

# THE ARCHITECTURE OF EU COMPANY LAW PROVISIONS PROTECTING WHO, WHAT AND HOW?

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## Abstract

The stakeholder-oriented nature of EU company law can be observed in the case of public or private limited liability companies. In the case of the former, protection of shareholders also comes in the forefront and it can be found through the information model legislation, demanding all relevant information to be presented to the shareholders, on the basis of which the shareholders take on the responsibility for their decisions. This shift of responsibility for protection from legislative provisions in the hands of company law actors can be also observed in the case of provisions addressed to creditors, albeit in limited form. The interplay of the two legislative approaches - information based Anglo-American approach and (minimum) harmonization Continental approach can be seen throughout the body of EU company law, including CJEU case law, but the use of one or another does not always depend on the EU legislative policy. The lack of harmonization of some basic company law principles across the national laws of Member States contributes to these shifts of legislative approaches and it does not always coherently follow the aims and goals of EU legislature concerning the internal market and international competitiveness of European businesses. In particular, competitiveness that is based on comparative advantages and not merely on size is at the present moment not promoted at the EU level. A company that focuses on internal growth and decides to change its legal form to public limited liability company faces a vast shift in applicable EU company law provisions that entail high costs, not providing a visible initiative for businesses to undertake such path. A shift in policy considerations would be advisable to achieve the goal that arose in the last decades at the EU level: since internal market is today insured, international competitiveness is next on the agenda and the same policy considerations as they were provided in the 1950s cannot hold today in the changed circumstances.

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Sui Generis nature of EU company law and the influence of related provisions on its protective nature

The EU company law is sui generis type of company law as far as its composition and substance is concerned and EU codex in this field is simply not available. Moreover, its exact substance is determined by national laws of 28 EU Member States, which furthers the diversity of protective instruments and policies. In addition, the CJEU case law and influence of rules in other fields of EU law (capital markets law, corporate taxation law) add its flavor to this equation and at the first glance, deducting a clear picture on its protective nature is close to impossible.

All these rules were not created with unified policy considerations; three phases can be distinguished historically in the EU company law creation[1], creating a net of protective provisions building a policy of protection. But the protective nature spontaneously developed in these phases does not necessarily coincide with this raw phase division. E.g. in the first phase, ending in 1990s, the pro-active role of the EU legislator could be observed and majority of the company law directives were at least envisaged if not passed[2], and this may point in the direction of Continental (German) style of corporate legislation[3] with the protection of shareholders, creditors and others, but a closer look at the enacted provisions shows different tendencies. Even though the First Company Law Directive encompasses substantive rules on the power of representation of the organs and the validity of the transactions entered into by companies with limited liability, the compulsory disclosure provisions seem to be its center of gravity. But the information function of corporate law is not a characteristic of Germany style of company legislation; it is more typical for Anglo-American corporate law theory of company as nexus of contracts[4] and it puts more responsibility on shareholders and creditors to act on the basis of the information given than the Continental-style legislation does. This interaction of both models is seen throughout the EU company legislation and it creates a sui generis protective nature of EU company law as its own EU-style legislation. Determining this spontaneously created protective policy contained in the EU company law legislation is the aim of research that surpasses the scope of this article.

In substance, the EU never developed a truly EU nature of protection of “members and others”. The aim of EU company law has always been the creation and reinforcement of the Internal Market, a task carried through the primary EU legislation with the provisions on the freedom of establishment[5] and the famous Article 50(2)(g) TFEU giving EU the competence to regulate the field of company law by “[c]oordinating to the

*necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms... ”.* What has been regulated therefore through EU’s facilitation of the freedom of establishment in secondary EU legislation were the safeguards and protective measures already determined at the level of national Member States. Even though these policy considerations belong to national Member States, the sum of them ultimately created EU’s own policy considerations, even if only incidentally. Those policy considerations will be extracted and gathered throughout further research.

For this spontaneously built EU protective policy to be determined with precision, the interpretation of the freedom of establishment in CJEU case law is of relevance; not only in company law cases, but also in tax law cases. CJEU interpretations of the secondary EU legislation add to this equation.

Since EU company law instruments in majority regulate public limited liability companies[6], the sphere of law that regulates their legal position from another point of view needs to be included in the analysis, e.g. parts of capital market law. Indeed, since public limited liability companies need to comply also with the rules of EU capital market law[7], their conduct on the market and their decisions on the form of the company and content of the business they are carrying on depends also on those highly-harmonized capital market rules[8]. At first glance those rules are in majority offering to (potential) shareholders and creditors vast information that can enable informed decision-making on their side[9], which suggests that the provisions on this legislative field lean more in the direction of Anglo-American style of company regulation. Whether this proves true or not is a matter of further research, but if so, this would suggest that the regulation of public limited liability companies is leaning more in the direction of Anglo-American policy of protection in company law.

On the other hand, the regulation of private limited liability companies is so scarce in the EU that indications as to the nature of regulation of this type of companies needs to be deducted from whatever regulation exists at the EU level, again combined with national company law legislation. This is a difficult task, since the EU today encompasses 28 Member States with divergent national company laws, in majority non-harmonized. Since in EU (in contrast with USA and to a certain extent UK) small and medium sized enterprises are prevailing[10], in majority in the form of limited liability company, here legal standards on control transactions or investor protection are not a part of the core principles. In this field, different national solutions need to be explored and summed up to a general EU-wide protective nature in the case of private limited liability companies.

The summary of all of these protective measures contained in different building segments of EU company law creates and represents the sui generis EU protective nature. This nature was arrived to by agreement of EU Member States and was carried out in the EU throughout decades, so it is imaginable to envisage the ability of applying such protective model also to new measures and directions in EU company law. The competitiveness of EU businesses worldwide should be seen as the next objective of EU company law, after ensuring the creation of the Internal Market, and at its best, remodeling some of the failed Company Law Directives under these “common protective principles” might actually bring them to life. A shift in EU company law policy is needed and this time it should focus on small and medium size enterprises as the cornerstone of EU business reality and the basis for its future development.

[1] Pro-active harmonisation phase from 1968 until 1990s, more Anglo-American oriented era until the financial crisis in 2008 and post-financial crisis law making oriented more towards Continental law models

[2] In the period from year 1968 until 1990 First, Second, Third, Fourth, Sixth, Seventh, Eight and Eleventh Company Law Directives were passed, only the Fifth Company Law Directive on the structure of public limited liability company and Ninth Company Law Directive on the law of groups failed and were not enacted until today

[3] See more in J.J. du Plessis et al., German Corporate Governance in International and European Context, Springer-Verlag Berlin Heidelberg 2012

[4] See more in Bratton, William W., "The "Nexus of Contracts" Corporation: A Critical Appraisal" (1989). Faculty Scholarship. Paper 839. [http://scholarship.law.upenn.edu/faculty\\_scholarship/839](http://scholarship.law.upenn.edu/faculty_scholarship/839)

[5] Articles 49 and 54 TFEU

[6] At this point comments on the feasibility of such policy orientation to regulate in majority public limited liability companies are omitted, since they deserve a deeper analysis, not appropriate at this point

[7] More strongly harmonized field of EU law than company law

[8] See more in Grundmann, Stefan; Möslin, Florian (2007) European company law. Organization, finance and capital markets. Antwerpen, Holmes Beach, Fla.: Intersentia; distribution for North America : Gaunt (Ius communitatis series, v. 1), p. 3-9

[9] E.g. the detailed demands for the contents of prospectuses in the Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, as regards the implementing powers conferred on the Commission, OJ L 345, 31.12.2003

[10] Roth, Günter H.; Kindler, Peter The spirit of corporate law. Core principles of corporate law in continental Europe, p. 5

[11] The failed Fifth and Ninth Company Law Directives can be remodeled on the basis of these EU protective principles and presented as such to the Member States, which already built in the past the protective nature of EU company law as it stands today, making it politically more acceptable to move forward in the field of EU Company Law programme

## I.

Are the Treaties alone revealing on the interests protected in EU?

### a) Articles 49 and 50(2)(g) TFEU

Even if the Article 49 TFEU brings about the freedom of establishment as the cornerstone of the EU company law and Article 50(2)(g) TFEU provides a tool to EU legislator to legislate in this field, EU legislator still has to act in this field in accordance with the principle of conferral[1], the principle of subsidiarity[2] and the principle of proportionality[3]. This in turn means that the protected interests cannot be determined solely at the level of the EU law, but must be developed in accordance with national company laws within the scope of EU competences to the extent necessary to achieve the goal of EU legislation in the field of company law. Already on the basis of the freedom of establishment therefore the EU legislator is limited as to what interests he may find worthy protecting at the EU level.

Majority of the EU company law instruments were enacted on the legal basis of Article 50(2)(g) TFEU, under which the Council and European Parliament act by means of Directives for “...[c]oordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms with a view to making such safeguards equivalent throughout the EU.” The wording of the this legal basis itself suggests that the safeguards necessary for protection of “members and others” already exist at the level of Member States and the EU role is to make those equivalent throughout the EU. What is obvious though from this legal provision is the fact that the EU never envisaged company law as solely protecting shareholders (“members”), but that the stakeholders are to be taken into account too (“others”).

b) Articles 114 and 352 TFEU as a possible tool to develop EU's own protective policy?

Besides Article 50(2)(g) TFEU, Articles 114 and 352 TFEU have also been used as a legal basis for EU acts in the field of company law. The EU competence under Article 114 TFEU is based on the approximation of Member States’ rules having as their objective the establishment and functioning of the internal market. Here the EU competence seems to be broader; the scope of Member States’ rules that EU legislation can approximate is broader and also the “approximation” seems a more vague term than “making safeguards equivalent”. Under these conditions the EU seems to determine more freely whose interest are to be protected through company law in that it decides to which standard it is going to approximate those Member States’ rules. On the other hand, the *Tobacco Advertising I*[4] case made it clear that legislating under this article requires that the national rules on the topic must differ substantially and that the general and complementary EU powers[5] cannot be used to regulate a matter falling

clearly within the ambit of more specific provision. Moreover, the second paragraph of Article 114 TFEU already excludes from the ambit of this article the rights and interests of the employees. So on the basis of this article, the EU legislation could only express its preferences on the protection of shareholders, creditors and third persons, to the exclusion of employees.

Another solution for expressing EU protective nature seems to be offered by Article 352 TFEU, under which the EU legal forms were created[6]. This article is intended to fill the competence gap where no specific provisions of the Treaty confer on the EU institutions the power to act and such powers are necessary to enable the EU to carry out its functions to attain one of the objectives of the Treaty[7]. Since Article 50(2)(g) TFEU represents such specific provision for enacting the protective measures for “members and others” in EU company law, this legal basis can hardly be useful for the EU to elaborate on its own protective EU company law provisions.

c) The power of the openness of Article 50(1) TFEU

On the contrary, what could be used for the EU to determine its priorities in protection mechanism of EU company law is Article 50(1) TFEU. As the CJEU already stated in *Diahatsu*[8], Article 50(2)(g) TFEU only sets out a non-exhaustive list of measures to be taken in order to attain freedom of establishment within the meaning of Article 50(1) TFEU. Since Article 50(1) TFEU confers on the Council and European Parliament the power to adopt directives to attain freedom of establishment, the EU legislator (limited by the three principles mentioned at the beginning of the paragraph) can enact measures promoting legal certainty and building confidence if such measures lift hindrances to companies exercising their freedom of establishment. This article has already been used in the adoption of the Takeover Directive[9], in which the hindrance was seen in impediments “to the acquisition of shares of an existing company” (protecting (potential) shareholders) and in the adoption of the Shareholder Rights Directive[10], where the effective shareholder control was seen as a prerequisite to sound corporate governance and as helping to attain the freedom of establishment[11]. Therefore, if “hindrances” were already interpreted in such a broad way, these might also be represented by insufficient protection of members and third parties, leading to the race to the bottom by Member States, as recognized in 2002 Report on a modern regulatory framework for company law in Europe[12]. Under these conditions the EU might set the bar of sufficient protection as high as it deems necessary (principle of proportionality) to ensure the efficient exercise of companies’ freedom of establishment across the EU. The architecture of the protection envisaged until today, as it will be revealed by further research

of the substance of secondary EU legislation, and under the measures envisaged in the near future, will reveal the protective preferences that could be pursued through the means of this article for creation of proper sui generis EU protective policy in the field of EU law.

### **CJEU interpretation on the freedom of establishment as an influence**

As far as the CJEU decision making is in question, its contribution to the developments in the field of EU company law is undeniable. Not only did it interpret the secondary EU company law legislation and its provisions, but it also interpreted multitude of national legal measures on the basis of primary EU legislation (especially the freedom of establishment) in multiple fields of EU law, not solely in pure EU company law cases.

For the purpose of this research, the CJEU's decision-making can be divided in three groups: its interpretation of the Treaty-based freedom of establishment in company law cases (mainly when judging on Member State's refusal to allow the move of company's de facto head office), its interpretation of the freedom of establishment in tax law cases and last but not least, its interpretation of secondary legislation in the field of EU company law. While the first two are going to be debated in the scope of this paper, the last one is going to be omitted at this point, since it presupposes a thorough review of the content of secondary EU acts in the field of company law and is therefore too early for its analysis.

a) Does the CJEU take position on whose interests to protect with EU company law?

The most renowned and quoted EU company law cases date from the year 2000 on, coinciding with the second phase of the development of EU company law, in which more tendency toward Anglo-American model can be noticed. While generally new ideas and more hands-off approach developed at the level of EU legislature, the CJEU on the other hand made sure that the Member States are allowed to use their jurisdiction in EU company law only to the extent and in a way as compatible with the Treaty based freedom of establishment and with applicable company law directives.

*Centros*[13] showed that even when EU citizens use their freedom of establishment solely to choose the most lenient national law to establish a company, the Member State with less lenient company law provisions (in this case Denmark with its minimum capital requirements) cannot prohibit the establishment of such a company. CJEU explained that a Member State is allowed to restrict the freedom of establishment only if there is no other way of countering fraud or protecting creditors. CJEU here specifically stated that the creditor protection is compatible with the spirit of EU company law but that it has to be carried out in the least intrusive manner regarding the freedom of establishment. This statement combined with the

fact that the CJEU also reminded Member States in this judgment of their option of adopting EU harmonizing legislation in this area of company law shows EU general acceptance of the possibility of EU wide protective policy in this field, obviously including not only shareholders, but also creditor protection. By the inborn nature of the Internal Market, if these safeguards would be harmonized throughout the EU, the question of breach of freedom of establishment would not emerge at all. In this case, regarding the content of creditor protection under such non-harmonized field, CJEU saw as a less invasive measure “...[m]aking it possible in law for public creditors to obtain the necessary guarantees.” By this statement, the CJEU took a stand that national legislation can perform the information function, but that the precautions that are to be taken are the responsibility of the creditors, which must inform themselves about the fact that the company is regulated by another set of rules, different from the national ones. These facts seem to be indicating that the EU is inclined to the Anglo-American system (based on the information function) due to the lack of EU harmonization in this field but that it would prefer the Continental approach of mandatory provisions, for which Member States’ agreement would be needed.

*Überseering*[14] decision built upon *Centros* and brought more legal certainty for creditors and shareholders across the EU since it clearly determined the obligation of Member States to recognize the legal standing of companies lawfully formed in another Member State. This ensures the enforcement of creditors’ and shareholders’ rights and therefore their practical utility. Their protection under EU law would otherwise be left without substance. Moreover, *Inspire Art*[15] reminded Member States that no additional conditions can be required from company lawfully incorporated in another Member State in order for it to do business on the territory of this Member State. CJEU reiterated that by Member States not taking harmonizing actions in the field of protective measures, they have to accept that the companies doing business on their territory might have lower protective standards regulating companies’ conduct and that in this case shareholders and creditors alone need to inform themselves on the content of this foreign law. Again, this solution seems to correspond more to the Anglo-American model but again it seems that only as a consequence of the lack of common EU standards of protection and not an EU preference.

When we take a look at *Cartesio*[16] decision, such limits are clearly shown in the fact that a Member State is allowed to condition the application of its law to a company on the fact that the company has to retain its registered office on its territory. The Member State therefore does not need to take on the burden of applying its protective provisions on a company with no real connection to this State. The equilibrium of protective provisions in this Member State is therefore taken into account and once



again here the CJEU reiterates the fact that this issue needs further legislative measures at the EU level.

In *Sevic*[17], on the other hand, CJEU explained that company transformation operations constitute a “[p]articular method of exercise of the freedom of establishment...” and placed the protective role of company law in the Member State in which the new, restructured company is registered. Once again, due to the lack of harmonization in this field, the creditors, shareholders and also employees of the company under reorganization are all of a sudden facing a different set of protective rules. This can be either beneficial or detrimental to them, but the fact is that it does not contribute to legal certainty and it does have an impact on decision-making of “members and others”, which shows that also in this point of view, harmonization would have been beneficial. Such uncertainty attributes to reluctance to broaden one's business across the EU to the detriment of EU competitiveness on the world markets.

b) The outcome under CJEU wording in company law cases

What can be seen from this brief overview of CJEU case-law in the field of EU company law is that the protection envisaged for “members and others” in national company laws of different Member States stays untouched if it is in compliance with the freedom of establishment and with secondary EU legislative measures, in principle ensuring information flow sufficient enough for those “members and others” to know what their level of protection in a particular case is. The CJEU is consistently reminding the Member States that further harmonization measures in this field are advisable, which shows that the current orientation towards Anglo-American information model is not a preferred path under its view. The tendency to what the majority of the Member States is and was historically inclined, the Continental model of mandatory provisions, can be noticed. The only crucial thing missing in achieving this common protective policy is what further research on this topic will do: a comprehensive overview of the protective company law provisions as they stand today and as envisaged in the proposed future measures.

c) The correlation between the protective role of EU company law and CJEU decisions in taxation of companies and shareholders

The Court has dealt extensively with the interpretation of the freedom of establishment also in preliminary rulings on corporate taxation. Its decisions on corporate income tax also brought landmark judgments on the equal treatment of branches and subsidiaries, the cross-border compensation of losses and on the taxation of cross-border services. Achievement of the internal market was in the forefront; the decisions on the taxation of individual and corporate shareholders also contributed to it[18]. Although the Court is not expressly dealing in these cases with the question of

protection of “members and others” in company law, its decisions nonetheless bear consequences on the nature and/or level of protection already contained in provisions on EU company law, since it creates a guarantee to a certain extent of the same tax treatment for companies deciding to do business cross-borders as if they would be doing business in one Member State. Moreover, their freedom of secondary establishment is today a matter of settled case-law[19]. What needs to be taken a look at is how this influences “members and others” in these companies.

d) The Court acts proactively in the field of taxation

To understand the nature of the influence of these decisions on “members and others”, the structure of case law on corporate taxation and on taxation of corporate shareholders is revealing in the sense that it shows the efforts of the Court to ensure a level-playing field among purely internal and cross-border situations in the EU and by doing so ensuring even protection and opportunities for “members and others” across the EU.

As far as the case law on corporate taxation is concerned, the CJEU decisions on the basis of the freedom of establishment usually demand equal treatment of resident and non-resident secondary establishments[20] if they are in “comparable situation” from the side of home as well as host State[21]. For instance, what is demanded from the side of the EU law in the host Member State is that it must treat a branch by a non-resident company in the same way as a branch of domestic company. Moreover, the host Member State must also treat equally subsidiaries of non-resident parent companies and those of resident parent companies[22]. This first and foremost brings advantages to companies, which can choose the most appropriate form of business-making in other Member States. If differential tax treatment cannot influence decision-making in terms of where to start or continue the business of the company in question, the business can expand more rapidly. Not only that; since more burdensome tax provisions for cross-border business making are limited to exceptional cases by CJEU case law[23], this guarantees that cross-border business making will not be tax-wise disadvantageous for the company and it allows it to spread its business and growth faster and more efficiently than in case where such discrimination would be allowed. Not only can this bring higher return to the shareholders, which will incentivize them to support such cross-border growth, it can also reassure the creditors about their payment, since more financial assets are kept in the company that decides to spread cross-borders, than it would be the case if tax discrimination would be allowed. In this case, even higher employee protection can be envisaged in terms of more predictable and stable business-making, bringing possibly with it more stable employment. All in all, the business growth in the EU becomes more “user-friendly”, enabling the EU world-wide competitiveness to become reality.

The home State is also obliged to treat branches in other Member States equally as branches created on its territory, if all the possibilities to carry-over the losses in the host Member State have been exhausted[24]. In this field therefore timing differences can be detrimental to foreign established entities and due to this flexible CJEU decision-making, shareholders of these companies can be dissuaded from creating branches in other Member States, in turn influencing not only the Internal Market but more specifically investment decisions of the company in question. Here shareholders cannot use the benefit of limited liability throughout the EU efficiently and the creditors might be more reluctant to enter into the business with foreign branch exposed to the option of non-carrying-on of its losses.

Since subsidiaries differ from branches in that the former have its own legal personality, the CJEU case law on foreign subsidiaries differs from the one on branches. In case of subsidiaries, inequality between subsidiaries of a “home” company and subsidiaries of a “foreign” company is unjustified under the freedom of establishment[25]. Besides the cases where this restriction on the freedom of establishment pursues legitimate objective and is justified by imperative reasons in public interest[26], these decision again create incentives for shareholders to expand the company’s business and more willingness from the side of creditors to enter into the business with a subsidiary of a “foreign” company, due to higher legal certainty in the field of company taxation as to what the financial position of such subsidiary is. The common EU business market and market for corporate control as well as general cross-border operations is also incentivized through financial encouragement, attributing to the use of the protective provisions offered by the EU legislature for EU wide operations.

e) Shareholder protection strengthened: a specific CJEU agenda or simply a result of special shareholder role in public limited companies?

The CJEU case law also touched upon taxation of shareholders across the EU. Before analyzing the decisions, one may ask if the shareholders benefit from these CJEU judgments more than the “others” in company law, e.g. creditors and employees. But since neither of those two categories are taxed on their participation in a company (besides income tax of employees, not connected with corporate taxation), their exclusion from separate CJEU decision-making seems natural.

Regarding outbound dividends, the CJEU took under scrutiny the withholding tax systems as well as tax credit systems. If a Member State levies a withholding tax only on dividends paid to foreign parents and not to domestic parents, this constitutes a restriction on the freedom of establishment[27]. Subsidiaries are therefore taxed the same no matter where their parent company comes from, which places shareholders of such

subsidiaries on the same level and reinforces the incentives of their shareholders to keep and/or create business cross-borders. The decisions on tax credit systems follow the same line; when a subsidiary of foreign company is liable to tax on its dividends, then a subsidiary of home company needs to be treated the same (both taxed or both exempted)[28].

A Member State is also not allowed to provide for exemptions only for dividends received from a domestic company but not for the ones received from a foreign company[29]. Although this decision was taken on the basis of the free movement of capital[30] guaranteed under the Treaty, it protects the financial interests of shareholders in multi-national companies operating through subsidiaries in multiple Member States and therefore their incentives for cross-border business making. The benefit of limited liability of such shareholders is therefore better utilized. The same goes for the EU prohibition of determining a different tax rate on foreign and domestic inbound dividends[31].

Shareholders' incentive to invest in cross-border business and to maximize the benefit of their limited liability under company law is furthermore protected by the CJEU decisions on the tax treatment of acquisition, holding and alienation of shares. Shareholders of EU companies which are resident in other Member States may not be excluded from tax advantages linked to the acquisition of shares[32] and the mere ownership of foreign shares may not be taxed in a discriminatory manner[33]. The possibility of deducting the costs connected with participations in foreign companies must be given, if such possibility exists for participation in domestic companies[34], not to hinder the creation of subsidiaries in other Member States. Moreover, since capital gains are often taxable in the country of residence of the shareholder at the moment of the disposal of the shares, this can lead EU residents to transfer their residence before selling their participations to benefit from a more favorable tax regime. But this still does not allow Member States to tax the shareholders upon the move on unrealized gains and it is said to be contrary to the freedom of establishment[35]. This brings additional possibilities for the shareholders to pursue their financial goals and ameliorate their financial positions also by the means of their own actions. Does this fact show CJEU inclination towards the interests of shareholders? I think that this deduction would be a bit far-fetched; the CJEU intention is to keep the Internal Market intact and to this extent in this particular case, the shareholders' interests are incidentally further promoted.

f) And the winner under CJEU case law is...the Internal Market

As seen, CJEU decisions in this field facilitate the freedom of establishment of companies and the creation and development of the Internal Market. Although this first and foremost benefits the EU companies in

general, it also facilitates shareholders' benefit of limited liability and provides incentives for them to be involved in cross-border EU companies. This case law provides the cross-border businesses in EU with a higher level of legal certainty, which might encourage creditors to engage in business with companies across the EU to a greater extent than they would before the CJEU clarifications were made. The internal as well as external growth of businesses is therefore facilitated, bringing prospects for further developments in this direction.

Moreover, with its decisions on shareholder taxation, CJEU further protected incentives of EU shareholders to invest across the EU and to maximize the utility of the benefits granted under EU as well as national company laws.

In the end, CJEU case law in the field of taxation does not bring new protective measures for “members and others” in the EU law, but it does make the already existing protective measures effective and used to their full potential across the EU, which is an important feature of the building process of EU protective policy in EU law. Without such firm interpretative actions on the side of the Court the provisions of EU law could be rendered empty and their wording just an unexploited option on a paper.

### **Secondary EU legislation as the protective substance at the EU level**

With no systematic EU company law, in order to be able to ascertain its protective nature, its individual provisions need to be looked at, including their amendments and subsequent interpretations of CJEU case law.

Looking at the historical developments of the legislative process on this subject matter, one can notice that the first idea must have been one of harmonization, since all the envisaged EU company law directives carry numbering in their names: from the First to the Fourteenth Company Law Directive[36]. This phase of EU company law can be limited in time as from 1968[37] until around 2002, the time when the Commission created its 2002 Communication[38]. Out of the fourteen envisaged measures five were not successful in this period: the Thirteenth Company Law Directive on Takeover Bids, the Tenth Company Law Directive on Cross-Border Mergers, the Fourteenth Company Law Directive on Cross-Border Transfer of the Registered Office, the Fifth Company Law Directive on the structure of public limited liability companies and the Ninth Company Law Directive on group law. The latter three were indeed never enacted. On this basis, while searching for the nature of protective measures in the EU company law, the measures enacted (and as amended) should be first taken into account. Moreover, does the jump from the first phase of harmonization in the second, post-year 2002 phase of soft law-making, model rules, battle among the Anglo-American and Continental law and competition among

national company laws show also a switch in the EU company law policy of protection? And last but not least, in the last phase of EU company law, triggered by the world-wide financial crisis, brought in the forefront more national protectionism and at the same time more interventionism also from the side of the EU, especially in the financial sector, the fueling source for EU companies. Was this change brought about by heavier inclination towards the Continental law and its mandatory law on protection of stakeholders? Or was this just a reactionary move to contain the damage done by too liberal legislature in the field of company law outside the EU?

a) The protective nature as build by the existing secondary legislation

Although at first glance the First Company Law Directive[39] is more information oriented due to its disclosure demands, a closer look reveals that it contains multiple minimum protection standards in its mandatory provisions[40] that lean more towards the Continental system of protection. It is not oriented towards shareholders' protection but more towards third party protection; the data demanded with Article 2(1) of this Directive are more about the protection of creditors and potential shareholders, since the shareholders are in any case those naming the directors or are gathering all these information through the general meeting. Since the publication of all accounts was demanded for public and private limited liability companies in all Member States, this provides additional protection for company's creditors and potential shareholders. And last but not least, the demanded disclosure of information about directors under this article is aimed straight at protection of third parties. The protection of third parties is moreover seen in the first paragraph of Article 9, determining that ultra-vires transactions bind the company. ECJ itself made clear in *Rabobank*[41] that the mandatory provisions for protection of third parties are preferred in the scope of this Directive, while stating that Article 9(1) is *lex specialis* to Article 3(5), which determines the disclosure requirements. Under this Directive, the reasons for nullity of company are extremely limited and by this shareholders' limited liability and creditors' interests are protected. The nature of the First Council Directive changed slightly with the amending Directive 2003/58/EC, which brought about making company information more easily and rapidly accessible for interested parties through electronic means[42]. Emphasis under the amended Directive is more on its information function, but the majority of the Directive still contains mandatory rules on content of the disclosure, which is also visible in the fact that in case of discrepancy between the original and the voluntary registration in additional languages, third parties may still rely on the voluntary registration if they were not aware about the existence of the original version[43]. Furthermore, the interpretation of CJEU of Article 6 shows this continental law nature of protection of third parties even clearly.

In *Diahatsu*[44] it ruled that a Member State is not allowed to restrict the members or creditors of a company, the central works council or the company's works council the right to apply for imposition of the national penalty in the event of failure by a company to fulfill the obligation of disclosure of annual accounts. The enforcement of the provisions of the First Council Directive is therefore essential and the possibility of demanding such enforcement must be given to shareholders, creditors and employees, as interpreted by the CJEU.

The Second Council Directive[45], although focused only on public limited liability companies[46], seems also to be closer to exhaustive code than a minimum standard, since Member States can supplement its rules by stricter provisions only where express authorization to such extent has been given in the Directive. Moreover, as CJEU made clear in *Pafitis et al.*[47]that the Second Council Directive remains applicable to companies in financial difficulties even if subject to special collective liquidation or rejuvenation procedures even if the company's shareholders have been temporarily divested of their powers. Therefore the main focus of this Directive is not the information function but mandatory provisions for all public limited liability companies in the EU (Continental model). The main protective focus seems to be on the potential shareholders and creditors, to that extent the following provisions need to be mentioned: Article 5 on the number of members of a company, payment for shares in Article 9, valuation of non-cash consideration in Article 10, serious loss of capital in Article 17, maintenance of capital in Articles 15 to 24a, limited acquisition by a company of its own shares in Articles 19 and 22 and finally reduction in capital in Articles 30 to 39 of the Second Directive. The shareholders of a company seem to be limited in their actions and not in the forefront of the Directive's protection, since under Article 15(1) the amount of possible distribution to shareholders is limited.

The Third[48] and Sixth[49] Council Directive on the other hand, dealing respectively with national mergers and divisions, seem to be more information-oriented, as under Anglo-American legislative approach. It contains mandatory provisions in majority ensuring information rights to shareholders to be able to make an informed and timely decision on the merger/division at the general meeting[50]. Draft terms of these operations need to be published at least a month before the general meeting to decide on the operation[51] and two sets of reports on these draft reports need to be provided: one from the boards of all the companies involved and one from the side of experts appointed by national administrative or judicial authority. Nevertheless, both Directives contain mandatory rules of substance too; the majority needed for the decision taken at the general meeting, shareholders' rights of inspection and the conditions where it is allowed to omit the general

meeting. Moreover, protection of creditors whose claims ante-date, but have not fallen due by the publication of the draft terms demands such mandatory provisions[52]. Since division entails more risks for creditors than a merger, additional protection is provided for them in the form of joint and several liability of the recipient companies if the creditors have not obtained satisfaction[53]. For protection of ‘members and others’, Member States must also determine civil liability of members of the company’s organ for misconduct in a merger or division and for the misconduct of experts responsible for drawing the report. The nullity of mergers and divisions is moreover subject to strict conditions contained in both Directives[54]. The general picture on these two directives is therefore reinforced protection for current shareholders and current creditors in a partially Continental and partially Anglo-American legislative approach.

In turn, the Fourth[55], Seventh[56] and Eighth[57] Council Directives will be examined together, since they are highly interconnected and they follow the same protective pattern. The Eighth Council Directive has been enacted in order for the Fourth and the Seventh Council Directive not to have limited effect due to divergent qualifications of auditors across the Member States. This Directive follows the Continental approach and in Articles 3 to 19 determines the conditions for Member States’ approval of auditors and requires publicity of information on such auditors in Article 22, and by doing so protecting potential and actual shareholders and creditors. The Seventh Directive builds on the provisions of the Fourth Council Directive on annual accounts, following the same principles contained therein and determining the conditions in which for the sake of clarity and ‘true and fair view’ consolidated accounts must be drawn up[58], while retaining the protective nature of the Fourth Council Directive. The Fourth Council Directive itself is in fact a compromise between the prescriptive continental approach[59] and pragmatic and flexible Anglo-American approach of accounting principles being subject to a general requirement of true and fair view[60]. Even though the CJEU has stated multiple times that the principle of ‘true and fair view’ was a primary objective of this Directive[61], this seems to be only the umbrella principle which is to be carried out by means of prescriptive provisions, further defining its content. The prevalence of the Continental approach can be observed through Article 31(1) on valuation on the prudent basis, Article 2(6) which provides that this Directive contains only minimum standards and the detailed prescription of the content of the annual accounts throughout the Directive. Those provisions protect primarily potential shareholders and potential creditors, which through obligatory publication of required annual accounts gain the necessary information to take an informed decision. This transparency increases general trust in the EU market and EU companies, attracts foreign



investments and ensures a level playing field among EU Member States' companies, since their annual reports become comparable.

The Eleventh Council Directive[62] on disclosure by branches is protecting third parties through (limited) disclosure; it must disclose information with a reference to the register of the company of which the branch is part. By the additional disclosure on its power of representation, its name and the legal form and any winding up or insolvency proceedings the creditors in the state of the branch are additionally protected. The nature of this Directive is closer to Anglo-American approach, since it is focused strictly on its information function and it puts the responsibility of protection on the protected parties themselves. On the other hand, in the Twelfth Council Directive[63] on single-member private limited companies, creditors' and shareholders' protection is not in the forefront; its purpose is more to offer additional means of encouragement for the creation and development of small and medium-sized companies. The protective measures under this Directive are completely in the hands of Member States[64].

The Stock Exchange Law Directive[65] on the other hand is in majority containing minimum harmonization rules to the benefit of investors; current and potential shareholders. It is meant to build up investor confidence through determining a body of mandatory rules for all the Member States. While the rules on admission to listing are determining the minimum conditions for equivalent protection for investors at the EU level, the rules on listing particulars are determining only the information to be disclosed for investors[66]. In this spirit the The Transparency Directive[67] demands a half-yearly report from listed companies in the EU, which tends to be oriented more towards the Anglo-American spirit of regulation, since only essential details are demanded. This mixture of methods for investor protection is nicely seen in the General Prospectus Directive, which is defining the contents of the prospectus where a listings is sought and only vaguely defines the content of information for prospectus where no listing is sought. This specific approach can be observed throughout EU company law legislation: regulating with more Continental approach public limited companies while using the more flexible Anglo-American approach for private limited companies. The exception to this rule can maybe be seen in the provisions on major shareholdings in Transparency Directive[68], which determines the minimum standards for investor protection through the information function: the acquirer is under obligation to notify the company and the competent authorities on his acquisition and then the company needs to disclose this information to the public. But no matter what the legislative approach in each of these Directives is, the ones protected with their provisions are (potential) shareholders.

And last but not least, the Thirteenth Directive[69] acknowledges the fact that the possibility of hostile takeover has considerable advantages for shareholders compared to mergers[70], so it protects them by giving them exclusive competence on the final decision about the takeover. The Directive balances the Anglo-American and Continental legislative approach, by protecting minority shareholders in the target company through information function at one hand[71] and by determining mandatory bid and its transparency through detailed explanation and publication on the other hand[72]. In this respect, the balance in the Directive seems to lean more in the direction of mandatory rules, if looked at the importance of the provisions[73]. Whatever the regulatory principle used, the protective principles contained in this Directive seem to focus on three groups of actors in company law: the shareholders of the target company[74] and the employees of the target and the bidding company[75]. Moreover, the target company itself is protected by these provisions so that its business operation may be affected to the extent absolutely necessary. Creditors' protection here is hidden in this latter provision, since the growth and continuance of business is of prime importance in these reorganization operations.

b) The suggestions of secondary EU legislature

Under EU company law all limited liability companies are regulated mainly for third party relationships, while protection of shareholders and the internal structure are harmonized only for public limited liability companies. The application of all the harmonization measures seems to be roughly split in two groups: measures to protect third parties (mostly creditors)[76] and measures for shareholder protection as their main aim[77]. It is nonetheless true also shareholder protection can be found also in acts which primarily deal with creditor protection; for example in the Second Council Directive with rules on mandatory competence of the general meeting for capital measures or its pre-emption right of shareholders. This creates an overall impression that the creditors or third parties in general enjoy the same level of protection with respect to all limited companies, through EU creation of confidence in cross-border activities, while shareholder protection is the center of EU law rules applying mostly to public limited companies. This outcome is achieved through EU use of different regulatory principles, all yielding the same result in the end. Although EU Treaties oblige national legislators to give the information rules priority over substantive mandatory rules[78], the majority of EU company law legislation still entails the integration model with minimum harmonization with addition of protection of minorities model (again through mandatory rules). Free market hypothesis seems to be of lesser importance in the EU than stakeholder protection through mandatory rules.

- [1] Article 4 of the Treaty on European Union, OJEC, C 83, 30 March 2010
- [2] Article 5 of the Treaty on European Union, OJEC, C 83, 30 March 2010
- [3] Article 5 of the Treaty on European Union, OJEC, C 83, 30 March 2010
- [4] Tobacco Advertising I, Case C-376/98, 5 October 2000
- [5] Such as the ones entailed in Articles 114, 115 and 352 TFEU
- [6] EEIG under Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985; SE under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company and supplementing Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001; SCE under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and accompanying Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees
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- [8] Diahatsu, Case C-418/11, 26 September 2013
- [9] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142/12
- [10] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184/17
- [11]Vossestein, G. J. (2010) Modernization of European company law and corporate governance. Some considerations on its legal limits. Austin, Alphen aan den Rijn, Frederick, MD: Wolters Kluwer Law & Business; Kluwer Law International; Sold and distributed in North, Central and South America by Aspen Publishers (European company law series, v. 6), chapter 4
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- [13] Centros, Case C-212/97, 9 March 1999
- [14] Überseering, Case C-208/00, 5 November 2002
- [15] Inspire Art, Case C-167/01, 30 September 2003
- [16] Cartesio, Case C-210/06, 16 December 2008
- [17]Sevic, Case C-411/03, 13 December 2005
- [18] The impact of the rulings of the European Court of Justice in the area of direct taxation 2010, European Parliament, Directorate General for Internal Policies, Brussels 2011, <http://www.europarl.europa.eu/activities/committees/studies>, p.42
- [19] Reiterated multiple time also in ECJ, 11 August 1995, Case C-80/94 *Wielockx* ECR I-2493, para. 16; 16 July 1998, Case C-264/96 *ICI*, ECR I-4695, para. 19; 29 April 1999, Case C-311/97 *Royal Bank of Scotland*, ECR I-2651, para. 19.
- [20]Branches and subsidiaries
- [21] The impact of the rulings of the European Court of Justice in the area of direct taxation 2010, European Parliament, Directorate General for Internal Policies, Brussels 2011, <http://www.europarl.europa.eu/activities/committees/studies>, p.40
- [22] The impact of the rulings of the European Court of Justice in the area of direct taxation 2010, European Parliament, Directorate General for Internal Policies, Brussels 2011, <http://www.europarl.europa.eu/activities/committees/studies>, p.43

- [23] See ECJ, 15 May 1997, Case C-250/95, *Futura Participations and Singer*, ECR I-2471, para 26, where CJEU acknowledged the additional condition of economic link between income in the Member State in question and losses suffered there; see also ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, ECR I-10837 on interlinked justifications for discriminatory tax treatment
- [24] See to that extent ECJ, 15 May 2008, Case C-414/06, *Lidl Belgium v Finanzamt Heilbronn*. See also, ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, ECR I-10837
- [25] ECJ, 16 July 1998, case C-264/96, *Imperial Chemical Industries (plc v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, ECR I-471, para. 23-24
- [26] See ECJ, 13 December 2005, Case C-446/03, *Marks & Spencer*, ECR I-10837
- [27] ECJ, 14 December 2006, Case C-170/05, *Denkavit Internationaal v Ministre de l'Economie*, ECR I-11949.
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- [29] ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v Verkooijen*, ECR I-4073
- [30] Art.63 – 66 TFEU
- [31] ECJ, 15 July 2004, Case C-315/02, *Lenz v Finanzlandesdirektion für Tirol*, ECR I-7063.
- [32] ECJ, 15 July 2004, Case C-242/03, *Ministre des Finances v Weidert, Paulus*, ECR I-7379.
- [33] ECJ 13 April 2000, Case C-251/98, *Baars*, ECR I-2787, paras 22 and 28- to 31
- [34] ECJ, 18 September 2003, Case C-168/01, *Bosal Holding*, ECR I-9401.
- [35] ECJ, 11 March 2004, Case C-9/02, *de Lasteyrie du Saillant*, ECR I-2409
- [36] Communication from the Commission to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM (2003) 284 final, Brussels, 21.5.2003, p.6
- [37] When the First Company Law Directive was enacted
- [38] Communication from the Commission to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*, COM (2003) 284 final, Brussels, 21.5.2003
- [39] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [Official Journal L 65, 14.03.1968], amended by Directive 2003/58/EC
- [40] For example Art.2(1) on the content of the mandatory disclosure and Art.9(1) on ultra vires transactions of First Council Directive 68/151/EEC
- [41] Case C-104/96, *Coöperatieve Rabobank BA v Erik Aarnoud Minderhoud*, Judgment of the Court (Sixth Chamber) of 16 December 1997, para.21 and further
- [42] Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 4.9.2003, p. 13 - 16, para. 3 & 6
- [43] Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 4.9.2003, p. 13 - 16, Art.1
- [44] Case C-97/96 *Verband deutscher Diahatsu-Händler eV v Diahatsu Deutschland GmbH*, Judgment of the Court (Fifth Chamber) of 4 December 1997

[45] 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 L 315, 14.11.2012, p.74-97

[46] To the exclusion of investment companies with variable capital and cooperatives incorporated as a public company, see Art.1(2) of the Second Council Directive

[47] Case C-441/93, Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others, Judgment of the Court of 12 March 1996

[48] 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, OJ L 295, 20.10.1978, p. 36-43

[49] Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies, OJ L 378, 31.12.1982, p.47-54

[50] The protective nature of these provisions was carried into the Cross-Border Merger Directive: Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25 November 2005

[51] See Art. 5 of the Third Council Directive and Art.3 of the Sixth Council Directive

[52] Art.13 of the Third Council Directive and Art.12 of the Sixth Council Directive

[53] Art.12(3) of the Sixth Council Directive

[54] Art.22 of the Third Council Directive and Art.19 of the Sixth Council Directive

[55] 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, p. 11 – 31

[56] Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts, OJ L 193, 18.7.1983, p. 1 – 17

[57] Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty in the approval of persons responsible for carrying out the statutory audits of accounting documents, OJ L 126, 12.5.1984, p. 20 -26

[58] Again prescriptive continental approach, see Articles 1 and 2 of the Seventh Council Directive

[59] Focusing on creditor protection with detailed legislation

[60] Art.2(3) of the Fourth Council Directive

[61] See for example cases C-275/97 DE + ES Bauunternehmung GmbH v Finanzamt Bergheim, Judgment of the Court (Fifth Chamber) of 14 September 1999 and case C-234/94 Waltraud Tomberger v Gebrüder von der Wettern GmbH, Judgment of the Court (Fifth Chamber) of 27 June 1996

[62] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ L 395, 30.12.1989, p.36-39

[63] Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited liability-companies, OJ L 395, 30.12.1989, p. 40 -42

[64] Art.2(2) of the Twelfth Council Directive provides that the Member States may lay down special provisions or sanctions for the protection of third parties under certain circumstances

- [65] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, OJ L 184, 6.7.2001, p. 1–66
- [66] Art.5 and Annex I of the Stock Exchange Law Directive
- [67] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p.38
- [68] Art.9 – 16 of the Transparency Directive
- [69] Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12–23
- [70] Grundmann, Stefan; Möslein, Florian (2007) European company law. Organization, finance and capital markets. Antwerpen, Holmes Beach, Fla.: Intersentia; distribution for North America : Gaunt (Ius communitatis series, v. 1), part 4
- [71] Art.6(1), Art.6(2), Art.6(5) and Art.8 of the Thirteenth Council Directive ('the Takeover Directive')
- [72] Art.3(1)(a) and Art.3(1)(b) of the Thirteenth Council Directive ('the Takeover Directive')
- [73] Mandatory bid, the determination of minimum compensation under the mandatory bid, the obligatory period for acceptance, and the takeover report determined through mandatory rules
- [74] Under Art.9(2) – Art.9(4) of the Takeover Directive they gain the exclusive competence to enact defensive measures during the takeover procedure
- [75] Art.8 of the Takeover Directive
- [76] The First, Second, Fourth, Seventh, Eight, Eleventh and Twelfth Council Directive
- [77] The Third, Sixth, Tenth and Thirteenth Council Directive
- [78] If those satisfy the need for protection in sufficient amount, see further Grundmann, Stefan; Möslein, Florian (2007) European company law. Organization, finance and capital markets. Antwerpen, Holmes Beach, Fla.: Intersentia; distribution for North America : Gaunt (Ius communitatis series, v. 1), part 7
- [79] Which are already inherently present in the EU competition law, see for example 'Merger Directive', Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310 of 25.11.2005, p. 1
- [80] Accompanied with anti-abuse provisions to ensure the EU traditional stakeholder protection

## **Conclusion**

Conherency of the EU law system as a whole could be achieved to a larger extent? Some reflections and propositions.

The majority of the business in the EU is carried out through private limited companies, and yet the most detailed mandatory EU company law rules relate to public limited liability companies. This tendency can be seen as a result of the aim of EU legislator to make EU companies more competitive in the world market so it focused its harmonizing legislative efforts on existing big EU companies. The incoherency inherent in this reasoning is the following: since in EU competition law policy the EU clearly shows its preference in maintaining fair competition on the internal market and preserving its variety, it does not make much sense legislatively coordinating the provisions on the already large companies in the field of company law and facilitating their cross-border operations, to the detriment of highly non-harmonized field of EU law on private limited companies and other company forms covering small and medium-size companies, that could be the source of comparative advantage for the EU economy.

Therefore next to the already provided equal creditor protection for all limited liability companies, providing additional incentives to small and medium enterprises to grow in size through cross-border operations would be advisable, possibly in the form of more lenient tax treatment, more lenient competition law provisions, and more lenient company law provisions with unified protective policy. Growth should be stimulated as an EU objective and even though this is stated as aim of multiple EU law instruments, a private limited liability company wishing to grow and develop its business as public limited company, it faces a switch in the regulatory principles and the body of applicable law. It goes from information model of regulation to a more stringent, Continental integration model, it faces additional rules on shareholder protection, more stringent accounting rules and a whole new body of EU case law in the field of taxation and Treaty freedoms as well as highly harmonized body of capital markets law.

Competitiveness today is not in size of production and low prices, it is more about the innovation and the price-quality ration. With that in mind, besides encouraging EU businesses to gain in size, innovation and quality should be rewarded through EU legislation, whether by using information and integration model, providing high stakeholder protection as a typical trait of Continental heritage. For all types of companies focus should be on additional information dissemination to further strengthen the cross-border confidence of investors, some transitional provisions for companies changing their form into public limited liability company should be provided, also provisions for encouraging quality innovations should be envisaged. For these provisions to be able to boost competitiveness of the EU economy as a

whole, the Member States should voluntarily adopt cooperative attitude in relation one to another rather than competing internally; they should strive for joint competitiveness with their inherent comparative advantages against the rest of the world, using their historic legacies and their combined strength to develop new, modern and flexible company law legislation.

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