

**REDUCING ADMINISTRATIVE BURDENS AND INCREASING LEGAL
CERTAINTY AND TRANSPARENCY OF BUSINESS - DIRECTIVE
2012/17/EU OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL OF 13 JUNE 2012 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**

Silvia-Claudia Călin-MIHALCEA*
Gabriela FIERBINȚEANU**

Abstract

The Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012, modifies three important company law directives, and is introducing also a new business registers interconnection system (BRIS). As article 2 from the consolidated version of the Treaty on European Union provides¹ the Union has set itself as an objective, promotion of economic progress through an area without internal frontiers but we must observe that such an approach needs permanent cross-border access to specific legal regulations and formalities applicable to the performed operations in each Member State. This article aims to point the steps to be made to achieve the goal of the Directive 2012/17/EU underlining the measures to be taken in each Member State in the process of implementing it.

Keywords: *interconnection, administrative burdens, BRIS, fees, implementation levels.*

Introduction

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. As remarked in other occasion², issues around the interconnection of business registers can be resumed in three categories³ - failure in updating business information in the register of foreign branches, difficult cooperation between registers in cross-border merger procedures and difficult cross-border access to business information. As the European Parliament stated following the financial and economic crisis there is need to restore trust in the markets but whereas the fact that business registers are not interconnected may cause economic losses and problems not only for

stakeholders or for the companies employees but also for the consumers and the public having in mind lack of transparency, efficiency and legal certainty⁴. We shall examine the sections in the three company law directives need to be improved and, as earlier said, the calendar of the measures need to be taken to ensure that the aim of the Directive 2012/17/EU⁵ is achieved.

1. Directive 89/666/EEC of 21 December 1989⁶ concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State defines the list of documents and particulars that companies have to disclose in the register of their branch. The disclosure requirements concern the address and the activity of the branch; the company's place of registration and registration number; particulars of the company directors; accounting documents and information on the closing of the branch but without establishing a legal obligation for the registers to exchange data, often we can find ourselves in a situation when despite the striking –off of a company from the home register, its branches continue to

* Silvia Claudia Călin Mihalcea, PhD Candidate, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: scmihalcea@gmail.com)

** Gabriela Fierbințeanu, research assistant, PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: gabriela.fierbinteanu@gmail.com)

¹ Treaty on European Union, Consolidated version, <http://www.eur-lex.europa.eu>

² G. Fierbințeanu, “Publication procedures and communication made by commercial registers in cross-border commercial activities”, 2013, cks.univnt.ro/uploads/cks_2013_articles

³ 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, eur-lex.europa.eu

⁴ European Parliament resolution of 7 September 2010 on the interconnection of business registers, <http://www.europarl.europa.eu>

⁵ OJ L 156, 16.06.2012

⁶ OJ L 395, 30.12.1989

function and operate because the information about the striking - off has not reached the register where the brunch is registered.

The business register of the branch is not in a position to constantly monitor updating of the information on businesses so that is not in position to have information about any changes in the registered data on the foreign company (including its removal from the register) unless the company provides this information or a complaint is received. In this case, without effective means of enforcement, a significant number of companies do not comply about the data. Consequently, the register provides misleading information to the market so that the quality problem is under the question.

The new introduced article 5a) provides now that the register of the company shall, through the system of interconnection of registers, make available, without delay, the 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. This information will be received without delay by the register of the brunch so that at the end where a company has been dissolved or otherwise struck off the register, its branches are likewise struck off the register without undue delay. We must notice that the syntagma "without delay" is been used almost in every paragraph of article 5 a) as a sign of understanding the importance, at economic level especially, of the rapid exchange of information between registers. Also to be noticed is that the second sentence of paragraph 4⁷ shall not apply to branches of companies that have been struck off the register as a consequence of changes in the legal form of the company concerned, mergers, divisions, or cross-border transfers of its registered office. We consider that an exchange of information is also necessary in this matter because any changing procedures concerning the company must be also registered at the brunch register ensuring the transparency of data .

2. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005⁸ on cross-border mergers of limited liability companies requires the registers to cooperate across borders without indicating the right channels of communication which could overcome difficulties as the language or the period of time allocated for notices between Member States. Many communications between the competent authorities are done via mail, and predominantly in the language of the issuing authority and this leads to a rather extended uncertainty for the involved companies regarding the

final registration of the merger. Also, after a cross-border merger or transfer of registered office is registered by the business register of the country of destination, the company appears to exist in both Member States until it is removed from its former register. Creditors may be misled by the content of the register. Unfortunately such a transition period is unavoidable, but the lack of communication prolong this beyond the necessary time.

The Directive applies to mergers of limited liability companies: formed in accordance with the law of a Member State; with their registered office, central administration or principal place of business within the EU; if at least two of them are governed by the law of different Member States. As article 13 paragraph 2 provides, "*The registry 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. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before*". The Directive Directive 2012/17/EU modified article 13 paragraph 2 as follows "*The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection of central, commercial and companies registers established in accordance with Article 4a(2) of Directive 2009/101/EC and without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before*". At the first reading not many changes were made, the difference is given only by the introduction of the communication procedure through the system of interconnection of central, commercial and companies registers. The explanation can be found in the fact that there was nothing else to improve on the original form of the article 13 the only problem being the absence of a clear mechanism offering a quick and reliable form of communication.

3. Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009⁹ on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent responded to the need to disclose the basic documents of the companies so that third parties can have access to information concerning companies, with accent on the persons authorized to bind the company, and also to the copies of the compulsory acts sustaining registered

⁷ article 5a, paragraph 4: Member States shall determine the procedure to be followed upon receipt of the information referred to in paragraphs 1 and 2. Such procedure shall ensure that, where a company has been dissolved or otherwise struck off the register, its branches are likewise struck off the register without undue delay.

⁸ OJ L 310, 25.11.2005

⁹ OJ L 258, 1.10.2009

operations. For a more business-friendly legal and fiscal environment it is not enough to have a frame allowing access to the registration processes because companies or the large public need to search the register on a country-by-country basis not having a tool creating the possibility to access

information in a centralized manner no matter where the register or the enquirer is situated. The new introduced article 4a) establishes the system of interconnection of registers and also a European central platform as a part of this construction so that the Member States shall ensure the interoperability of their registers within the system of interconnection of registers via the platform.

4. Time limits. Costs. Free availability of information As mentioned above, exchanging information is to be made “without delay” but the time limits are design in the article 2a) amending Directive 2009/101/EC so that national legislator can appreciate correctly the necessary changes to be made in the provision of the civil and commercial laws governing the activity of trade registers. According to those new provisions, Member States shall take the measures required to ensure that any changes in the documents are entered in the competent register and are disclosed, in accordance with Article 3(3) and (5), normally within 21 days from receipt of the complete documentation regarding those changes including, if applicable, the legality check as required under national law for entry in the file. Member States shall ensure that up-to-date information is made available and shall provide the information required for publication on the European e-Justice portal, with the observation that the Commission shall publish that information on the portal in all the official languages of the Union. The exchange of information between registers shall be free of charge and the fees charged for obtaining the documents through the system of interconnection of registers shall not exceed the administrative costs. Member States shall ensure that through the system of interconnection of registers will be available free of charge the name and legal form of the company; the registered office of the company and the Member State where it is registered; the registration number of the company or any other further documents and particulars chosen by Member State. In regard of the funding of the system of interconnection of registers, it entails participation by the Union and by its Member States in the financing of that system. According to the principle 24 of the Directive 2012/17/EU the Member States should bear the financial burden of adjusting their domestic registers to that system, while the platform and the portal serving as the European electronic access point should be funded from an appropriate budget line in the general budget of the Union. Maintenance and functioning of the platform shall be financed from the general budget of the Union and may be co-financed by fees for access to the system of interconnection of registers charged to its individual users(article 4d

inserted in Directive 2009/101/EC). By means of delegated acts and in accordance with article 13a, article 4d gives the power to the the Commission to adopt rules on whether to co-finance the platform by charging fees, and, in that case, the amount of the fees charged to individual user. A delegated act adopted in the conditions of article 4d, shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object.

5. BRIS Project The scope of the new system, Business Registers Interconnection System (BRIS), is to increase the confidence in the European Single Market, to ensure a safer business environment for consumers and also for business partners, and to provide a higher legal certainty regarding the stored data in the trade registers. The BRIS project represents the convergent action of DG MARKT, DG JUST and DIGIT and covers European Central Platform (ECP), interconnection of the domestic business registers with this ECP, and the connection of the ECP with the e-Justice Portal that will become the European access point for searching information on companies in the interconnected business registers. The role of each of the components is as follows: European Central Platform will organize the traffic between the e-Justice Portal and the domestic business registers, data about company is indexed in ECP which maintains the relationships between companies and their foreign branches in order to send notifications only to those domestic business registers that are concerned, and to facilitate the display in the search results of data on a company’s foreign branches and at last, on the e-Justice Portal will be made the payment for the information that is not free of charge. The three systems need to collaborate so that the e-Justice portal should offer the search module in order to disclose information, and provide access to payment facilities, facilitating mechanism will enable the communication between the e-Justice portal and the BRs, and between the BRs and the domestic BR systems should store and provide access to domestic information about registered companies and also are responsible to act on notifications received from other national business registers. BRIS system should cover several business needs: the need for a search facility allowing users to search in the whole of the EU and the need for a mechanism to interconnect the business registers of the Member States allowing them to inform each other in case of cross-border company mergers and of companies being strucked of. In order to make the communication and the research easier and clear for all interested parties, new paragraphs were added in article 1 of the Directive 89/666/EEC with the idea of finding a common point of identification of the company so that the article stipulates that Member

States shall ensure that branches have a unique identifier allowing them to be unequivocally identified in communication between registers through the system of interconnection. The elements to be comprised in the structure of that unique identifier shall make it possible to identify the Member State of the register, the domestic register of origin and the branch number in that register, and, where appropriate, features to avoid identification errors.

6. Administrative burdens Over 112 000 branches registered in EEA countries belong to companies registered in different countries. In the field of the Cross-Border Mergers Directive, the United Kingdom reported four inbound and four outbound mergers in 2008. In 2009, one inbound and eight outbound mergers took place and so far in 2010 there have been six and seven respectively. In Estonia the figures are three inbound and one outbound in 2008, four and five in 2009 and one and none so far in 2010.¹⁰ In some calculations, the cost of disclosure of accounting documents of the company of the branch was estimated at EUR 304 million a year and disclosure of information on the address, activities, trade register, name and legal form of the branch was estimated at EUR 43 million. Improving interoperability between countries within these areas will create the possibility of reducing not only these administrative costs but also waiting time. In cases of crossborder mergers where business registers do not currently communicate directly, the companies will still need to notify the former register themselves. Estimates suggest that this costs between EUR 8 and EUR 1 200 each time, out of which around 75 % are considered to be due to administrative burdens. In cases where the former register is notified by the new register, the lack of agreement on and standardisation of the technical details of the notification result in more time being spent on the registration on the part of the registers. The exact figure will depend on the extent of uncertainties in each individual case and the need for clarifications and translations.¹¹

7. Implementing the Directive – stages at EU level

The Directive 2012/17/EU will be implemented in different stages: by 7 July 2014, Member States need to transpose into national law those provisions that are not impacted by the specification of technical details for the system and by 7 July 2015 the Commission will have to adopt the implementing acts including the technical specifications for BRIS. No later than two years after the adoption of the implementing acts Member States will have to ensure interoperability of the business registers via the central platform and

transpose into national law the remaining provisions (as per Art. 5(2) of the directive). As can be observed there are two transposition levels so that Member States will have to communicate twice the national law provisions. Through implementing acts, the Commission shall adopt, according to article 4 c inserted in the Directive 2009/101/EC the technical specification defining the methods of communication by electronic means for the purpose of the system of interconnection of registers; technical specification of the communication protocols; the technical measures ensuring the minimum information technology security standards for communication and distribution of information; the technical specification defining the methods of exchange of information between the register of the company and the register of the branch; the detailed list of data to be transmitted for the purpose of exchange of information between registers, as referred to in Article 3d of the Directive, in Article 5a of Directive 89/666/EEC, and in Article 13 of Directive 2005/56/EC; the technical specification defining the structure of the standard message format for the purpose of the exchange of information between the registers, the platform and the portal; the technical specification defining the set of the data necessary for the platform to perform its functions as well as the method of storage, use and protection of such data; the technical specification defining the structure and use of the unique identifier for communication between registers; the specification defining the technical methods of operation of the system of interconnection of registers as regards the distribution and exchange of information, and the specification defining the information technology services, provided by the platform, ensuring the delivery of messages in the relevant language version; the harmonised criteria for the search service provided by the portal; the payment modalities; the technical conditions of availability of services provided by the system of interconnection of registers; the procedure and technical requirements for the connection of the optional access points to the platform.

Conclusions

“The significance of the data held in different business registers can vary and that this can in turn have legal consequences, not only for companies but also for their workers and for consumers, that may vary from Member State to Member State” stated the European Parliament in the resolution of 7 September 2010 on the interconnection of business registers. As the Internal Market and Services Commissioner

¹⁰ Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2010, http://ec.europa.eu/internal_market/company/docs/business_registers

¹¹ Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2011

Charlie McCreevy declared when the public consultation on identifying better ways to cooperate between business registers was released by the European Commission: "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."¹²

The steps referred to in the Green paper elaborated by the Commission in 2009¹³ were taken. All Member States shall participate in the

decisional process having reliable information on companies, in all official languages of the EU, in a centralized manner and at the same quality of service across the EU. We can only hope that strengthen cooperation in the case of cross-border procedures, such as cross-border mergers, seat transfers or insolvency proceedings, interconnection of business registers and cross-border access by electronic means to business information will ensure an appropriate degree of transparency and legal certainty in the markets all over the EU and will reduce administrative burdens from the shoulders of European contributors.

References

- Treaty on European Union, Consolidated version, <http://www.eur-lex.europa.eu>
- Gabriela Fierbințeanu, "Publication procedures and communication made by commercial registers in cross-border commercial activities", 2013, cks.univnt.ro/uploads/cks_2013_articles
- 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, eur-lex.europa.eu
- European Parliament resolution of 7 September 2010 on the interconnection of business registers, <http://www.europarl.europa.eu>
- Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012
- Directive 89/666/EEC of 21 December 1989
- Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005
- Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009
- Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2010, http://ec.europa.eu/internal_market/company/docs/business_registers
- Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2011
- Getting better access to a company information: Commission consults on the interconnection of business registers, <http://europa.eu/rapid/press-release>
- Commission of the European Communities, Brussels, 4.11.2009 COM(2009) 614 final, GREEN PAPER The interconnection of business registers, http://ec.europa.eu/internal_market/consultations/docs/2009/interconnection_of_business_registers/green_paper_en.pdf

¹² Getting better access to a company information: Commission consults on the interconnection of business registers, <http://europa.eu/rapid/press-release>

¹³ Commission of the European Communities, Brussels, 4.11.2009 COM(2009) 614 final, GREEN PAPER The interconnection of business registers, http://ec.europa.eu/internal_market/consultations/docs/2009/interconnection_of_business_registers/green_paper_en.pdf