

PUBLICATION PROCEDURES AND COMMUNICATION MADE BY COMMERCIAL REGISTERS IN CROSS-BORDER COMMERCIAL ACTIVITIES

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Abstract

Expanding companies' activities beyond state borders brings into existence the need to be established permanent cross-border access to specific legal regulations and formalities applicable to the performed operations . Interconnection of companies registers and facilitation of the access to information from a national commercial register for any interested person, irrespective of its geographical location should represent an impossible to ignore objective at EU level and beyond, not only in considering a stable legal environment but also in considering the possibility of carrying out the activity in states other than their own. In this paper we propose to capture the steps taken to this end in the European Union, pointing undesirable economic impact of the lack of such measures.

Key words

Commercial registers, Directive 2012/17/EU, Directive 2006/123/EC, internal market, cross-border commercial activities

Introduction

“What is needed above all is a clear-headed appreciation of how different institutions work, along with an understanding of how a variety of organizations – from the market to the institutions of state – can together contribute to producing a more decent economic world”¹

We all think, in a simple manner of speaking, that doing business should lead to economic development and maybe we all believe that this can be reflected for every individual in a process that can be defined (as the title of a famous movie “Eat, Pray, Love”) in three words - think, pray, work - but the truth is that complicated legal frameworks and sophisticated explanations are sometimes a burden for enthusiastic private enterprises and also for the public.

Businesses registration must be focused not only on the formal registration procedure but also on providing clear and trustworthy information for the business partners and for the third parties, creating a safe and user - friendly environment. Some keys for the business register reform process presented by the World Bank Group as recommendations can be: trust between representatives of the business sector and from the authority's with a role in business registration, clearly defined roles and responsibilities in business registration, an information strategy needed for building awareness, funding the reforms by the country governments.²

Returning to the process of doing business recently was shown in another World Bank Group material:” A number of recent studies have found that simpler registration processes translate into advantages for workers and employers, including greater employment opportunities, more productive jobs, and higher total factor productivity. In addition, society as a whole benefits from registration reform, which requires that businesses pay taxes, play by the rules, and provide productive, decent employment”³ .

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¹ Amartya Sen, “Adam Smith’s Market Never Stood Alone,” Financial Times, March 11, 2009, <http://www.ft.com>.

² Innovative Solutions for Business Entry Reforms - A Global Analysis, July, 2012, Investment Climate Advisory Services of the World Bank Group, <https://www.wbginvestmentclimate.org>.

³ Reforming Business Registration, A Toolkit for the Practitioners, January, 2013, Investment Climate, World Bank Group, <https://www.wbginvestmentclimate.org>.

After this short introduction about the process of business registration and the differences between what it is and what it should be, we will try to focus on the efforts made at EU level in the matter of publicity and cooperation in exchanging information through business registers.

1. EU legal framework in the field of publicity and cooperation between business registers

As the Article 2 from the consolidated version of the Treaty on European Union underlines⁴ the Union has set itself as an objective, to promote economic progress through the creation of an area without internal frontiers promoting strengthening economic and social cohesion. “Transnationalization of companies”⁵ increases competition between enterprises and that process has as a result higher performances, cooperation between firms, quality best practices and also a good dissemination of corporate information. In this part, a historical evolution of legal framework in EU legislation will be made.

First Council Directive of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (68/151/EEC) (Official Journal L065, 14.03.1968 P.0008-0012)

The First Council Directive was a first step in the process of co-ordination of national provisions concerning especially limited liability companies and companies limited by shares, in consideration of the extended cross border activities of such companies. The Directive 68/151/EEC was structured in four sections regulating types of documents for which must be ensured compulsory disclosure, regime of the acts done by the representatives of the company before the companies acquire legal personality, the grounds for the nullity of companies and of course general provisions for Member States regarding amendments of the national laws. Was this the beginning of the globalization at this level as an “inexorable trend”^{6,7}

Since the activities of companies were extending beyond national territories there was the need, as provided in the body of the act, to coordinate the national provisions concerning nullity and basic documents of a company that should be disclosed in order for third parties to have their interests and assets protected and to ascertain the content of basic company documents, especially the persons who are authorized to bind the company. For this scope, the act stipulates in Article 3 that in each Member State shall be opened a file in a central register, commercial register or companies register for each of the companies registered therein, regulating also that disclosure of the documents shall be effected by publication in the national gazette appointed for that purpose by the Member State.

According to Article 1, compulsory disclosure regards the instrument of constitution and the amendments made, the persons or the body authorized to represent the company, information about the subscribed capital, the balance sheet, the transfer of the seat of the company, any measures related to a winding up procedure, appointment of liquidators and the striking off from the register.

In regard with nullity of companies, Article 11 captures 6 grounds providing this sanction, in a restrictive manner, specifying that ordering of nullity is the attribute for courts of law: the legal formalities were not complied properly, the company object are contrary to public policy or not

⁴ Treaty on European Union, Consolidated version, eur-lex.europa.eu.

⁵ Maresceau Kristof, Tison Michel, Cross-border business in the European Union and statutory disclosure requirements - using IT as a catalyst for further market integration, November, 2007, Financial Law Institute, University of Ghent, papers.ssm.com.

⁶ Guillen, Mauro F, Corporate Governance and Globalization: Arguments and Evidence against Convergence, 1999, <http://knowledge.wharton.upenn.edu/papers/839.pdf>.

according to the law, the statutes does not contain compulsory elements(name of the company, total amount of capital, duration), the minimum amount of capital was not paid according to national law, founder members are incapable or the number of founder members is less than two, contrary to the national law.

Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Official Journal L 026 , 31/01/1977 P. 0001 - 0013)

As a next step in the coordination process provided for in Article 54(3) of the Treaty establishing the European Economic Community, whereas in order to ensure protection for shareholders and creditors of public limited liability companies and to make possible for any interested person to be acquainted with particulars of the company, including capital and the increase and reduction of the capital, the Directive, applicable to public companies limited by shares (die Aktiengesellschaft), prescribes in details the information that must appear in the instrument of incorporation or a separate document to be published according to a procedure laid down in the national laws-the registered office; the company name; the nominal value of the shares subscribed and conditions limiting the transfer of shares or governing the reducing or increasing of the capital; condition regarding assets acquisitions; rules for appointing the members which are responsible for de administration of the company; any special advantage granted during the time of the formation of the company, to anyone who has taken part in the formation and more important stipulates that minimum capital, “25 000 European units of account” must be subscribed in order to incorporate this type of company.

The two Directives were subject of debate at the Conference on Company Law and the Single Market held in Brussels on 15 and 16 December 1997, as a result of the consultation launched by a Commission's questionnaire in February 1997, having as the main goal the plan to design a path ahead in achieving the consensus in EU countries in the matter of the changes imposed by practice in company law area. As observed in the analysis of the received responses on the questionnaire, contained in the material presented at the Conference by Blanquet Françoise, “Analysis of the Responses received on the Questionnaire” the respondents felt that the provisions on disclosure contained by 68/151/EEC Directive need a facelift according to modern communication tendencies and also argued that a number of provisions in Directive 77/91/EEC must not be so rigid, because large contractual freedom should be allowed to businesses. The importance of modern internet technology allowing retrieving data's at any time and simple disclosure of the papers containing valuable information about companies(balance sheet, meetings and decisions of shareholders), enterprises publicity ensuring the transparency of company movements and the protection of possible partners and third parties, the need to establish if the publicity set off by the first Directive is constitutive or declaratory, development of the European Business Register Project⁷, cross-border validity of statutory company information were only some of the topics at the Conference.

The first council Directive was repealed by the Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such

⁷ The European Commission initiated in 1992 the European Business Register (EBR) project as part of the European Nervous System (ENS) Program, within the 3rd Framework Program of Research and Technological Development (DGXIII).

safeguards equivalent (JO L 258/11, from 01.10.2009). The 2009/101/EC Directive contains provisions clearly drowned regarding some of the topics presented at the Brussels Conference in 1997 - compulsory disclosure by companies of specific documents, ensuring the filing of documents by companies or other bodies by electronic means, possibility to replace the publication in a national gazette with other effective means, the treatment of the acts done by the organs of the company that exceed the powers that the law offers, provisions concerning nullity.

The Second Council Directive was amended by Directive 92/101/EEC (OJ L347/28.11.1992) (discussions about the dominant influence of a public limited liability company in another company in which holds the majority of the voting rights), Directive 2006/68/EC (OJ L264/25.09.2006) (the right for the creditors who had claims antedate the publication of the reduction of the capital decision to obtain adequate safeguards, the permission for the company to acquire its own shares, re-evaluation of the assets under the supervision of the management body), Directive 2009/109/EC (OJ L259. 02.10.2009) (establishing alternative publication through company websites regarding mergers/divisions) and **finally repealed by Directive 2012/30/EU** of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. (OJ L315/74 from 14.11.2012).

As some basic steps were made, the following acts of the Council were taken in the direction of coordination the provisions in case of mergers of public limited liability companies, Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (Official Journal L 295 , 20/10/1978 P. 0036 - 0043), Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, (OJ L 222, 14.8.1978), Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (Official Journal L 310 , 25/11/2005 P. 0001 - 0009) introducing the obligation for the registry for the registration of the company resulting from the cross-border merger to notify the registry in which each of the companies filed the documents that the cross-border merger has taken effect so that deletion of the old registration is made.

Interesting problems were raised in the attempts to regulate the transfer of a registered office from one Member State to another and in the creation of the European Private Company. In the first matter, in 2007 the European Commission announced that the "14th Company Law Directive „is on hold. Different approaches of the Member states in the subject - principle of the place of incorporation and principle of the real seat - generated two ways to treat the transfer - moving the head office to another Member State without dissolution and without change of the legal regime governing the company is valid for the countries applying incorporation principle; the transfer of registered office under the real seat principle is not allowed unless the head office is also transferred. It was also suggested that a new construction can improve companies' mobility - European Private Company, legal form facilitating the operation of business in several Member States of small and medium enterprises.⁸ As other voices noticed⁹, the Commission's argument that there is no economic case for a Directive on cross-border transfer of the registered office having in mind the possibilities

⁸ Impact assessment on the Directive on the cross-border transfer of registered office, Commission Staff Working Document, 2007, ec.europa.eu.

⁹ Vossestein, Gert-Jan, Transfer of the registered office. The European Commission's decision not to submit a proposal for a Directive, Utrecht Law Review, 2008, <http://www.utrechtlawreview.org>.

are already offered through SE or cross-border mergers are not so strong, thinking that under a new Directive this transfer can be realized at lower costs and in a clearer manner. A new consultation on the cross-border transfers of registered offices of companies was launched by EU, Internal Market and Services DG, for a period from 14.01.2013 to 16.04.2013 having the purpose to get more in-depth information on the costs currently faced by the companies transferring their registered offices abroad¹⁰.

2."The relationship between companies and society has become unbalanced in favour of the former. But companies need to serve society, rather than society serving the shareholders"¹¹.

In this section we will present two important EU regulations which try to cover simplification of procedures and to establish new horizons in the cooperation between business registers at this level.

Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (L376/36, Official Journal of the European Union, 27.12.2006)

In the context of this regulation there are few aspects to describe in connection with the paper:

- Simplification of the procedures - Member States must examine the procedures and formalities applicable to a service activity and examine the possibility to simplify them if the case

- points of single contact - Member States shall ensure for providers to complete some procedures and formalities through points of single contacts. The procedures regard 'declarations, notifications or applications necessary for authorization from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association' (Article 6)

- right to information - the Directive completes the picture specifying also the categories of information accessible through the points of single contacts (Article 7)

“(a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;

(b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;

(c) the means of, and conditions for, accessing public registers and databases on providers and services;

(d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;

(e) the contact details of the associations or organizations, other than the competent authorities, from which providers or recipients may obtain practical assistance.”

Directive 2012/17/EU of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers (L156/1 Official Journal of the European Union, 16.06.2012)

Issues around the interconnection of business registers can be resumed in three categories¹²: failure in updating business information in the register of foreign branches, difficult cooperation

¹⁰ “Consultation on the cross-border transfers of registered offices of companies – Consultation by DG MARKT”, ec.europa.eu/internal market/consultations/2013/seat-transfer.

¹¹ Resolution - The Future of European Company Law, adopted at the Executive Committee of the European Trade Union Confederation, 6-7 March, 2012, www.etcuc.org.

between registers in cross-border merger procedures and difficult cross-border access to business information.

Responding to the three segments the new adopted Directive establishes:

▶ A unique identifier for branches allowing them to be identified in a simple manner in communication between registers (the identifier shall comprise elements making possible to be identified the Member State, the domestic register of origin and the branch number in that register) (new paragraph added in Article 1 of the Directive 89/666/EC)

▶ The register for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect and the deletion of the old registration shall be effected only on receipt of that notification (new Article 13 in Directive 2006/56/EC)

▶ The register of the company shall make available information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company (Article 5a inserted in Directive 89/666/EC).

The new Directive aims to facilitate cross-border access to official information defining a set of dates about companies available to third parties in all EU languages; to develop a framework for cooperation between EU business registers; to ensure the up-date regarding branches is respected and completed in time; to develop an easier way of tracking legal entities introducing the unique company identifier composed of the national registration number and an international prefix; to introduce reasonable time frames for communication.

The interconnection represents a proposal included in the Commission's Communication on the Single Market Act, in the effort to create a business-friendly legal environment and also is in strong connection with the European e-Justice Portal which serves as the single access point for legal information in the EU, and will include also databases and information regarding commercial registers.

Continuing the innovation brought by Directive 2006/123/EC, the European Commission launched in May 2009 a pilot project, SPOCS - Simple Procedures Online for Cross-border Services - aiming to build the next generation of online portals Point of Single Contact. SPOCS develops an interoperability layer meant to foster the services economy in EU by facilitating the Service Providers to apply using Point of Single Contacts for businesses in the Member States¹³.

Another interesting project¹⁴, developed with the financial support from the Prevention of and Fight against Crime Program Directorate General Home Affairs European Commission, must be mentioned in sustaining the idea that cooperation between business registers is more than a simple dissemination of information, implications being larger than that. The project BOWNET (identifying the Beneficial Owner of legal entities in the fight against money laundering Networks) is a feasibility study having the role to determine what information can be used and must be developed to obtain a support system which can be used in the fight against money laundering and when investigating beneficial owners of suspicious corporate entities.

Conclusions

Facilitating access to information about companies for third parties, including public authorities or enterprises from different Member States was one of the goals of the Directive

¹² Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers, <http://eur-lex.europa.eu>.

¹³ Simple Procedures Online for Cross-border Services project, <http://www.eu-spocs.eu>.

¹⁴ Beneficial Owner of legal entities in the fight against money laundering NETWORKS project, <http://www.bownet.eu>.

68/151/EEC and since 1968 evolution of the EU legal framework determined constant improvement in the field of publicity and cooperation. Amendments in 2003 of the Directive 68/151/EEC stipulating the existence of the electronic business registers, cross-border mergers Directive 2005/56/EC or Directive 2012/17/EU of the European Parliament and of the Council are only few of the proofs of the fact that economic reality imposes cross-border procedures and transparency as a necessity. As the Internal Market and Services Commissioner Charlie McCreevy said when the public consultation on identifying better ways to cooperate between business registers was released by the European Commission: "The current financial crisis highlighted once again the importance of transparency across the financial markets. Improving access to up-to-date and official information on companies for creditors, business partners and consumers could serve a means to restore confidence in the markets. Business registers play an important role in ensuring transparency and legal certainty in Europe."¹⁵ Having in mind also the EUR 69 million savings brought by the Directive 2012/17/EU we can only trust, but it will be subject of analyses, that finally, administrative costs, waiting time and unreliable information on companies are history and all the money saved will go into economic growth.

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¹⁵ Getting better access to company information: Commission consults on the interconnection of business registers, <http://europa.eu/rapid/press-release>.

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