidiary; The company conducting business in foreign jurisdictions for at least two years can establish an SE as a subsidiary within the union.

(iv) Forming parent company; Existing companies jointly establish an SE to where they transfer at least 50% of their shares subsequently. It is when two companies form a joint venture abroad.

SE shall have the same legal capacity with that of domestic public limited company in one jurisdiction where it is formed. The minimum share capital contributed to this corporate form shall be EUR 120 000, stated in Article 4(2) of the statute. Therefore, the requirement on share capital in each national legislations are set aside. Besides, any other competencies, such as liability of directors, principles of creditor protection, rising the capital and others, are subject to domestic rules of each Member States.

Furthermore, an SE can also be formed through indirect moving of the business to another Member State. That way of founding may sometimes lead to circumvention from onerous requirements in that type of establishment. The indirect formation of SE can be achieved through merging to the secondary establishment of the national company. Moreover, it can also lift the barriers to export the seat to the foreign jurisdiction.

This situation can happen when one entity, willing to transfer its seat to another state, settles the new public limited company in another Member State without any activity and personnel which is similar to "letter-box companies". Subsequently, it merges itself to that subsidiary where, as a result, the former terminates its continuation and the latter becomes an SE. Following to that, all assets and liabilities are transferred to the secondary establishment of the first country. Thus, indirect forming of SE does not practically differ from transfer of the seat from one state to another.

---

<sup>52</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

Although having achieved some conclusions through the case proceedings, the cross-border movement of the seat in the domestic level has not been harmonized yet, since the 14th directive of the EU concerning this question is still pending. However, the advantage of SE is that it lifts the barriers on the transferring the seat from one state to another in the union without winding up a company. Despite the cross-border movement of the seat is still subject to restrictions to the certain extent in the domestic level, German SE, for instance, can transform itself to the UK SE without losing its legal continuity. This process can be realized regardless of the differences under national legislations in these states, because an SE is the hybrid structure being governed by both unified standards and national laws.

Nevertheless, the main advantage of establishing SE is providing the integration between monistic and dualistic systems of corporate governance. While these two managing structures provide different models which rises the problem in cross-border regulations, the SE can be governed by both systems contingent upon the choice of the founder.

For the most Continental European states, this approach is the drastic change on the way how cross-border operations of the company are realized. Through establishing this corporate form, the founders can opt for Anglo-American system for running German SE. That can happen in the reverse side, where, to illustrate, German public limited company establishes British SE by exporting its own system to the UK. In this case, the SE established under British jurisdiction will have the structure with supervisory board and independent directors which is ultimately alien for British domestic companies. Thus, the SE has introduced the exchange and integration of legal traditions among different Member States.

As a result of introducing hybrid structure of corporate governance, both companies established under either legal systems can now co-ordinate both monistic and dualistic concepts in their board. For companies based on Continental European system, establishing SE in their system with monistic structure of the board is advantageous in the perspectives of shareholders. Regarding to being public limited company, it has the possibility to be listed on the market and in this case, the location of the power will be on the side of shareholders due to existing of "dependent" non-executive directors. Thus, for reasons of power location, shareholders in civil law states tend to establish SE with one-tier system board.

Choosing monistic system in SE also works out in a favourable way for group of companies. In Continental Europe, parent companies under that system are usually founded as public limited companies. In order to be able to take the influence on their subsidiary, they form the secondary establishments as private limited company. Otherwise, the directors of the subsidiary will be independent and those of parent company would not be able to give instructions to them. Here the problem is the difficulty on the corporate governance when there is this sort of corporate structure in group of companies.

One of efforts to facilitate the situation could be sending a director of parent company to take over that position in the supervisory board of its subsidiary, but in this case, it would be burdensome for

that director to be accountable for dozens of companies. For that reason, the secondary establishments are mostly formed as private limited companies. However, the problem of getting listed in the public stock market arises in that approach instead. To tackle with the issue, forming the subsidiary as public limited company could be the solution, but here above-mentioned problems will arise as a consequence.

However, establishing the subsidiary as an SE with Anglo-American board structure can alleviate the problem for parent-public limited companies. As a result, the non-executive directors of the secondary establishment will be dependent on the shareholders. Through this way, the parent company will establish its subsidiary which is entitled to get listed on the stock market and having all other advantages of public limited company. Additionally, it will be easier to govern it on the one hand and posses the power of taking control thereon on the other.

Collaboration of monistic and dualistic company systems was a marked innovation for countries following strict Continental European principles, such as Germany and Austria, and common law Member States like the UK. However, in some EU members, including Italy and France, the system of the choice in board structure for domestic public limited companies was free to use both monistic and dualistic structures before the introduction of SE. Therefore, launching this hybrid governing framework in the European public limited company was not an innovation for those countries. Thus, we could say that governing approach by SE was derived from rather French and Italian systems of corporate management.

Within the European Union, the subdivisions inside of either board structures could also be observed. On one hand, there are Member States following monistic rules such as Cyprus, the UK and Ireland. Among the civil law states in the EU Austria, Germany and most Eastern European countries, such as Greece, Slovakia and Czech Republic could be classified as followers of strict dualistic approach. Besides, the EU members such as Italy and France may be categorized as being in the middle group because of the fact that they implement both monistic and dualistic board structures in the management of domestic companies.

As a result of introducing an SE, we now have the integration of monistic and dualistic approaches not only in specific Member States but in the whole union. As a result, many companies formed under their domestic legislation transform themselves into SE. The examples can be given for "Allianz SE", "Porsche Automobil Holding SE", "Fresenius SE" and others<sup>53</sup>.

The essential aim of the EU is the formation of private limited company in the union level. Surely, creation this law approximation would be advantageous in order to draw different legal traditions closer to one another. Nevertheless, the implementation of European private limited company can only make a sense in case of the full harmonization on this subject. Although the SE does not entirely regulate the EU corporate governance but leaves considerable space for the national laws on that, its advantage is indicated in applying for unrestricted approach on transfer of the seat for companies located in different jurisdictions within the union.

---

<sup>53</sup> CMS publications - Broschüre Societas Europaea 06/05/2011, page 7. <[www.cmslegal.com](http://www.cmslegal.com)>.

Therefore, partly unification for public limited company contributes to the union to the certain extent, since there is a freedom of choice on establishing monistic or dualistic corporate governing structures. However, settling the roughly Europeanized private limited company can almost not to benefit to the community, because theory behind it is merely establish a single company form operating in the community equally for all Member States. Unfortunately, for the time being members cannot agree on all terms of establishing that form of company which results in hindering to realize the concept.

### *Application under national laws*

As a result of implementing SE structure, company governance in the EU has become more liberal and unified. However, it was not the complete elimination of restrictions imposed by some legal traditions, since the formation of SE leaves a room for being filled in by national legislation. German law practice provides stricter rules on the transfer of the seat, although partly mitigation on that was contributed by cases on freedom of establishments. The formation of an SE opened German companies to the whole union in export of the business activities to another Member States, because requirements on being wound-up as a result of living the domestic jurisdiction and re-establishing under the receiving state were eliminated.

Regardless of following real seat or incorporation theories, the state where the company has been formed has the right to determine on the company to migrate to foreign state. Nevertheless, establishing SE facilitated this issue which lifted further constraints on cross-border transfer of the seat. To this regard, introduction of an SE company form provided for followers of strict rules with rather alleviation of this traditionalism. Yet, some Continental European jurisdictions, such as German legislation, requires from companies established under its law to have the location of registered seat and main business activities in the same state. That rule is also applied for the operation of SE companies. Accordingly, strict theories of Continental European approach on cross-border transfer of the seat could not be softened significantly through placing public limited company forms in European level.

The rules on the location of head office and registered office in Continental European approach is stricter as well when it comes to the implementation of statute provision on the permissibility of not having these two placements in the same jurisdiction. Article 2(5) of the SE regulation allows the formation of that corporate form through engaging companies not having head office within the EU. In most civil law Member States that provision is not entitled for the formation of an SE under their jurisdiction. Germany and Austria, strict Continental European states, prohibits such formation on the view that it is opposing to their legal tradition.

However, British law approves establishing European public limited company with the participation of companies who do not have the head office in the EU. Instead, involving entities must fulfil certain conditions, such as location of registered seat in the Member State where an SE is formed and having regular economical links thereto. Meantime, some civil law states including Belgium, the Netherlands and Denmark also apply to this way of establishing an SE.

The establishing unified public limited company form mainly aims at liberate the cross-border transfer of the seat within the union. Interestingly, the approach of SE in the location of head office and registered office follow Continental European principle and almost the strict rules such as real seat theory. According to Article 7 of SE regulation, both offices have to locate in the same Member State where the company was incorporated. To follow this, the national legislations of the EU members also supplemented this provision with their own legal tradition.

Much stricter way to regulate the location of the company belongs to Austrian law. Following its real seat theory, SE can only be recognized under its law if both registered and head offices locate in Austria. In the contrary case, SE shall not enjoy the same entitlements as domestic companies do. However, there is an intermediary period provided for to move its office back to Austria in case SE transfers its seat and realizes the division of registered and main place of business. Subsequent to not falling into this obligation, an SE established under Austrian law shall be subject to liquidation required by the order of domestic court, According to Article 5(2) of Austrian national law on SE implementation.<sup>54</sup>

Notwithstanding, British law does not provide such requirement on the location of registered and head offices. It is the way how domestic companies are regulated in the UK, following the incorporation theory. Therefore, the grounds of not establishing the obligation on the placement of business places is that this approach is not in line with the UK legal tradition and non-existence of respective requirement for them for local entities.

On the other hand, UK regulation on SE establishment is distinguished with its monetary punishments on not fulfilling the requirements under the regulation and national law. The imposition of fine is mainly realized on using misleading wording in the name of an SE company and not accomplishing requirements of documentation requirements in the transfer of the seat<sup>55</sup>.

Another peculiarity of UK legislation on the regulating SE companies is the rule on supplying solvency proof to the "Secretary of State", provided in Article 72(1) of European Public Limited Liability Company Regulations 2004 ("ECRs"). This assurance can be granted either by the whole board or executing branch of the company depending upon the monistic or dualistic way of board structure respectively. This evidence ensures that moving company will not face any incapability to pay the debts upon transferring all assets and liabilities to another jurisdiction. Seemingly, that proof of solvency is quite similar to the warranty terms furnished in the M&A contracts. The main difference is that not fulfilling this contractual commitment can be subject to imprisonment in the former.

The transfer of the seat in SE is effected through the proposal thereof drafted by management which is further referred to supervising board of the company. Following this step, the drawn up offer has

---

<sup>54</sup> Gesetz über das Statut der Europäischen Gesellschaft. Entry into force: 8th October, 2004. The last amendment: 13th August, 2015.

<sup>55</sup> Under Article 34(2) of "The European Public Limited-Liability Company Regulations 2004 (European Communities, 2004 No. 2326)", no monetary punishment shall exceed £ 75.000. The provision on setting fine on improper supply of documents is laid down in Article 34(2) of the regulation.

to be delivered to the competent authority in home state. In Continental Europe, this is mainly court who is the receiver of this document and accomplishes the final scrutinize on that a month before general meeting, where the voting process on the transfer is carried out. However, in the UK it is the British Company House where this offer must be passed on for the final examination of cross-border transfer of the seat.

Article 19 of the regulation entitles relevant authority of participating Member States to disallow its national company in formation of an SE by merging. In some Continental European countries, such as Belgium and Denmark, this provision has been approved and applied by the national legislation. However, Austrian law does not establish such rule for its public limited companies which mainly leaves the decision on merging to an SE to the AGM. Unlike that, under British legislation the "Secretary of the State" has an authority to veto on the merger on the purpose of securing "public interest", provided in Article 60 of ECRs.

Shareholders of participating companies who vote against the merger to an SE are provided with exit rights in return to the cash compensation with the amount which is determined by the court according to the share-exchange ratio. That is mostly the case as far as minority shareholders are on the issue. The UK law did not lay down supplementary provisions on this question, since all rules established for merger with participation of domestic companies are also exercised to that process for an SE. The most substantial standard on minority shareholders protection under UK law is implementation of remedy through petition right to the court<sup>56</sup>. However, most Continental European legislations furnish further provisions to protect the interest of minority shareholders in merging to an SE. German law also entitles the minority shareholders to address to the court on the determination of fair share-exchange ratio for the receipt of compensation. Interestingly, it is only provided for the shareholders of the company being transferred to the merger<sup>57</sup>.

Strict formalities in the Continental European approach also indicate itself in the formation of an SE by the merger. In most civil law states in the EU, the merger decision of each companies has to be approved by the public notary of participating states. Moreover, the fulfilment of formal requirements is reviewed by the national courts. The merger is authenticated after successful completion of these steps, since the strict requirement of the notary deed for the state approval of legal actions is the peculiarity of civil law system.

British legislation is distinguished in this regard with respect to the requirement of expert's report, which was stated for domestic mergers as well in Section 909 of UK Companies Act 2006. The third paragraph of that section lays down that the designation thereof is authorized by the court following inquiry of involving companies. The main advantage of this report is being free of any influence from each merging parties which provides for the merger agreement with independent scrutiny. That grants the expert full autonomy to examine the legality of merger by forming an SE. This approach provides the process with transparency, fairness and impartiality.

---

<sup>56</sup> Right to petition to the court on "unfair conduct". British Companies Act 2006, Section 994(1).

<sup>57</sup> Van Gerven, D. (2006). *The European company. 1 (2006)* (1. publ. ed.). Cambridge: Cambridge Univ. Press, p.244, par.6.



## *Governance*

As pointed out before, the particularity of forming an SE is flexible structure of corporate governance. While one-tier system is not familiar for Continental European company forms and two-tier system for Anglo-American structure, the governance of an SE is enabled to be conducted in either ways, subject to the decision by participating companies. For that reason, the states enacted further provisions in order to implement the new board structure, which is not recognized for national companies, for running and SE in its jurisdiction.

Article 38(b) of SE statute stipulates that the composition of the board shall consist of "supervisory" and "management" bodies in dualistic structure. The management organ is comprised by directors, designated by the supervisory board, are accountable for running of the business, laid down in Article 39(1)(2) of the regulation. For monistic system, the company only contains in so-called "administrative organ" which implements both supervision and management duties in one point.

The applicable law on the regulation of an SE is determined on the jurisdiction where it is registered. Generally, an SE has to be treated in the same legal manner in its registered state with domestic public limited companies there, subject to certain modifications. The dissimilar approaches may occur mainly on the basis of differences in the board structures in the EU.

Under the UK law, the dualistic structure of the board is not supported for national companies. However, for establishing an SE, it has to implement certain rules due to being one of the Member States of the EU. For instance, duties and authorities of directors laid down in British Companies Act 2006 will not be fully applicable to an SE established with two-tier board system, because members of supervisory board were not considered in those provisions and their capacity is just scrutinizing the operation but not carrying out it. As a result of existence of dimension on the duties of the board members, national legislation in the UK may be applicable only for management organ of an SE on the grounds that the statutory provisions are drawn up for the duties of directors.

For structuring an SE under a Continental European state, the one-tier system can be enforced through implementation of national rules thereof. Unlike the separate establishment of supervisory and management board, here an SE consists of administrative and managing directors. Nevertheless, the different approach has been taken over by Dutch law, where this divergence is not implemented for one-tier structure in an SE established in the Netherlands. While the former deals with giving directives on the operation of the company, the latter plays executive role to this regard. However, when it comes to the issue of liability, the whole board is involved there and members become "jointly and severally liable". The same applies in the question of representing the company.

Obviously, the British legislation does not provide worker co-decision rights in the board for domestic companies. However, that should not mean losing of employee participation rights in companies that form an SE established under UK law. In this case, British legislation provides employee participation rights in the board if the jurisdictions of involving companies have respective provisions in their national legislation.

However, British regulation on exercise of SE statute sets forth provisions containing rules on worker co-decision rights for SE establishment. The SNB is convened for reaching the agreement among participating companies on this question within 6 months, calculated from the time when negotiations commence. However, this duration of the time could be extended, subject to the continuation of conciliation process, according to Article 27 (3)(a)(b) of ECRs. If SNB are unable to reach an agreement with parties to the company within time limits signified in the British regulation, then the "standard rules", laid down in the Schedule 3 of ECRs, will apply regarding to the purpose of harmonization on employee participation in the board of an SE. Any complaint regarding to the employee involvement in the SE, such as improper implementation of standard rules or not fulfilling the provisions of the regulation, can be referred to British "Central Arbitration Committee", stated in Article 33(1) of ECRs.

Seemingly, The UK legislation could cover the full harmonization on employee involvement for SE structure, despite of the fact that this experience does not apply at all for domestic companies. Actually, that was one of the aims of introducing European public limited liability which assists the integration of legal traditions within the EU and fade the line between monistic and dualistic approaches to the board structure. Before an SE company form came to the force, it was completely out of envisagement to establish company under the UK law with provision of worker co-decision.

Similar to national companies, the decisions are taken in an SE by general meeting which is obliged to be convened at least once a year. Article 54(1) of SE statute stipulated that the call for the meeting shall be realized during the last 6 months of fiscal period. The same provision also sets forth the rule that parties to an SE are entitled to summon the general meeting at any time during 18 months after the formation of it. This standard has been enacted by most Member States. Besides, According to Article 55(3), if general meeting could not be assembled by company itself within the prescribed time, the relevant authority of the state, which are, for instance, "Secretary of the State" in the UK, "President of the Commercial Court" in Belgium, "District Courts" in the Netherlands and others, can call for the general meeting.

Besides, the report of annual accounts are governed according to the law of the state where SE has been registered. Account statements have to be reported in general meeting annually and if there are any secondary establishments, their balance sheet shall also be formulated, as "consolidated accounts." In general, it shall be drawn up by the end of the financial year. The annual account statement has to provide a report on the performance of an SE during a fiscal period and its prospects for the further year. Moreover, while drawing up these annual statements, "International Accounting Standards" shall be followed in a general view. However, some states provide their individual or specific rules to comply in drafting account reports.

In a general view, the SE statute is a legal basis for the governance structure of the European public limited company which partly regulates it. All remaining issues are left for the discretion of national laws. Therefore, an SE corporate form is the further step to co-ordinate domestic and EU legislations and draw different legal traditions closer to one another.

## Conclusion

The proper functioning of the EU Internal Market is based on freedom of movement, right of establishment and integration of national legal traditions. The company law stands in one of the first levels to this regard, because interconnection of corporate governance structures in the union is what brings about economic relations among Member States.

Companies are governed by each domestic legislation of the member. However, when the cross-border element is attached to corporate laws thereof, different legal backgrounds may sometimes collide. Although all legislations are build up upon some common standards, they still signify their particularities in specific cases.

Having two distinct legal systems is the direct reason of why the EU cannot agree the full harmonization of company law in the union level. When the cross-border co-operation of company laws in the EU is on the issue, legal traditions may collide due to existence dissimilar regulations on corporate governance.

The most discussing question in the union is transfer of the seat between Member States. In this respect, while there is strict rules in most Continental European states on one hand, much more liberal approach has been set forth by British system on the other. There are certain restrictions in civil law systems on the recognition of foreign company that moves its seat abroad. For instance, strict followers of Continental European approach require from moving company to re-register and fulfil all the preconditions stipulated in the domestic legislation of the host state as all national companies there did. If the company has been established abroad with different amount of the share capital or none, most Continental European states do not recognize that foreign corporate form, since it lacks the compilation of minimum requirements of domestic law.

Much more liberal way of regulate cross-border measurements has been initiated by the British law, where establishment of the company "anywhere in the union" suffices to operate as a foreign entity in the host state. In this perspective, if two companies from different legal traditions transfer their seat, convert its form into another, merges and being taken over, there would be genuine contradictory points to challenge. However, bringing cases on the EU freedom of establishment standard before CJEU opened new directions for companies coming into and from the real seat theory states, because that principle deduces that any restrictions may be imposed on the movement of companies shall be prohibited within the EU.

Although host states are obliged to recognize companies transferring their seat regardless of the fact that they have been incorporated abroad, home states are still allowed to decide on the cross-border operations of their domestic entities, on the grounds that companies are resulting from the national laws. Nevertheless, cases brought before the CJEU significantly contributed to alleviation of national boundaries on international attachment to companies.

In the merger and transformation into foreign corporate form the most substantial question becomes rules on employee participation being applied in resulting company. It is because of the fact that

while most Continental European states provide worker co-decision rights in the board, in Anglo-American systems this way of managing companies does not exist where employees are involved into the company through workers' unions instead. In order to prevent dissenting views on this issue, the EU has been initiated conciliation process carried out by "Special Negotiation Body", where parties to cross-border measure are brought together in order to seek for the resolution on worker co-decision rights in transferor company.

Besides, another step to bring legal traditions closer was initiated through establishing European corporate forms. *Societas Europaea*, which is European public limited company, is considered the most effective innovation to this regard, since it has lifted numerous restrictions on moving the seat and merger procedures. However, the most crucial novelty that this corporate form brought to the EU is the governing structure which allows the collaboration of one-tier and two-tier systems in one company. That was one of marked steps towards the unification of company law in the EU, because this way of corporate governance has put monistic and dualistic systems into the situation of effecting the legal practice of each other interchangeably as a result.

The attempts of the European Union in both harmonization and unification of company law in the community are quite effective, depending upon national policies of Member States and differences in not only two legal systems, but also in domestic legislations. Enacted 13 directives on the company law in the union level contributed to the establishment of single provisions on divisions, mergers, account statements, secondary formations and other issues positively. Moreover, the case decisions by the CJEU, such as "Daily Mail", "Überseering", "Inspire Act" and "Centros", played a big role on changing conservative views on cross-border regulations in the EU in a more modernized way.

Eventually, the main problem in the co-operation of companies from different Member States in the EU was the existence of two legal systems which are distinct from each other with their particularities. Nowadays, the progress on interconnecting domestic legal systems and implicating union legislation thereto has opened up companies of members from national horizons to the community level.

## Bibliography

Karel Van Hulle, Harald Gesell; *European Corporate Law*, 2006, 1<sup>st</sup> edition; Baden-Baden: Nomos Verlagsgesellschaft.

Adriaan Dorresteijn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff; *European Corporate Law*, 2009, 2<sup>nd</sup> edition; Wolters Kluwer Law & Business.

Dirk Van Gerven; *Cross-border Mergers in Europe, Volume I*, 2010, 1<sup>st</sup> publication; Cambridge: Cambridge University Press.

Dirk Van Gerven, P. Storm; *The European Company, Volume I*, 2006, 1<sup>st</sup> publication; Cambridge: Cambridge University Press.

Eddy Wymeersch; *The Transfer of the Company's Seat in European Company Law*, 2003; Law Working Paper No. 08/2003; ECGI Working Paper Series in Law.

Federico Maria Mucciarelli; *The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: an Important Decision from Italy-Case Note on the Decision "B&C" of the Italian Corte di Cassazione*; *European Company and Financial Law*, 2005, Vol.2(4); p. 512-533 [Peer Reviewed Journal].

Olivier Valk; *C-210/06 Cartesio Increasing Corporate Mobility Through Outbound Establishment*; *Utrecht Law Review* 6(1), 2010, p. 151-167.

Joachim Englisch; *National Measures to Counter Tax Avoidance Under the Merger Directive*; Oxford University Centre for Business Taxation, 2011; Oxford OX1 1HP, WP 11/13.

Axel Wedin, Petra Inwinkl, Marie Larsson-Linton; *Corporate mobility in the EU: Freedom of Establishment for national companies*, 2010; Jönköping International Business School.

Henk Wouter De Jong; The Governance Structure and Performance of Large European Corporations; *Journal of Management&Governance*, 1997, Vol. 1(1), p. 5-27 [Peer Reviewed Journal].

J.H.W. Verzijl; International Court of Justice 1964: Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections (New Application: 1962); *Netherlands International Law Review*, Vol 12(1), 1965, p. 2-42 [Peer Reviewed Journal].

John Lowry; Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company; *The Cambridge Law Journal*, 2004, Vol. 63(3), p 331-345 [Peer Reviewed Journal].

Federico Mucciarelli; Company "Emigration" and EC Freedom of Establishment: Daily Mail Revisited; *European Business Organization Law Review*, 2008, Vol. 9(2), p. 267-303 [Peer Reviewed Journal].

Amit M. Sachdeva; Regulatory Competition in European Company Law; *European Journal of Law and Economics*, 2010; New York, NY: Springer Science + Business Media, Vol. 30(2), p. 137-170 [Peer Reviewed Journal].

Stefano Lombardo; Conflict of Law Rules in Company Law after Überseering: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union; *European Business Organization Law Review*, 2003, Vol. 4(2), p. 301-336 [Peer Reviewed Journal].

**Orkhan Afandi.**

**Master thesis proposal.**

Title:

**Anglo-American and Continental European approaches of company law in cross-border regulations in the EU.**

I would like to write a thesis connected with International Company Law. More specifically, my essential intention is to make a broad research on Anglo-American and Continental European approaches in cases where companies have the attachments of different jurisdictions in their commercial activity.

In fact, existence of diverse legal systems in Europe is the key reason that why we do not have full EU harmonization in company law. Therefore, I will discuss how the both approaches tackle with this question where operation of companies exceeds the border of a country.

Here, main question is on the recognition of the company in overseas areas according to different legal backgrounds. While management-based German "real seat theory" puts strict requirements on that, shareholder-based British "incorporation" method introduces more liberal approach on this issue. I will question what is the historical reason of such different ways and relations of these approaches to the company law as international business is concerned.

In the UK, registration of companies follows post-control principle in the protection of consumers, while in common law countries this process can be evaluated as complicated process with pre-control alternative in comparison. While the former established "computer-based" registration, in the latter judge, who is competent in company law, implements the listing of an enterprise. As a result, protection of creditors based on either notaries or information respectively. My analyze will also focus on reasoning of these distinctions and reliability question in the process of listing an enterprise in different ways.

Additionally, I will raise the argumentation that how differences of company law in both frameworks can affect to the freedom of establishment in the EU and the links of this principle on this question with international private law. As far as country of origin is concerned, functioning of Internal Market could be affected to some extent. The broad dispute on whether the EU has got "Delaware effect" on company regulations will be looked into. I think, there is a strong link between the EU principles and distinguishing two company law approaches, because freedoms without harmonization can result in a race to the bottom.

Then I would try to explain how differences of the monistic and dualistic concepts apply in governance of cross-border public limited companies. The attention is intended to be drawn to the EU's introduction of so-called " Societas Europaea", where both structure could be chosen for implementation.

My major purpose is to define the relations of Anglo-American and Continental European approaches in company law where their possible clashes may come to an existence as far as governance of corporation is on the issue. The reason of why I tend to take EU perspective as a basement is that it has already initiated possible unified structures towards the opposed principles of two legal systems. While the country of origin principle can be the most effective solution of this dispute, in some cases company owners may tend to use this method in attempting the circumvention of the applicable law. I would like to probe how two different legal frameworks could apply for the company where the registration and place of operation derives from the distinct legal systems.

**The main list of bibliography:**

Karel Van Hulle, Harald Gesell; European Corporate Law, 2006, 1st edition; Baden-Baden: Nomos Verlagsgesellschaft.

Adriaan Dorresteyn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff; European Corporate Law, 2009, 2nd edition; Wolters Kluwer Law & Business.

Dirk Van Gerven; Cross-border Mergers in Europe, Volume I, 2010, 1st publication; Cambridge: Cambridge University Press.



**Orkhan Afandi**

**Vorschläge für Masterarbeiten.**

Titel:

**Angloamerikanisches und Kontinentaleuropäisches Herangehen des Gesellschaftsrechtes in der EU in den Beziehungen Grenzüberschreitend.**

Ich möchte meine Entscheidung über das Schreiben der Masterarbeiten im Zusammenhang mit Internationales Gesellschaftsrecht mitteilen. Insbesondere, mein Erwarten ist die Forschung die Angloamerikanisches und Kontinentaleuropäisches Herangehen in der kommerziellen Tätigkeit der Gesellschaften im Fall der Anwesenheit der Gemische verschiedener Zuständigkeiten.

Tatsächlich, die Anwesenheit verschiedener Rechtssysteme in Europe ist Hauptgrund der nicht-vollen EU Harmonisierung im Gesellschaftsrecht. Deshalb, werde ich den Verhalten zu den Situationen des Grenzübertrittes der Tätigkeit der Gesellschaften der beiden Herangehen analysieren.

Hiesige Grundfrage ist auf der Bekanntschaft der Gesellschaft, die Rechtsgrundlage hat, im Ausland vom rechtlichen Standpunkt. Wenn Management-basierte deutsche "Sitztheorie" in dieser Richtung sichere Anforderungen stellt, britische "Gründungstheorie" mit Aktionärsbasis tritt mit dem liberaleren Herangehen auf. Ich möchte die historischen Gründen dieser beiden verschiedenen Herangehen und ihre bilaterale Beziehungen mit einander auf dem internationalen Businesshintergrund erlernen.

Obwohl die Registrierung der britischen Gesellschaften auf dem Verbraucherschutz dem Prinzip post-Kontrolle folgt, werden in den Ländern Common Law zum Vergleich komplizierteres Prozess, Vorsteuerung-Alternative benutzt. Anwendet erste computerbasiertes Registrierungssystem, trifft der zweiter, Richter, der im Gesellschaftsrecht erfahrener ist, die Entscheidung über die Registrierung der Gesellschaft. Im Ergebnis, wird den Schutz der Kreditoren beim Notar oder auf der Information gebildet. Meine Untersuchung wird gleichzeitig auf die Unterschiede und den Sicherheitsgrad fokussiert.

Zusätzlich, ich werde die Wirkung von Niederlassungsfreiheit in der EU von diesen beiden Herangehen des Gesellschaftsrechtes und die Argumenten im Kontext Internationales Privatrechtes diskutieren. Diese Frage wirkt auf die Tätigkeit der Europäischen Binnenmarkt auf dem Hintergrund der Herkunftslandprinzip. Darüber hinaus, wird These den Effekt von "Delaware" im Gesellschaftsrecht in der EU forschen. Meine Meinung nach, zwischen den EU-Prinzipien und dieser zwei Herangehen besteht eine enge Verbindung, weil ohne Harmonisierung die Freiheiten mit "Race to bottom" enden können.

Danach im Grenzüberschreitenden Kontext der monotischen und dualistischen Konspekten wird die Leitungssystem von Kapitalgesellschaft diskutiert. Das Hauptaugenmerk wird auf „Societas Europaea“ von EU gerichtet werden, hier kann man für die Leitung zwei Systeme auswählen.

Mein Hauptziel ist die Bestimmung der Verbundenheit, die mögliche Widersprüche zeigen kann, der Angloamerikanisches und Kontinentaleuropäisches Herangehen im Leitungssystem der Gesellschaften. Der Grund der Aufnahme von EU-Prinzipien ist die Maßnahme dieser beiden verschiedenen Systeme auf der Richtung der Einheitlichkeit. Ist der Herkunftslandprinzip günstigster Lösungsweg in dieser Diskussion, können die Unternehmer das für die Ausweichung vom anwendbaren Recht benutzen. Ich habe das Ziel diese beiden Systeme bei der unterschiedlichen Registrierungs- und Tätigkeitsorten der Gesellschaft zu untersuchen.

### **Die Hauptliste der Bibliographie:**

Karel Van Hulle, Harald Gesell; European Corporate Law, 2006, 1st edition; Baden-Baden: Nomos Verlagsgesellschaft.

Adriaan Dorresteyn, Tiago Monteiro, Christoph Teichmann, Erik Werlauff; European Corporate Law, 2009, 2nd edition; Wolters Kluwer Law & Business.

Dirk Van Gerven; Cross-border Mergers in Europe, Volume I, 2010, 1st publication; Cambridge: Cambridge University Press.