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Coordinatore Chiar.mo Prof. Giuseppe Melis

CROSS-BORDER MERGERS: AN ITALIAN PERSPECTIVE

Dottorando
Massimo Schirinzi

Tutor
Chiar.mo Prof.
Silvio Martuccelli

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Chapter I

Mergers and cross-border mobility of companies

SUMMARY: 1. Cross-border mergers as international expansion strategies – 2. What drives cross-border mergers? – 3. Cross-border mergers and obstacles to recognition of foreign companies – 4. Cross-border mergers as a solution for free choice of law. U.S. v. European Union – 4.1. Freedom of choice in the U.S. – 4.2. Freedom of choice in the European Union.

1. Cross-border mergers as international expansion strategies

The downturn phenomena and the negative turbulence recently experienced in the global context have cleared what is one of the essential requirement in order to assert the market power of an enterprise.

Companies must acquire a sufficient size and scale to compete with foreign players, in order to ensure the opportunity to diversify their revenues and to take advance of any tax and financial benefits.

Internationalization of business dynamics is a key feature of the company that allows it, in most cases, the achievement of sustainable profitability. It is expressed in the company's ability to set up and manage the different activities that make up the value chain in the global environment, taking advantage of the benefits offered by each of several States selected and obtainable by the group as a whole.

Multinational enterprises have been the subject of numerous studies, aimed at identifying, from a theoretical point of view, the reason of their existence. One of the most interesting theories is the eclectic theory of the multinational enterprise[1], which explains how a company decides to locate the upstream segment of the value chain, or otherwise to manage the intra-group trade not only according to their own internal organizational ability and the existence of benefits linked to the realization of market trades, but also basing on the presence of institutional factors - such as tax law - in force within the territory where the investment will be realized.

There are several investment options for access a country other than the origin one, according to the desired degree of international involvement. Companies must pay attention to the different ways of foreign engagement taking into account three factors: (i) the characteristics of the industry or the market[2]; (ii) the extent and the intensity of competitive dynamics; and (iii) human tangible and intangible resources of the company.

"Soft" way of access into a country characterized by lower commitment and rapid implementation times are exports, contractual agreements and international joint ventures. Said transactions have in most cases a low capital impact for the business entity due to the absence of payment of the purchase price and of the need of investments in fixed assets components, which bring strong risks relevant to the control of competencies, exposing the company to the possibility of opportunistic behaviour of the counterparties. The advantages related to such forms are, on an empirical evidence basis,

[1] J. H. DUNNING, *Multinational Enterprises and the Global Economy*, Addison-Wesley, 1993.

[2] See E. VALDANI – G. BERTOLI, *Marketing internazionale*, Milano, 2014, p. 163 et seq., according to which said characteristics are declined in evaluating economic and strategic importance of the country and the accessibility of the same.

usually limited and do not allow the enterprise to achieve a lasting competitive advantage[3].

In order to decisively face to the challenges posed by the characteristics of the international market, companies may on the other hand, realize a “foreign direct investment” whose aim, according to the definition provided by the International Monetary Fund, is to acquire a lasting interest in an enterprise operating in an economy other than the one of the investor, the investor’s purpose being to have an effective voice in the management of the enterprise. The definition of International Monetary Fund includes extended trade credits from a parent to a subsidiary, acquisition of shares, loans from parent to subsidiary companies, parent company’s guarantees of a subsidiary’s loan and self-financing over and above the normal consolidation requirement. Profit retained in the foreign subsidiary should also be counted as foreign direct investment. The common view of the practical minimum of equity needed for an effective voice in the sense of the International Monetary Fund definition in management, is a 10 percent ownership[4].

A clear recent trend within this regard has been the increase in foreign direct investment in forms of cross-border mergers and acquisitions. As described, cross-border M&A are transactions in which the assets of companies that belong to different countries are combined in order to create a new legal entity[5]. Alternatively to these

[3] J. XIA, *Mutual dependence, partner substitutability, and repeated partnership: The survival of cross-border alliances*, in *Strategic Management Journal*, 32, 2011, p. 229–253.

[4] Anyway, it must be remembered that exceptions to the International Monetary Fund’s definition are frequent. Japan and France, for example, do not consider retained profits in a foreign subsidiary as foreign direct investments. And again, France, Germany and the United Kingdom use other definitions with reference to practical minimum of equity needed for an effective voice.

[5] R. CAIAZZA, *Cross Border M&A: determinanti e fattori critici di successo*, Torino, 2011, p. 3.

methods, the enterprise may decide to establish *ex novo* a commercial/production facility within the selected country. It is therefore used to distinguish between “brownfield investment” and “greenfield investment”, and the choice between them should be made taking into consideration, among others, the following variables: the current and future international orientation required by the company, the amount of necessary investments not only for the transaction itself but also for the overcoming of any barriers to market entry and for the construction of a local reputation, as well as timing of implementation of the strategy.

Particularly significant are then the consequences linked to the legal connotations of the newly incorporated or acquired company in the foreign country. This specifically can take the form of subsidiary company, associate company or branch depending on the existence, or not, of the legal personality and on the percentage of control held by the bidder or incorporating entity[6].

According to the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investments flows jumped 36% in 2015 to an estimated US$1.7 trillion, their highest level since the global economic and financial crisis of 2008-2009. The UNCTAD observed that the growth was largely due to cross-border merger and acquisitions (M&As), with only a limited contribution from greenfield investment projects in productive assets. Moreover, a part of foreign direct investment flows was related to corporate reconfigurations involving large values in the financial account of the balance of payments but little movement in actual resources. Cross-border merger and acquisitions – as pointed out by UNCTAD in its survey - increased by 61% in 2015, while the overall value of

[6] *Ibidem*, p. 4.

announced greenfield investment projects registered little change from the previous year. There was a decline in announced greenfield investments in developing economies, pointing to a growing weakness in multinational enterprises' capital expenditures[7].

The following paragraphs, after a brief summary of the main theories on the determinants of cross-border mergers, will focus on the main obstacle to said transaction on a legal standpoint (*i.e.* the recognition of foreign companies and the law applicable to mergers), concluding this chapter with an analysis about cross-border merger as means for free choice of law.

2. What drives cross-border mergers?

Amongst the forms of internationalization, particular attention should be paid to cross-border mergers and acquisitions, as corporate finance activities to which is recognized the role of tools for the achievement and maintenance of the company's profitability conditions[8].

An enormous number of hypotheses have been formulated to explain "mergers waves" within the United States, as well as among European countries.

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[7] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Global Investment Trends Monitor*, no. 23 (4 May 2016) and no. 24 (7 October 2016), available at: http://unctad.org/en/Pages/DIAE/Research%20on%20FDI%20and%20TNCs/Global-Investment-Trends-Monitor.aspx

However, as underlined in the above-mentioned reports, «*barring another wave of M&A deals and corporate reconfigurations, FDI flows are expected to decline in 2016, reflecting the fragility of the global economy, volatility of global financial markets, weak aggregate demand and a significant deceleration in some large emerging market economies. Elevated geopolitical risks and regional tensions could further amplify these economic challenges*».

[8] M. L. ROCK, *Fusioni e acquisizioni. Aspetti strategici, finanziari e organizzativi*, McGraw-Hill Companies, Milano, 1990, p. 20.

The so-called neoclassical view stems from the empirical observation that industries seem to consolidate in waves around radical changes in the economy[9]. The tool of merger, in fact, is the most simple and convenient method for adapting the company structure to the new market demands[10]. The theory assumes that managers act to maximize their own utility or shareholder's wealth[11]; this benefits their shareholders and benefits managers through their holdings of their own company's shares, stock options, bonuses and salary increases as a reward for good performance, thus implicitly increasing also their wealth.

Merger waves occur in response to specific industry shocks from economic or trading environment changes, including also regulatory changes as the creation of the European Single Market[12].

However, in addition the economic motivation for transactions, merger waves require also higher capital liquidity and relatively low transaction costs, in order to generate a large volume of transactions, that accompany an economic expansion[13].

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[9] Which as an example could be technological or regulatory. G. ANDRADE – M. MITCHELL – E. STAFFORD, *New Evidence and Perspectives on Mergers*, in *Journal of Economic Perspectives*, Vol. 15, no. 2, 2001, pp. 103 – 120; J. H. MULHERIN - A. L. BOONE, *Comparing Acquisitions and Divestitures*, in *Journal of Corporate Finance*, no. 6, 2000, pp. 117-39.

[10] J. F. WESTON, *Mergers & Acquisitions as Adjustment Process*, in *Journal of Industry, Competition and Trade*, 2001, p. 395.

[11] See M. L. MITCHELL - J. H. MULHERIN, *The Impact of Industry Shocks on Takeover and Restructuring Activity*, in *Journal of Financial Economics*, Vol. 41, 1996, pp. 193-229; J. F. WESTON - K. S. CHUNG - J. A. SIU*, Takeovers, restructuring, and corporate governance (2nd ed.),* Upper Saddle River, NJ: Prentice Hall, 1998; B. JOVANOVIC – P. L. ROUSSEAU, *The Q-Theory of Mergers*, in *American Economic Review*, vol. 92(2), 2002, p. 198-204.

[12] For an overview of the determinants of merger waves in Europe see J. BARTHOLDY – B. W. BLUNCK – T. POULSEN, *What Drives Private and Public Merger Waves in Europe* (February 5, 2009). Available at SSRN: https://ssrn.com/abstract=1338347.

[13] J. HARFORD, *What drives merger waves?*, in *Journal of Financial Economics,* vol. 77, p. 529 et seq.

On the contrary, according to the different market-driven theory, transactions are driven by stock market valuations of the merging firms[14].

The fundamental assumption of this model is that, due to the inefficiency of financial markets, firms are valued incorrectly. So, irrational market misevaluation influences different aspects of the takeover market.

But, as it has been observed, managers are completely rational, understand stock market inefficiencies, and take advantage of them through corporate actions, as merger decisions[15]. It means that overvalued companies are driven to acquire relative less overvalued companies - using for the acquisition their overvalued stocks as a medium of exchange - and therefore exploiting their own overvaluations and creating long-term value in the interests of the original acquirers' shareholders. However, they will eventually face price corrections from their elevated levels.

Finally, according to the agency-cost theory, merger waves are driven by empire-building from the part of acquiring managers. Self-serving managers are free to conduct acquisitions in an attempt to hit previously stated growth targets, lacking an external control on his management. In this scenario, a firm's equity becomes substantially overvalued; this implies a set of organizational forces that are extremely difficult to manage, that almost inevitably lead to value destruction[16].

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[14] See J. ANG - Y. CHENG, *Direct Evidence on Stock Market Driven Acquisitions Theory*, Florida University Working Paper, 2003.

[15] A. SHLEIFER – R. W. VISHNY, *Stock Market Driven Acquisitions*, in *Journal of Financial Economics*, vol. 70 (3), 2003, p. 302.

[16] About agency costs therory see M. C. JENSEN – W. H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, in *Journal of Financial Economics*, vol. 3, no. 4, 1976, pp. 305-360. Reprinted in M. C. JENSEN – C. W. CLIFFORD, JR. (eds), *The Modern Theory of Corporate Finance*, New York:

3. Cross-border mergers and obstacles to recognition of foreign companies

The progressive elimination of barriers to the international goods and services trade, which has taken place after World War II with the end of the colonial economy, has fostered the internationalization of the companies' activities following the example of the American trade liberalization model[17].

Companies are now the key players of the world economy, replacing in this role States.

This phenomenon has now reached its peak with the market expansion beyond any political border, leading to the so-called "global markets"[18].

As a result, with increasing frequency companies incorporated under a jurisdiction sell goods and provides services in another jurisdiction, both on occasional basis and trough the creation of a permanent establishment.

With reference to the first case, there are no particular rules different from those relevant to the carrying out of the business activities (e.g. goods and services import and export rules). In case of permanent establishment, conversely, countries adopt more strict rules to oblige companies operating in their jurisdiction to comply in whole or in part with their applicable laws.

Said compliance requirement changes according to the intensity of the connection with the establishment jurisdiction. It is possible to consider three main cases:

McGraw-Hill, Inc., 1984; M. C. JENSEN, *Agency Costs of Overvalued Equity*, in *Financial Management*, vol. 34, issue 1, 2005.

[17] M. KIIKERI, *The Freedom of Establishment in the European Union*, Report to the Finish Ministry of Trade and Industry, 2002.

[18] F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005, p. 7.

a) incorporation of a company according to the laws of the country of establishment;

b) opening of a secondary office by the foreign company in the country of establishment, which implies the application to the secondary office of certain rules of domestic laws, but does not invalidate the original identity of the company and its capacity to sue or to be sued in the country of establishment;

c) locating in the country of establishment the "real seat" of the company incorporated under the laws of a foreign country, in order to operate primarily or exclusively in the jurisdiction of establishment (pseudo-foreign corporations[19]).

Many jurisdictions refuse the pseudo-foreign corporations through a process of disqualification, denying their legal personality and access to justice, or by subjecting them to its jurisdiction[20].

As a general principle, the possibility that a jurisdiction may admit the transfer abroad of the seat of its companies is subject to the principle of territorial connection adopted by that country. From said connection depends the recognition of companies as a part of that jurisdiction, and therefore the relevant applicable law (*lex societatis*). Within this regard, the distinction between the real seat theory

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[19] E. R. LATTY, *Pseudo-Foreign Corporations*, in *65 Yale Law Journal*, 1955, p. 137 et seq. See also L. ENRIQUES, *Società costituite all'estero. Commento sub. artt. 2507-2510 cod. civ.,* in *Commentario al codice civile Scialoja e Branca*, Bologna, 2007; E. DE LA ROSA, *El establecimiento de sociedades ficticias en la Uniòn Europea y en el entorno globalizado*, in *Revista de la Facultad de Derecho de la Universidad de Granada*, 2004.

[20] E. WYMEERSCH, *Il trasferimento della sede della società nel diritto societario europeo*, in *Riv. soc.*, 2003, 4, p. 723.

(*Sitztheorie*) and the incorporation theory (*Gründungstheorie*)[21] is helpful to understand the functioning of conflict rules[22].

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[21] The theory of incorporation was born in England, where the English courts of the nineteenth century, driven by imperialist purposes, were concerned to apply the English company laws also to different countries to were companies incorporated under the English laws carried out their activities. *Gründungstheorie* allowed the application and penetration of English laws and companies into ever-new areas, regardless of whether the territory of application belongs to the English Crown. The real seat theory, on the other hand, was born in France in the mid-nineteenth century for defensive purposes, in particular to prevent French companies escaping in England or Belgium.

European countries that adopt the theory of incorporation are United Kingdom (A. V. DICEY-J. H. C. MORRIS, *On the Conflict of Laws*, 13th Edition, London, 2000, Volume 2, rule 152 (2), and G. C. CHESHIRE-P. NORTH, *Private International Law*, 13th Edition, London, 1999, p. 175 «*every person, natural or artificial, acquires at birth a domicile of origin by operation of law. In the case of the legitimate natural person if it is the domicile of his father; in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated*»); Bulgaria; Cyprus; Ireland; Denmark; Finland (M. KIIKERI, *The Freedom of Establishment in the European Union*, *op. cit.*, p. 116); Netherland (T. M. DE BOER-R. KOTTING, *Private International Law,* in *Introduction to Dutch Law,* J. CHORUS, P. H. GERVER, E. HONDIUS & A. KOEKKOEK (eds.), London-Boston, 1999, pp. 265 et seq.); Sweden (V. DEJMEK, *The European Company all over Europe*, K. OPLUSTIL AND C. TEICHMANN (eds.), Berlin, 2004, p. 298, which remembers that in Sweden «*nothing prevents the company from having its head office or its core business in another State*») and Hungary.

The real seat theory applies in Germany (lacking an express law provision, the real seat theory applies according to settled case-law of the BGHZ (BGHZ 97, 269 (271); Z 78, 318 (334); Z 53, 181 (183); Z 51, 27 (28). On the notion of administrative office see P. BEHRENS, *Die Gesellschaft mit beschränkter Haftung im internationalen und europäischen Recht*, Berlin, 1997); France (section L 210-3, first paragraph, of the *code de commerce* of 2000. T. VIGNAL, *Droit international privè*, Paris, 2005, nn. 739 et seq.); Spain (E. DE LA ROSA, *El establecimiento de sociedades ficticias en la Uniòn Europea y en el entorno globalizado*, *op. cit.*); Austria (section 10 of international Austrian law - *Internationales Privatrechtsgesetz prevedeche* – according to which «*the personal law of a legal entity as well as the personal law of any other legal alliance is the law applicable at the place where the actual centre of administration of such entity or such alliance is established*» and subsequent section 12 which provides that «the legal and the corporate capacity of an entity is governed by the personal law of such entity». However, see H. HIRTE, *L'evoluzione del Diritto delle imprese e delle società in Germania negli anni 1998 e 1999*, in *Riv. soc.*, 2003, p. 595, which underlines the abandonment by the Austrian Supreme Court of real seat theory following the recent decisions of the Court of Justice of the European Union (former Court of Justice of the European Communities) on freedom of establishment (so-called «Centros doctrine»); Belgium, see section 110 of the Belgium International Law Code, Law 16 July 2004, according to which «bodies with separate legal personality are governed by the law of the State on the territory of which they had their main establishment since the time of the incorporation»; Greece, see I. PAPADIMOPOULOS, *Approximation and Integration of Corporate Law in the European Community, Ellinki Epitheorissi*

According to the theory of incorporation, companies are subject only to the laws of the jurisdiction under which are incorporated. The internal affairs of a company are governed by the law of the place where those empirical events from which the establishment of a company depends occur. The law will coincide usually with the law of the country in whose territory is located the company's registered office and where the formalities for its registration have been carried out[23].

Companies incorporated under said jurisdictions are free to transfer their seat in a different country; they remain subject to the law of the country of incorporation.

On the other hand, according to the theory of real seat, companies are subject to the law of the country where its real seat is located. These jurisdictions adopting said theory are essentially based on the idea that companies must have a real connection with the State whose jurisdiction should be applied; this "attachment" is identified

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Europakou Dikaiou, 1995, p. 865 et seq.; Luxembourg, see section 159 of *loi sur les sociétés commerciales* dated 10 August 1915, according to which «*toute société dont l'administration centrale est située au Grand-Duché, est soumise à la loi luxembourgeoise, bien que l'acte constitutif ait été passé en pays étranger. Lorsqu'une société a son domicile au Grand-Duché de Luxembourg, elle est de nationalité luxembourgeoise et la loi luxembourgeoise lui est pleinement appliquée*»; Portugal, see section 3 of the Portuguese Commercial Code, Decree Law 262/86 of 2 September 1986. See also A. M. DOS SANTOS, *Estudios de direito da nacionalidade*, Coimbra, 1998, p. 45 et seq..

Italy, as more described *infra* in detail adopts a mixed system (according to section 25 of Law 31 May 1995, no. 218, which applies the connecting factor of the law of incorporation unilaterally, as it intends to apply the internal mandatory rules to the pseudo-foreign companies).

[22] However, as explained by F. M. MUCCIARELLI, *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited*, in *European Business Organization Law Review*, vol. 9, issue 2, 2008, p. 281, in reality the distinction between "real seat theory" and "incorporation theory" is only «a rough distinction», and «legal systems which are classified as belonging to the same "theory" might follow different practical solutions».

[23] M. BENEDETTELLI, *Sul trasferimento della sede sociale all'estero*, in *Riv. Soc.*, 2010, p. 1259. See also S. GRUNDMANN, *European company law cross-border establishment and structural changes*, Antwerp-Oxford, 2007.

with the managerial or administrative State of corporate activities. Should said connection fail, because the real seat is transferred, or because it does not exist from the beginning (as the case of foreign companies), companies are not allowed to be qualified according to the laws of the jurisdiction of origin, but a requalification procedure in the country where the real seat is located is necessary. Countries that adopt said approach do not recognize entities without territorial links in the State and therefore do not recognize companies belonging to different jurisdictions different from the ones in which the real seat is located[24].

It follows that from the adoption of one or the other theory derives different approach of States in case of transfer abroad of the company.

In jurisdictions where the incorporation theory applies, the transfer of registered office abroad does not constitute an issue from a legal point of view. Companies incorporated in those jurisdictions are free to transfer their registered office in a different jurisdiction without being wound up. Therefore, in these countries transfer of the registered office shall be considered as a simple bylaws amendment.

On the other hand, in those jurisdictions that adopt the real seat theory, the transfer of the seat shall be considered also having "extinctive" effects, as the relevant country, as mentioned above, does not recognize any connection with its territory[25].

That said, it is clear that the harder stance against the pseudo-foreign companies comes from jurisdictions that adopt the real seat theory. The aim of these rules against pseudo-foreign companies is to

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[24] M. V. BENEDETTELLI, *"Mercato" comunitario delle regole e riforma del diritto societario italiano*, in *Riv. soc.*, 4, 2003, p. 724.

[25] A. RIGHINI, *Il trasferimento transnazionale della sede sociale*, in *Contr. e impr.*, 2006, p. 760.

prevent that the incorporation of companies abroad can be used in order to avoid the application of the company law provided by the country of establishment and to protect those interests deemed worthy of protection (in particular, employees, creditors and shareholders).

The provision of limits to the access of foreign or pseudo-foreign companies falls within the sovereignty of the States, which can freely choose the connecting factor applied with regard to corporate law.

In this scenario, cross-border merger could be an easy solution to circumvent the requirement of dissolution and reincorporation of the company in case of transactions that involves a change in the applicable law.

It would be simple in fact, for a company that intends to transfer abroad its registered office with consequent change of the applicable law, to incorporate a special vehicle company in the country of establishment, with which the first company will merge. For that reason, many of the countries that adopt real seat theory – such as Germany – prohibit cross-border merger, or impose a sort of reciprocity requirement according to which cross-border mergers must be permitted both by the law of the country "of origin" and by the law of the country "of arrival".

Anyway, it is undoubtful that the imposition of restrictive national conflict rules could seriously prejudice international commercial relationships, preventing companies from the carrying out of important cross-border deals. The provisions of choice of law clauses in cross-border transaction agreements could be a smart solution in order to avoid the application of conflict rules they consider not corresponding to their interest; however, such a clause would be effective only between the parties, and cannot be enforced against third parties.

4. Cross-border mergers as a solution for free choice of law. U.S. *v.* European Union

It has been observed that according to a theoretical model of a perfect "market for corporate law", companies should be allowed to select the corporate law they prefer, regardless of the countries where the firm's activities take place or where the corporate headquarters is[26].

Corporations would actually "buy" the best "tailored" corporate law, choosing from different jurisdictions. However, a free demand of law requires freedom of incorporation (as well as freedom of reincorporation) for companies, which can therefore leave the country of origin and switch to the law of a different State.

While in the U.S. this model become reality, in the European Union the path has been difficult, and freedom to reincorporate under the law of another Member State is a recent achievement.

4.1 Freedom of choice in the U.S.

The reference model of market of rules for companies is the well-known U.S. "market for corporate charters", whose origins date back to the Paul *v*. Virginia case settled in 1868[27]. In the U.S., companies are free to choose the state law governing their internal

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[26] F. M. MUCCIARELLI, *Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U.*, in *New York University Law and Economics Working Papers,* Paper 257, 2011, p. 4.

[27] Paul *v*. Virginia, 75 US 168 (1869). The question in this case was whether the state of Virginia could impose restrictions on a "foreign" company (one incorporated outside Virginia), selling insurance in Virginia, that were not imposed on "native" companies. The U.S. Supreme Court held that a corporation formed in one state could not be restricted from doing business in another, and thus a national market in charters was opened up that essentially undermined any individual state prohibitions.

affairs[28]. This freedom of choice is ensured by the incorporation doctrine, also referred as internal affairs doctrine by the U.S. scholars[29]; internal affairs of a company are therefore governed by the law of the state of incorporation, regardless of where the corporation's seat is located[30]. In other words, the state of incorporation is competent to regulate internal corporate matters, whilst the other states should recognize validly incorporated companies[31].

One of the most significant and long-standing debate on state competition in corporate law has been about the efficiency of free choice of law and regulatory competition. According to the so called "race to the top" theory, regulatory competition among the U.S. states to attract companies has positive effects upon shareholder's value[32].

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[28] See A. E. GARFIELD, *Evaluating State Anti-Takeover Legislation: A Broadminded New Approach to Corporation Law or "A Race to the Bottom"?*, in *Colum. Bus. L. Rev.*, 1990, p. 122; R. ROMANO, *The Advantage of Competitive Federalism for Securities Regulation*, Washington, 2002, p. 63.

[29] See, e.g., D. M. MAJCHRZAK, *Corporate Chaos: Who Should Govern Internal Affairs*?, in *24 T. Jefferson Law Rev.*, 24, 2001, p. 83 et seq.; D. A. DEMOTT, *Perspectives on Choice of Law for Corporate Internal Affairs*, in *48 Law and Contemp. Probs.*, 1985, p. 161 et seq.; R. M. BUXBAUM, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, in *75 Cal. L. Rev.*, 1987, p. 29 et seq. According to F. M. MUCCIARELLI, *Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U.*, op. cit., p. 9, «*the internal affair doctrine seems to be a version of the "incorporation theory" applied in the U.K. and in the other common law countries*».

[30] D. A. DEMOTT, *Perspectives on Choice of Law for Corporate Internal Affairs*, op. cit., p. 163.

[31] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AMERICAN LAW INSTITUTE), § 296, according to which «*In order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled*» and § 297, according to which «*Incorporation by one state will be recognized by other states*».

[32] D. R. FISCHEL, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 *Nw. U. L. Rev.*, 1982, p. 922, characterized the existing state of affairs as «*a system of fifty states striving to create an attractive climate for private parties to maximize their joint welfare*». See also F. H. EASTERBROOK – D. R. FISCHEL, *The Economic Structure Of Corporate Law*, London, Harvard UP, 1991, p. 6, observing that «*states compete to offer – and managers to use – beneficial sets of legal rules*»; R. K. WINTER, JR., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.*, 1977, p. 251. According R. ROMANO, *The Genius Of American Corporate Law*,

On the opposite, according to the race-to-the-bottom view, states will compete for corporate charters not by making their corporate law more efficient, but by making their law more management-friendly, protecting the board's interest at the expenses of shareholders and creditors[33]. However, in recent years, some scholars have suggested that there is neither a race to the bottom nor a race to the top[34]. In any case, both theories assume that states compete for corporate charters in order to maximize the revenues derived from incorporation fees[35];

Washington, DC, 1993, p. 16 - a supporter of state competition who has been most influential writer on state competition in the past decade - «*states do compete for chartering business*». Under her depiction, which she labels "defensive competition," most states compete to maintain their position and not to enlarge their market share. By the same author see also R. ROMANO, *The Need for Competition in International Securities Regulation*, in *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers*. Paper 258, 2001, p. 1 et seq.; R. ROMANO, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *J.L. Econ. & Org.*, 1985, p. 236.

[33] W. L. CARY, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *Yale L. J.*, 1974, p. 666; L. A. BEBCHUK, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law,* 105 *Harv. L. Rev.*, 1992, p. 1440 according to *which* «*[S]tate competition causes a race for the top with respect to some corporate issues but a race for the bottom with respect to others*»; G. SUBRAMANIAN, *The Influence of Antitakeover Statutes on* Incorporation *Choice: Evidence on the "Race " Debate and Antitakeover Overreaching,* 150 *U. Pa. L. Rev.*, 2002, p. 1801, taking the view that the federal government should play a greater role in the area of corporate law; L. A. BEBCHUK – A. FERRELL, *Federalism and Corporate Law: The Race To Protect Managersfrom Takeovers,* 99 *Colum. L. Rev.*, 1999, p. 1168, observing that State competition probably does not maximize shareholder wealth; L. A. BEBCHUK – A. FERRELL, *A New Approach to Takeover Law and Regulatory Competition,* 87 *Va. L. Rev.*, 2001, p. 130, according to which State competition leads states to protect managers from takeovers to an inefficient extent; J. SELIGMAN, *The Case for Minimum Corporate Law Standards,* 49 *Md. L. Rev.*, 1990, p. 971-974; by the same author, *The New Corporate Law,* 59 *Brook. L. Rev.*, 1993, p. 60-63, suggesting partial federalization of corporate law.

[34] See, e.g*.,* W. BRATTON, *Corporate's Law Race to Nowhere in Particular*, in *Un. Toronto L. Rev.*, 1994, p. 401. See also I. AYRES, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks,* 43 *Kan. L. Rev.*, 1995, p. 543, suggesting that even under the assumption that managers demand value-maximizing corporate law, the results yielded by State competition may not be optimal.

[35] W. L. CARY, *Federalism and Corporate Law: Reflections upon Delaware*, op. cit., p. 683; R. ROMANO, *Law as a Product: Some Pieces of the Incorporation Puzzle*, op. cit., p. 233.

the difference is the direction that such competition takes[36]. In other words, whether the race is toward the top or the bottom, states vigorously “race” in seeking to attract incorporations.

Companies incorporated in one of the states of the U.S. can validly reincorporate into another state with no need to go into liquidation. Practically speaking, according to the laws of the majority part of the states of the U.S., as well as the Model Business Corporation Act - *i.e.* the model set of law prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association followed by twenty-four states[37] - the reincorporation can be implemented also by means of cross-border merger. In such a case, the company merges into a newly incorporated “shell company” in the state of arrival[38]. As a consequence, companies are free to

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[36] J. C. DAMMANN, *Freedom of Choice in European Corporate Law*, in *Yale Journal of International Law*, vol. 29, Issue 2, 2004, p. 478.

[37] L. A. BEBCHUK, *The Case for Increasing Shareholder Power*, in *Harv. L. Rev.*, Vol. 118, no. 3, 2005, pp. 844.

[38] MODEL BUSINESS CORPORATION ACT (2002) § 11.02:

«*(a) One or more domestic business corporations may merge with one or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two or more foreign business corporations or domestic or foreign eligible entities may merge into a new domestic business corporation to be created in the merger in the manner provided in this chapter.*

(b) A foreign business corporation, or a foreign eligible entity, may be a party to a merger with a domestic business corporation, or may be created by the terms of the plan of merger, only if the merger is permitted by the foreign business corporation or eligible entity.

(b.1) If the organic law of a domestic eligible entity does not provide procedures for the approval of a merger, a plan of merger may be adopted and approved, the merger effectuated, and appraisal rights exercised in accordance with the procedures in this chapter and chapter 13. For the purposes of applying this chapter and chapter 13:

(1) the eligible entity, its members or interest holders, eligible interests and organic documents taken together shall be deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and

(2) if the business and affairs of the eligible entity are managed by a group of persons that is not identical to the members or interest holders, that group shall be deemed to be the board of directors.

(c) The plan of merger must include:

choose the preferred corporate law, both at the moment of initial incorporation and at a later stage, regardless of where the headquarters ore the business of the corporation are placed.

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(1) the name of each domestic or foreign business corporation or eligible entity that will merge and the name of the domestic or foreign business corporation or eligible entity that will be the survivor of the merger;

(2) the terms and conditions of the merger;

(3) the manner and basis of converting the shares of each merging domestic or foreign business corporation and eligible interests of each merging domestic or foreign eligible entity into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing;

(4) the articles of incorporation of any domestic or foreign business or nonprofit corporation, or the organic documents of any domestic or foreign unincorporated entity, to be created by the merger, or if a new domestic or foreign business or nonprofit corporation or unincorporated entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organic documents; and

(5) any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organic document of any such party.

(d) Terms of a plan of merger may be made dependent on facts objectively ascertainable outside the plan in accordance with section 1.20(k).

(e) The plan of merger may also include a provision that the plan may be amended prior to filing articles of merger, but if the shareholders of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to change:

(1) the amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, or other property to be received under the plan by the shareholders of or owners of eligible interests in any party to the merger;

(2) the articles of incorporation of any corporation, or the organic documents of any unincorporated entity, that will survive or be created as a result of the merger, except for changes permitted by section 10.05 or by comparable provisions of the organic laws of any such foreign corporation or domestic or foreign unincorporated entity; or

(3) any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

(f) Property held in trust or for charitable purposes under the laws of this state by a domestic or foreign eligible entity shall not be diverted by a merger from the objects for which it was donated, granted or devised, unless and until the eligible entity obtains an order of [court] [the attorney general] specifying the disposition of the property to the extent required by and pursuant to [cite state statutory cy pres or other nondiversion statute].]»

In the U.S. market for corporate law, Delaware has reached a position of dominance[39], so that corporate regulatory competition among states could be deemed, as recently observed, as substantially restricted by actual[40] or threatened federalization[41].

4.2 Freedom of choice in the European Union

In the European Union, the debate over free choice of law and reincorporation has been heated and has inspired close scrutiny[42]. Differently from the U.S., Member States do not share a common choice of law criterion for companies. As already described above, chose of law criteria adopted by the Members States are traditionally divided in two opposite fields, *i.e.* incorporation theory and real seat theory[43]. Anyway, it is unsurprising that the ability of companies to

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[39] But see also L. A. BEBCHUK – A. HAMDANI, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 *Yale L. J.*, 2002, p. 553, that wrote about absence of real threat of Delaware dominion, due to barriers to entry into the market for corporate laws; M. BARZUZA, *Delaware's Compensation,* 3 *Va. L. Rev.*, 2008, p. 521, observing that Delaware franchise fee is not optimal and induce Delaware to create a law that increases directors' powers; and M. KAHAN – E. KAMAR, *The Myth of State Competition in Corporate Law*, 55 *Stanf. L. R.*, 2002, p. 679, according to which entry barriers are not sufficient to explain the lack of regulatory competition, which depends also on political reasons.

[40] L. A. BEBCHUK – A. HAMDANI, *Federal Corporate Law: Lessons from History*, 106 *Colum. L. Rev.*, 2006, p. 1793, according to which federal interventions mitigate competition among States (which would produce a race to the bottom).

[41] M. J. ROE, *Delaware and Washington as corporate law makers*, 34 *Del. J. Corp. Law*, 2009, p. 1, according to which Delaware is always exposed to the risk of federalization on corporate law matters. By the same author see also *Delaware's competition*, 117 *Harv. L. Rev.*, 2003, p. 588.

[42] Even if some authors, but not recently, had argued the absence of a market for corporate charters in Europe, also due to the role of the real seat doctrine in preventing the emergence of said market in the European Union; see R. ROMANO, *The Genius Of American Corporate Law*, op. cit., p. 128; D. CHARNY, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities,* 32 *Harv. Int'l L. J.*, 1991, p. 423; C. D. STITH, *Federalism and Company Law: A "Race to the Bottom" in the European Community,* 79 *Geo. L. J.*, 1991, p. 1618 according to which the European Union has to fear a race to the bottom.

[43] Although it has been observed that this divide is, at a deeper glance, an oversimplification; see in this sense J. WOUTERS, *Private International Law and*

choose the applicable corporate law regime has long faced a formidable obstacle in the real seat doctrine[44]. In this regime, companies cannot choose the law of another country unless they are willing to move their registered office as well; it results that costs of such a move usually outweigh the advantages connected with a more efficient corporate law regime[45]. As a consequence, the real seat doctrine effectively prevents free choice, and consequently "outbound" reincorporation.

But, on closer inspection, prohibitions of outbound reincorporation have been independent from the choice of law criterion adopted by the country of origin, as both the incorporation theory and the real seat theory are neutral for the question as to whether companies can change the country of incorporation with no need to go into liquidation[46]. Freedom to "emigrate" has been subject to several limits posed by the law of European countries, despite of the choice of the principle of territorial connection[47].

Companies' Freedom of Establishment, in *European Business Organization Law Review*, 2001, vol. 2, p. 103.

[44] J. C. DAMMANN, *Freedom of Choice in European Corporate Law*, in *Yale Journal of International Law*, vol. 29, Issue 2, 2004, p. 482.

[45] See D. C. ESTY – D. GERADIN, *Regulatory Co-Opetition*, 3 *J. Int'l Econ. L.*, 2000, p. 243; W. J. CARNEY, *Federalism and Corporate Law: A Non-Delaware View of the Results of Competition*, in W. BRATTON ET AL. (eds.), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States*, Clarendon Press, Oxford, 1996, p. 169.

[46] F. M. MUCCIARELLI, *Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U.*, op. cit., p. 11.

[47] For example, reincorporation has been impossible under English law, whose conflict of law rule provides that the competent jurisdiction for corporate matters is such where the original domicile of the company is located. See A. V. DICEY - J. H. C. MORRIS –COLLINS L. A., *On the Conflict of Laws*, 14th Edition, London, 2006, Volume 2, p. 1336; D. PRENTICE, *The incorporation theory – The UK*, 14 *European Business Law Review*, 2003, p. 633; A. FARNSWORTH, *The Residence and Domicile of Corporations*, London, 1939, p. 71.

In Germany (as anticipated above, the), in case of companies wishing to relocate abroad, the national law ceased to apply and therefore the company would be dissolved and liquidated. See P. BAHRENS, *From "Real Seat" to "Legal Seat": Germany's Private International Company Law Revolution*, in P. HAY – L. VÉKÀS –

However, the European Economic Community experience taught that freedom of States to provide restrictions to the entry of foreign companies could be limited by a regional economic integration process (such as the European one). The Treaty

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Y. ELKANA - N. DIMITRIJEVIC (eds.), *Resolving International Conflicts*, *Liber amicorum Tibor Vàrady*, Budapest, 2009, p. 60.

Other countries, however, allows reincorporation, but providing certain requirements that practically restrict the availability of such operation.

For example, according to the French *Code de commerce*, the reincorporation abroad of a private limited liability company shall be resolved by the shareholders unanimously (*Code de commerce*, section L. 223-30: «*les associés ne peuvent, si ce n'est à l'unanimité, changer la nationalité de la société*». With regard to public companies, the same majority is necessary, but reincorporation can be performed only into another country with which France has signed an international convention (*Code de commerce*, section L. 225-97: «*l'assemblée générale extraordinaire peut changer la nationalité de la société, à condition que le pays d'accueil ait conclu avec la France une convention spéciale permettant d'acquérir sa nationalité et de transférer le siège social sur son territoire, et conservant à la société sa personnalité juridique*»). See H. LE NABASQUE, *L'incidence des normes européennes sur le droit français applicable aux fusions et au transfert de siège social*, in *Rev. Sociètè*, 2005, p. 81.

In Spain, *Ley 3/2009, de 3 abril*, *sobre modificaciones estructurales de las sociedades mercantiles* has admitted and regulated direct re-icorporations, which are however subject to a complex procedure in order to protect minority shareholders and creditors.

In Italy, as it will be better explained in the following chapter, even if cross-border mergers are admitted, it is still unclear whether direct reincorporation is allowed. The conflict of law criterion applied (section 25, law 31 May 1995, no. 218) make reference to the country "in which their incorporation process has been concluded", but does not refer also to any subsequent places of "re-incorporation". Therefore, re-incorporations should not be admitted. Anyway, according to sections 2437 and 2473 of the Italian Civil Code, dissenting shareholders shall have the right to withdraw from the company in Code in case of transfer abroad the registered office of their company, therefore admitting *de facto* such a transfer. However, re-incorporations have been commonly implemented in the Italian business practice. Therefore, Italy could be assimilated Italy to those countries that admit re-incorporations. See F. M. MUCCIARELLI, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi*, Milano, 2010.

Besides Italy, other Member States (such as French and Spain) allowed re-incorporations abroad by way of cross-border mergers, which however has been prohibited by others, such as Germany, Austria and Luxembourg. See M. M. SIEMS, *The European Directive on Cross-border Mergers: An International Model*?, 11 *Columbia Journal of European Law*, 2005, p. 170.

establishing the European Economic Community signed in Rome on 25 March 1957 (now Treaty on the functioning of the European Union) expressly requires Member States to permit the EU companies' establishment and guarantee them a non-discriminatory treatment compared to domestic companies.

But, as known, freedom of establishment guaranteed by the Treaty is likely to come into conflict with the domestic corporate laws of the members States, as well as with the international private laws provided by the same countries as a protectionist tool to ensure the application of the same domestic corporate law[48].

Anyway, the compatibility of connecting factors on corporate law with the economic freedoms, and in particular the restrictions to the entry of foreign companies that Member States could impose (and, practically speaking, to "inbound" transfer of headquarter of foreign companies and to "inbound" cross-border mergers), were the subject of certain important rulings of the Court of Justice of the European Union which have led to reconsider the relationships between European Union law, private international law and domestic corporate law and have challenged the validity of the traditional private international approach adopted by several member States. The leading cases in this context are the following: Daily Mail (Case C-81/87 *Daily Mail and General Trust vs. H. M. Treasury*, [1988] ECR 5483), Centros (Case C-212/97 *Centros Ltd vs. Erhvervs- og Selskabsstyrelsen*, [1999] ECRI-1495), Überseering (Case C-208/00 *Überseering BV vs Nordic Construction Company Baumanagement GmgH* [2002] ECR I-9919), Inspire Art (Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd*, [2003]

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[48] W. SCHÖN, *The mobility of companies in Europe and the organizational freedom of company founders*, in *European Company and Financial Law Review*, 3(2), 2006, p. 124.

ECR I-10155) and SEVIC (Case C-411/03, *SEVIC Systems AG* [2005] ECR I-10805)[49], which has been the first case dealing with a cross-border merger[50].

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[49] For the broad doctrinal debate see, for English language: J. ARMOUR, *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition*, *working paper*, ECGI, Working Paper No. 54/2005, June 2005, available at: ssrn.com; T. BALLARINO, *From Centros to Überseering. EC Right of Establishment and the Conflict of* Laws, in *Yearbook Private International Law*, 2002, p. 203 et seq.; L. A. BEBCHUK - A. COHEN, *Firms' Decisions where to Incorporate, Journal of Law and Economics*, 46, 2003, p. 383-425; M. V. BENEDETTELLI, *Conflicts of Jurisdiction and Conflicts of Law in Company Law Matters Within the EU «Market for Corporate Models»: Brussels I and Rome I after Centros,* in *European Business Law Review,* 2005, p. 55 et seq.; M. BECHT - C. MAYER - H. F. WAGNER, *Corporate Mobility Comes to Europe: The Evidence*, *Corporate Mobility Comes to Europe: The Evidence,* working paper, Université Libre de Bruxelles & Sa ıd Business School, Oxford University, 2005, available at: ssrn.com; P. BEHRENS, *The Establishment of Companies after the Centros Case. Implications for Central European Countries*, in *Europe Tomorrow*, 2002, p. 387 et seq.; J. C. DAMMANN, *The U.S. Concept of Granting Corporations Free Choice among State Corporate Law Regimes as a model for the European Community*, working paper, 2005, available at: ssrn.com; H. J. de kluiver, *Inspiring a New European Company Law? Observations on the ECJ's Decision in Inspire Art from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member* States, in *European Company and Financial Law Review,* 2004, p. 126 et seq.; C. E. DECHER, *Cross Border Mergers: Traditional Structures and SE-Merger Structures,* in *European Company and Financial Law Review*, 2007, p. 5 et seq.; A. DELLA CHÀ, *Companies, Right of Establishment and the CENTROS Judgment of the European Court of Justice,* in *Dir. comm. int.,* 2000, p. 925 et seq.; M. DORALT, *Cross-Border Mergers – A Glimpse into the Future,* in *European Company and Financial Law Review*, 2007, p. 5 et seq.; R. DRURY, *A European Look at the American Experience of the Delaware Syndrome,* in *The Journal of Corporate Law Studies,* 2005, p. 1 et seq.; W. F. EBKE, *Centros. Some Realities and Some Mysteries,* in *The American Journal of Comparative Law,* 2000, p. 623 et seq.; L. ENRIQUES, *EC Company Law and the Fears of a European Delaware*, in *European Business* Law *Review,* 2004, p. 1259 et seq.; L. ENRIQUES, *Company Law Harmonization Reconsidered: What Role for the EC?*, in S. M. BARTMAN (ed.)*, European Company Law in Accelerated Progress*, Kluwer Law International, 2006; W. F. EBKE, *The European Conflict of Corporate Laws Revolution: Überseering, Inspire Art and Beyond*, in *International Lawyer*, 2004, p. 38 et seq.; V. EDWARDS, *EC Company Law,* Oxford EC Law Library, Oxford Clarendon Press, 1999; L. ENRIQUES - M. GELTER, *How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law*, *working paper*, ECGI - Law Working Paper No. 63/2006, available at: ssrn.com; Z. FLUCK - C. MAYER, *Race to the Top or Bottom? Corporate Governance, Freedom of Reincorporation and Competition in Law*, *Annals of Finance*, 1(4), 2005, p. 349-378; C. FROST, *Transfer of Company's Seat. An Unfolding Story in Europe,* in *Victoria University of Wellington Law review*, 2005, p. 359 et seq.; L. L. HANSEN, *A New Look at Centros from a Danish Point of View,* in *European Business Law Review,* 2002, p. 85 et seq.; M. GELTER, *The Structure of Regulatory Competition in European Corporate Law*, in

Journal of Corporate Law Studies, 2005, p. 247 et seq.; S. GRUNDMANN, *The Structure of European Company Law: From Crisis to Boom*, in *European Business Organization Law Review,* 2004, p. 601 et seq.; L. L. HANSEN, *Merger, Moving and Division Across National Borders. When Case Law Breaks through Barriers and Overtakes Directives,* in *European Business Law Review,* 2007, p. 181 et seq.; H. C. HIRT, *Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd*, in *European Business Law Review*, 2004, p. 1189 et seq.; C. HOLST, *European Company Law after Centros. Is the EU on the Road to Delaware?,* in *Columbia Journal of European Law,* 2002, p. 323 et seq.; A. JOHNSTON, *EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition*, in *Journal of Corporate Law Studies*, 2006, p. 71 et seq.; M. LAUTERFELD, «*Centros» and the EC Regulation on Insolvency Proceedings: The End of the «Real Seat» Approach towards Pseudo-Foreign Companies in German International Company and Insolvency Law,* in *European Business Law Review,* 2001, p. 80 et seq.; A. LOOIJESTIJN-CLEARIE, *Have the Dikes Collapsed? Inspire Art a Further Break-through in the Freedom of Establishment of Companies*?, in *European Business Organization Law Review*, 2004, p. 389 et seq.; C. KIRCHNER - R. W. PAINTER – W. A. KAAL, *Regulatory Competition in EU Corporate Law after Inspire Art: Unbundling Delaware' s Product for Europe,* in *European Company and Financial Law Review,* 2005, p. 159 et seq.; U. KLINKE, *European Company Law and the ECJ: The Court' s Judgements in the Years 2001 to 2004*, in *European Company and Financial Law Review*, 2005, p. 270 et seq.; S. LOMBARDO, *Conflict of Law Rules in Company Law after Überseering: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union*, in *European Business Organization Law Review*, 2003, p. 301 et seq.; E. MICHELER, *Recognition of Companies Incorporated in other EU Member States,* in *The International and Comparative Law Quarterly,* 2003, p. 521 et seq.; F. M. MUCCIARELLI, *Seat's transfer and State of Origin-Imposed Limits to Companies' Mobility*, working paper, 2007, available at: ssrn.com; F. M. MUCCIARELLI**,** *The Transfer of the Registered Office and Forum-Shopping in International Insolvency Cases: an Important Decision from Italy – Case Note on the Decision "B & C" of the Italian Corte di Cassazione*, in *European Company and Financial Law Review,* 2005, p. 512 et seq.; F. MUNARI - P. TERRILE, *The Centros Case and the Rise of an EC Market for Corporate Law, in Dir. un. eur.,* 2001*,* p. 1; S. RAMMELOO, *Corporations in Private International Law. A European Perspective*, Oxford University Press, 2001; W. G. RINGE, *No Freedom of Emigration for Companies*, in *European Business Law Review*, 2005, p. 16 et seq.; P. ROSE, *EU Company Law Convergence Possibilities after Centros,* in *transnational Law & Contemporary Problems,* 2005, p. 122 et seq.; W. H. ROTH, *From Centros to Überseering: Free Movement of Companies, Private International Law and Community Law,* in *International and Comparative Law Quarterly,* 2003, p. 177 et seq.; W. SCHŐN, *The Mobility of Companies in Europe and the Organizational Freedom of Company Founders*, in *European Company and Financial Review*, 2006, p. 122 et seq.; K. E. SØRENSEN, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric*?, in *Common Market Law Review*, 2006, p. 423 et seq.; C. P. SCHINDLER, *Cross-Border Mergers in Europe – Company Law in Catching Up!. Commentary on the ECJ's Decision in SEVIC System AG*, in *European Company and Financial Law Review*, 2006, p. 109 et seq.; P. SESTER - J. L. CÀRDENAS, *The Extra-Communitarian Effects of Centros, Überseering and Inspire Art with Regard to Fourth Generation Association Agreements*, in *European Company and Financial Law Review*, 2005, p. 398 et seq.; M. M. SIEMS, *The European Directive on Cross-*

border Mergers: An International Model?, op. cit., p. 167 et seq.; P. STORM, *Cross-border Mergers, the Rule of Reason and Employee Participation*, in *European Company Law*, 2006, p. 130 et seq.; P. STORM, *Convergence, Competition, Centros and Conflicts of Law: European Company Law in the 21st Century,* in *European Law Review,* 2002, p. 47 et seq.; C. W. A. TIMMERMANS, *Company Law as Ius Commune?*, First Walter Van Gerven Lecture, Antwerp, Intersentia, 2002, p. 1 et seq.; T. H. TRÖGER, *Choice of Jurisdiction in European Corporate Law. Perspective of European Corporate Governance*, in *European Business Organization Law Review*, 2005, p. 3 et seq.; G. J. VOSSESTEIN, *Companies' Freedom of Establishment after SEVIC*, in *European Company Law*, 3, 2006, p. 177 et seq.; M. VENTORUZZO, *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law,* in *European Company and Financial Law Review*, 2007*,* p. 47 et seq.; O. VOSSIUS, *The Innoventif Case of the ECJ 1.6.2006, C- 543/04,* in *European Company and Financial Law Review*, 3, 2006, pp. 475 et seq.; E. WERLAUFF, *EU Company Law. Common Business Law of 28 States*, second edition, 2003, pp. 1 ss.; E. WERLAUFF, *The Main Seat Criterion in a new Disguise. An Acceptable Version of the Classic Main Seat Criterion,* in *European Business Law Review,* 2001, p. 2 et seq.; E. WYMEERSCH, *The Transfer of the Company's Seat in European Company Law*, in *Common Market Law review*, 2003, p. 662 et seq.; by the same author see also *Is a Directive on Corporate Mobility Needed?,* in *European Business Organization Law Review*, 2007, p. 161 et seq.; F. WOOLDRIDGE, *Überseering: Freedom of Establishment of Companies Affirmed,* in *European Business Law Review,* 2003, p. 227 et seq.; J. WOUTERS, *European Company Law: Quo Vadis?*, in *Common Market Law Review*, 2000, p. 257 et seq.; WYATT & DASHWOOD'S, *European Union Law*, fifth edition, London, 2006, p. 749 et seq.; D. ZIMMER, *Private International Law of Business Organisations*, in *European Business Organization Law Review*, 2000, p. 585 et seq.

For Italian language see N. AL NAJJARI - S. PERON, *Le fusioni transfrontaliere di società di capitali: uno sguardo di insieme,* in *Contratto e impresa/Europa,* 2, 2005, p. 708 et seq.; T. BALLARINO, *Problemi di diritto internazionale privato dopo la riforma,* in *Il nuovo diritto delle società, Liber amicorum Gian Franco Campobasso*, P. ABBADESSA-G. B. PORTALE (eds.), I, Torino, 2007, p. 149 et seq.; T. BALLARINO, *Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie,* in *Riv. soc.*, 2003, p. 679 et seq.; A. BARONE, *Diritto comunitario e disciplina applicabile alle sedi secondarie di società estere,* in *Riv. not.,* 2003, p. 90 et seq.; M. V. BENEDETTELLI, *Le fusioni transfrontaliere,* in *Il nuovo diritto delle società, Liber amicorum Gian Franco Campobasso*, P. ABBADESSA-G. B. PORTALE (eds.), IV, Torino, 2007, p. 366 et seq.; M. V. BENEDETTELLI, «*Mercato» comunitario delle regole e riforma del diritto societario italiano,* in *Riv. soc.,* 2003, p. 699 et seq. M. V. BENEDETTELLI, *Diritto internazionale privato delle società e ordinamento comunitario,* in *Diritto internazionale privato e diritto comunitario,* P. PICONE (ed.), Padova, Cedam, 2005, p. 205 et seq.; M. V. BENEDETTELLI, *Libertà comunitarie di circolazione e diritto internazionale privato delle società,* in *Riv. dir. int. priv. e proc.,* 2001, p. 569 et seq.; S. M. CARBONE, *La riforma societaria tra conflitti di leggi e principi di diritto comunitario,* in *Dir. comm. int.,* 2003, p. 89 et seq.; M. COLANGELO, *La sentenza Inspire Art: verso un nuovo «mercato europeo delle regole»,* in *Riv. dir. civ.,* 2005, pp. 257 ss.; G. CONTALDI, *Il diritto comunitario delle società tra evoluzioni giurisprudenziali e la legge di riforma delle società,* in *Dir. Unione Europea,* 2003, p. 711 et seq.; G. COSCIA, *La teoria della sede effettiva o Sitztheorie e la libertà di stabilimento societario,* in *Giur. it.,* 2003, p. 703 et seq.; L.

Following the European Court of Justice reasoning, domestic restrictions to the activities of pseudo-foreign corporations are allowed only if they fulfil the four condition provided by the "Gebhard test", *i.e.*: «*they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it*»[51].

ENRIQUES, *Commento sub. artt. 2507-2510 cod. civ.,* in *Commentario al codice civile,* A. SCIALOJA-G. BRANCA (eds.), Bologna, 2007; M. GESTRI, *Mutuo riconoscimento delle società comunitarie, norme di conflitto nazionali e frode alla legge: il caso Centros,* in *Riv. dir. int.,* 2000, p. 71 et seq.; M. GNES, *Il diritto di stabilimento delle società nell'Unione Europea: un nuovo «caso Delaware»?,* in *Giorn. Dir. amm.,* 2003, p. 133 et seq.; A. GUACCERO, *Libertà di stabilimento e diritto societario degli Stati membri: Europa vs. USA*, in *Europa e diritto privato,* 2007, p. 133 et seq.; M. E. GURRADO, *Via libera alle fusioni transfrontaliere,* in *Dir. Comm. int.,* 2006, p. 353 seq.; P. KINDLER, *Aspetti essenziali di un futuro regolamento comunitario sulla legge applicabile alle società,* in *Dir. int. priv. proc.,* 2006, p. 657 et seq.; S. LOMBARDO, *La libertà comunitaria di stabilimento dopo il «caso Überseering»: tra armonizzazione e concorrenza fra ordinamenti,* in *Banca, borsa, tit. cred.,* 2003, p. 456 et seq.; S. LOMBARDO, *Libertà di stabilimento e mobilità delle società in Europa,* in *La nuova giurisprudenza commentata civile,* 2005, p. 352 et seq.; G. MARGIOTTA, *Il trasferimento della sede all'estero,* in *Riv. not.,* 2004, p. 649 et seq.; F. M. MUCCIARELLI, *Libertà di stabilimento per le società comunitarie e diritto societario dell'Unione Europea,* in *Giur. comm.,* 2000, p. 83 et seq.; F. M. MUCCIARELLI, *Libertà di stabilimento comunitaria e concorrenza tra ordinamenti societari,* in *Giur. comm.,* 2000, p. 559 et seq.; S. NOCELLA, *Il caso Inspire Art: l'armonizzazione al banco di prova,* in *Giur. comm.,* 2005, II, p. 5 seq.; F. MUNARI, *Riforma del diritto societario italiano, diritto internazionale privato e diritto comunitario,* in *Riv. dir. int. priv. proc.,* 2003, p. 19 et seq.; A. PERRONE. *Dalla libertà di stabilimento alla competizione fra gli ordinamenti? Riflessioni sul «caso Centros»,* in *Riv. soc.,* 2001, p. 1292 et seq.; G. PETRELLI, *Lo stabilimento delle società comunitarie in Italia,* in *Riv. not.*, 2004, p. 344 et seq.; M. POCCI, *Le fusioni societarie transfrontaliere nel mercato comune,* in *Dir. prat. soc.,* 2006, p. 6 et seq.; G. B. PORTALE, *La riforma delle società di capitale tra diritto comunitario e diritto internazionale privato,* in *Europa e diritto privato,* 2005, p. 101 et seq.; G. B. PORTALE, «*Armonizzazione» e «concorrenza» tra ordinamenti nel diritto societario europeo,* in *Corr. giur.,* 2003, p. 95 et seq.; A. PRETO - C. DESOGUS, *La direttiva comunitaria sulle fusioni transfrontaliere di società di capitali,* in *Contratto e impresa/Europa*, 2006, p. 234 et seq.

[50] The positions developed by the European Court of Justice, in its most famous rulings, about companies' mobility and freedom of establishment will be addressed in detail in chapter IV.

[51] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165.

After the decisions of the European Court of Justice, companies can be incorporated in any Member State and carry out their business activities in another State, thus giving free way to a flourishing market for company law also within Europe. However, it has been observed that one of the main differences with the U.S. is that the companies engaged in this market are mostly not listed companies[52]. One of the reasons has been found, for example, in the regulation of minimum legal capital[53]; unlike European company law systems, in the U.S. there are no significant differences regarding minimum legal capital among the individual States.

However, notwithstanding the significant interventions of the European Court of Justice, the issue relevant to the restrictions provided by the country of origin to re-incorporations abroad was much more uncertain. As it will better described hereinafter, in "Daily Mail" case the Court of Justice stated that freedom of establishment does not cover freedom to "emigrate", since corporations are «*creatures of national law*» and that «*they exist only by virtue of the varying national legislation which determines their incorporation and functioning*»[54]. Therefore, member States were still free to set the conditions (and they felt free also to prohibit domestic companies from reincorporating abroad) by which a corporation could transfer its seat into another Member State.

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[52] M. BECHT - C. MAYER – H. F. WAGNER, *Where do Firms Incorporate?, Deregulation and the Cost of Entry,* in *Journal of Corporate Finance*, 2008, p. 241 et seq.

[53] M. VENTORUZZO, *"Cost-based" and "Rules-based" regulatory competition: Markets for corporate charters in the U.S. and in the E.U.*, 3 *N.Y.U. J.L. & Bus.,* 2007, p. 107. As a consequence, a relevant number of limited liability corporations in recent years have been incorporated in Member States with low capital requirements.

[54] Judgement of the Court, Case C – 81/87, para. 19.

This position, however, is destined to evolve. In the more recent Cartesio ruling (Case C-210/06 *Cartesio* [2008] ECR I-9641)[55], the European Court of Justice stated in an *obiter dictum* - with doubtful binding force, but extremely significant – that Member States have the power to define the connecting factor for domestic corporations, but can not require «*the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State*»[56].

However, this is not sufficient to pave the way for the type of transfers which shall be deemed as lawful, since the conversion can take place «*to the extent that it is permitted under law* [of the Member State of arrival - author's note] *to do so*»[57]. The decision not to put any obligation on the host State makes the *obiter dictum* quite ineffective, because under the current national laws of EU countries such conversion seems generally impossible.

In any case it must be remembered that the European Commission, also in order to foster the development of the internal market, drafted in 1997 a proposal for a fourteenth directive on cross-border transfer of company seats[58], never adopted by the European Council, which is still at the preparatory stage, despite reminders from the European Parliament in 2009 and 2012.

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[55] See footnote 50 above.

[56] Judgment of the Court, Case C-210/06, para. 112.

[57] *Ibidem*.

[58] COM XV/6002/97. See F. FERRARI, *E.U. Corporate Tax Law ed i progetti di direttiva sul trasferimento di sede di società da un Paese membro ad un altro*, in *Dir. comm. int.*, 1999, p. 399 et seq.; R. R. DRURY, *Migrating Companies*, in *Eur. law rev.*, 1999, p. 354 et seq; S. RAMMELOO, *Cross Border Company Mobility and the Proposal for a 14th EC Company Law Directive: Daily Mail Surmounted*, in *Maastricht journal eur. comp. law*, 1999, p. 105 et seq.; M. LUTTER, *The Cross-Border Transfer of a Company's Seat in Europe*, in *Eur. Tidskriff*, 2000, p. 60 et seq.; M. JOHNSON, *Does Europe Still Need a Fourteenth Company Law Directive?*, in *Hertfordshire law journal*, 2004, p. 18 et seq.

To be honest, at the present moment re-incorporations are admitted in the European Union and liberalized by E.U. derivative law not directly – *i.e.* by allowing "direct reincorporation" abroad – but through cross-border mergers.

The Regulation on the European Company (*Societas Europaea*) [59] has been the first step toward freedom of re-incorporation. The regulation in question has created an organizational form, the *Societas Europaea* or European Company, incorporated directly by the European Union law. On a first analysis, this kind of company may seem to offer a way to reincorporate in another Member State, as a vehicle to avoid restrictions to re-incorporations according to the laws of certain Members States[60]. Paragraph 1 of section 8 indeed specifically grants the European Company the right to transfer its registered office to another Member State, not requiring the winding up of the European Company or in the creation of a new legal person. Thus, a company wishing to transfer its office to another Member State could transform into a European Company, and then transfer its registered office to another Member State, transforming into a corporation under the law of the new country of incorporation.

However, the truth is quite different. As provided by section 7 of the same Regulation, the registered office shall be placed in the same country as the real seat[61]. It means that the European Company intending to change the applicable law can only transfer its registered

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[59] Council Regulation no. 2157/2001/EC on 8 October 2001, on a Statute for an European Company, Official Journal of the European Communities, L 294, 10 November 2001.

[60] L. ENRIQUES, *Silence is Golden: the European company as a catalyst for company law arbitrage*, in *J. Corp. L. Stud.*, 2004, p. 82; H. EIDENMÜLLER – A. ENGERT – L. HORNUF, *Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage*, in *European Business Organization Review*, 10, 2009, p. 1.

[61] About the position according to which section 7 the SE Regulation violates EC freedom of establishment provided by the Treaty see W. G. RINGE, *The European Company Statute,* in *J. Corp. L. Stud.*, 2007, p. 190.

office if it also transfers its real seat; therefore, the *Societas Europaea* cannot be considered a vehicle for free choice of law[62].

Few years later, with the Directive 2005/56/CE of the Parliament and the Council, 26 October 2005 (Tenth Directive), free choice of law through the European Union has been recognized (but not directly, as explained above), imposing to Member States to provide specific rules governing cross-border mergers. A company incorporated in a Member State, therefore, can now incorporate a new shell company in another Member State and then merge into said vehicle, determining a change in the applicable law[63]. But, however, this could not be in any case enough; certain limits connected with the application of real seat theory in some countries still remain. For example, if the absorbing company (or the company resulting from the merger) is subject to the laws of a country in which the real seat theory applies, the registered office shall be anyway placed in the same country as the real seat, as already said above for the *Societas Europaea*.

The long path leading to the adoption of the Tenth Company Law Directive on cross-border mergers of limited liability companies, as well as its provisions and the Italian implementation rules will be addressed in detail in later chapters, after an examination of the Italian private international law rules on companies and cross-border mergers.

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[62] F. M. MUCCIARELLI, *Freedom of Reincorporation and the Scope of Corporate Law in the U.S. and the E.U.*, op. cit., p. 18.

[63] About mergers as means for re-incorporation see J. C. DAMMANN, *A New Approach to Corporate Choice of Law*, in 38 *Vand. J. Transnat'l L.*, 2005, pp. 77 - 79.

CHAPTER II

Italian private international company law

SUMMARY: 1. Cross-border mobility of companies and mergers under Italian law; conflict rules section 25 of Law 31 May 1995, no. 218 – 2. Companies and other entities: the subjective scope of application of section 25 of Law 218/1995 – 3. The governing law according to section 25 of Law 218/1995. Seat of the management and the principal operation – 4. Subject matter of *lex societatis* – 5. "Any transfer of the registered office to a different State as well as mergers of entities having registered offices in different States" – 5.1. Transfer of the registered office – 5.2. Mergers of entities having registered offices in different States.

1. Cross-border mobility of companies and mergers under Italian law; conflict rules section 25 of Law 31 May 1995, no. 218

Law no. 218 of 31 May 1995 contains a general reform of the Italian system of private international law, which replaced sections 16 to 31 of the general legal provisions of the Italian Civil Code ("*preleggi*"). Section 25 - concerning «companies and other entities» and which is the sole section of chapter III regarding «legal persons» - has introduced in Italian legal system a bilateral conflict rule on companies and other entities[64].

[64] An English unofficial translation of the full text of section 25 of law no. 218 of 31 May 1995 is provided below:

«1. Companies, associations, foundations and any other entities, both based on public or private structure, even though not having the characteristics of an association, shall be governed by the law of the State in which their incorporation process has been concluded. Nevertheless, Italian law shall apply if the seat of the management (*sede dell'amministrazione*) is in Italy as well as if the principal operation of said entities is located in Italy.

2. The law governing the entity shall in particular apply to:

a) legal nature;

b) trade or corporate name;

In its clause 3, section 25 of Law 218/1995 has introduced a provision relevant to transfer of registered office and cross-border mergers, according to which said transactions are permitted and shall be effective, provided that they are admitted and regulated by the law of the foreign State ("of arrival" or of "origin") and carried out in full compliance with the laws of Italy and of the foreign States.

The private international law rule at hand is generally based on the connecting factor of the place of incorporation, however Italian law shall apply «*if the seat of the management (sede dell'amministrazione) is in Italy as well as if the principal operation of said entities is located in Italy*». Said mixed regime, which gives relevance to both connecting factors (incorporation and real seat), has been adopted at the end of a heated debate among the reform commission of the Italian Parliament, as resulting from the fact that the government bill no. 1192/XI was based on the pure real seat theory, and was amended by the Parliament in its last reviews[65].

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c) incorporation, transformation and dissolution;

d) capacity;

e) establishment, powers and operational modalities of the internal bodies;

f) representation;

g) modalities to acquire or lose shareholding status in the entity and relevant rights and obligations;

h) liability for obligations undertaken by the entity;

i) consequences resulting from breach either of law or of the articles of incorporation.

3. Any transfer of the registered office to a different State as well as mergers of entities having registered offices in different States shall take effect only when performed in compliance of the laws of those States».

[65] For a reconstruction of the reform process see, D. DAMASCELLI, *I conflitti di legge in materia di società*, Bari, 2004, p. 25 et seq.; G. BROGGINI, *Sulle società nel diritto internazionale privato*, in G. GAIA (ed.), *La riforma del diritto internazionale privato e processuale. Raccolta in ricordo di Edoardo Vitta*, Milano, 1994, p. 283 et seq.; P. PICONE, *I metodi di coordinamento tra ordinamenti nel progetto di riforma del diritto internazionale privato*, in *La riforma italiana del diritto internazionale privato*, Padova, 1998, p. 50 et seq.

Before the entrance in force of Law 218/1995, given the absence of an express provision governing legal persons and companies, Italian scholars elaborated several interpretations, in order to fill the law gap and to provide a regulation of the matter, based on the application of general legal provisions of the Italian Civil Code. One of the first theories relied on section 17 of general legal provisions of the Italian Civil Code concerning status and legal capacity of natural persons. As a consequence, the connecting factor of nationality - which is peculiar to natural persons – applies also to companies, through identification of the legal system to which the company "belongs"[66].

Another important theory considered as prevailing the contractual element, and the issue of the recognition of legal status of a foreign entity was solved applying the conflict rule on contractual obligations, thus attributing importance to the will of the parties[67].

According to other scholars, recognition of foreign companies should be based on clause 2 of section 16 of general legal provisions of the Italian Civil Code, concerning recognition of the foreigner (and which provides a reciprocity condition)[68], or in general based on mechanisms that exclude the application of conflict rules (moving in any case from clause 2 of section 16 of general legal provisions of the Italian Civil Code)[69].

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[66] F. CAPOTORTI*, La nazionalità delle società*, Napoli, 1953, p. 113 et seq.

[67] G. BALLADORE PALLIERI, *Diritto internazionale privato*, in A. CICU–F. MESSINEO (eds.), *Trattato di diritto civile e commerciale*, vol. 45, Milano, 1974, p. 153.

[68] T. BALLARINO, *Le società costituite all'estero*, in P. RESCIGNO (ed.), *Trattato di diritto privato*, vol. 17, Torino, 1985, p. 391 et seq.; E. SIMONETTO, *Trasformazione e fusione delle società. Società costituite all'estero od operanti all'estero*, in A. SCIALOJA–F. BRANCA (eds.), *Commentario al codice civile*, Bologna, 1976, p. 351 et seq.

[69] C. ANGELICI, *Appunti sul riconoscimento di società costituite all'estero*, Milano, 1982, p. 43 et seq.; G. COSCIA, *Il riconoscimento di società straniere*, Milano, 1981, p. 76; R. MONACO, *L'efficacia della legge nello spazio*, in F. VASSALLI (ed.), *Trattato di diritto civile*, vol. 1, 4, Torino, 1964, p. 122 et seq.

Finally, together with the above mentioned theories, also deserving a mention is the minority opinion according to the real seat theory applies in the Italian legal system, affirming that section 2505[70] was a general rule and a fundamental principle of the international company law. Therefore, according to this solution, Italian law must be applied to all companies with their seat of management or company purpose in Italy[71].

On the other hand, the issue of transfer abroad of the registered office of Italian companies was controversial. Thesis that attributed to Italy the adoption of the real seat theory[72], affirmed also that, through section 2509 of the Italian Civil Code[73], Italian companies could transfer abroad the corporate purpose or the management seat without transforming into foreign companies; however, consequences of transfer of registered office were not assessed. The same issue emerges more clearly from that thesis according to which, on the basis of section 2509, the Italian legal system provided for a bilateral conflict rule that refers to the country of incorporation[74]; this approach, at the same time, denied that the transfer of the registered office abroad can change the law applicable to Italian companies.

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[70] According to the previous version of section 2505 of the Italian Civil Code, which has been repealed by Law 218/1995, companies incorporated abroad, which have the seat of the management (*sede dell'amministrazione*) or the principal operation of the business in Italy, are subject to, including with respect to the validity requirements of the incorporation deed, all the provisions of Italian law.

[71] F. CARUSO, *Le società nella comunità economica europea,* Napoli, 1969, p. 66 et seq.; U. LEANZA, *Voce "Società straniera"*, in *Noviss. Dig. It.*, XVII, Torino, 1974, p. 697.

[72] U. LEANZA, *Voce "Società straniera"*, op. cit., p. 698.

[73] According to the previous version of section 2509 of the Italian Civil Code, which has been repealed by Law 218/1995, companies incorporated in Italy, even if the object of their activities is located abroad, are subject to the provisions of Italian law.

[74] A. SANTA MARIA, *Le società nel diritto internazionale privato*, Milano, 1970, p. 142.

The conflict rule set forth in section 25 of Law 218/1995, then, replaced the previous rules provided by sections 2505 and 2509 of the Italian Civil Code, following indeed for the most part their contents[75], which have been repealed by section 73 of the reform of private international law.

2. Companies and other entities: the subjective scope of application of section 25 of Law 218/1995.

The general reform of the Italian system of private international law has undoubtedly extended the subjective scope of the conflict rule on companies. Despite of the title of the chapter III «legal persons» under which section 25 is placed, that might suggest the intention to limit the application of the rule at hand solely to personified legal entities – according to the previous discipline provided by the general legal provisions of the Italian Civil Code and the previous formulation of sections 2505 and 2509 of the same Code, that made reference only to legal persons ("*persone giuridiche*") – an accurate interpretation of the leads to include in the field of application of section 25 any entity other than natural persons[76].

The broad wording of first part of section 25 indeed represents a clear expression of the will of extending the application of the connecting factor provided therein also to foreign legal entities governed differently from the corresponding Italian ones or even not

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[75] A. SANTA MARIA, *Spunti di riflessione sulla nuova norma di diritto interazionale privato in materia di società e di altri enti*, in *Riv. soc.*, 1996, p. 1094.

[76] R. LUZZATTO - C. AZZOLINI, *Società (nazionalità e legge regolatrice), Digesto discipline privatistiche, Sez. commerciale,* XIV, Torino, 1997, p. 137 et seq.; F. MOSCONI-C. CAMPIGLIO, *Diritto internazionale privato e processuale*, vol. 2, 2nd edition, Torino, 2006, p. 43; M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, in *Riv. soc.*, 1997, p. 44; A. SANTA MARIA, *Spunti di riflessione sulla nuova norma di diritto interazionale privato in materia di società e di altri enti*, op. cit., p. 1094.

corresponding to any of the association types provided by the Italian legal system (and therefore implicitly recognizing those entities)[77].

In particular, it has been noted that chapter II «natural persons» and chapter III «legal persons» of Law 218/1995 seems to enclose all the issues relevant to the law applicable to "persons"[78]; there is no any other provision indeed aimed at identifying the law applicable to entities without legal personalities.

In addition, first part of section 25 seems to recall the provisions of several commerce treaties entered into by Italy before the private international law reform, which provided a broad wording of "entity" with regard to the reciprocal recognition of entities belonging to signatory States[79].

Anyway, even if the definition of "entity" must be interpreted in a broad sense, two general limits to the application of section 25 can be identified.

First of all, section 25 shall not apply in case of existence of specific rules provided for a given institution, such as internal rules adopted for the implementation of international conventions to which Italy is a party[80], as expressly provided for by section 2 of Law 218/1995[81].

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[77] According to the decision Italian Supreme Court of Cassation on 16 November 2000, no. 14870, for the recognition of a foreign legal person in the Italian legal system it is not necessary that the said entity must be structurally or functionally compliant with the domestic legal persons, but it needs only to be recognized acceding to its legal system of origin.

[78] M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, op. cit., p. 44.

[79] For example, according to section 2 of the Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic signed in Rome on 2 February 1948, «*the term "corporations and associations" shall mean corporations, companies, partnerships and other associations, whether or not with limited liability and whether or not for pecuniary profit, which have been or may hereafter be created or organized under the applicable laws and regulations*».

[80] This is what happens for example with regard to trusts, which are subject to the Hague Convention on the Law Applicable to Trusts and on their Recognition,

In addition, section 25 should not apply to *de facto* corporations and in general to those entities whose existence does not result from and incorporation process, such as "secret company" (*società occulta*); section 25 provides a list of entities that are subject to the law of the State in which their "incorporation process" has been concluded; therefore, they shall be limited to the entities which incorporation has been performed through a "process". The word "process" shall be interpreted in the sense of conclusion of an administrative process ending with the registration of the company, and not in the sense of a simply conclusion of a "corporation agreement".

The consequence would be that *de facto* companies should always remain subject to Italian law. Said conclusion seems to ensure a certain degree of legal certainty because, in case of *de facto* companies with more foreign elements, it would be quite uncertain to determine in which legal system have occurred those facts that give birth to the company, that would easily cause nationality conflicts. Secondly, given that in practice *de facto* companies are considered only in the context of trials before Courts, it is quite difficult to consider that presumed shareholder could argue to the Court that the

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adopted on 1 July 1985, ratified by Italy with law 16 October 1989, no. 364; section 6 of the Hague Convention provides that the trust shall be governed by the law chosen by the settlor. Where the law chosen does not provide for trusts or the category of trust involved, the choice shall not be effective the trust shall be governed by the law with which it is most closely connected. Within this regard, reference shall be made in particular to (a) the place of administration of the trust designated by the settlor; (b) the situs of the assets of the trust; (c) the place of residence or business of the trustee; (d) the objects of the trust and the places where they are to be fulfilled.

[81] According also to the decision Italian Supreme Court of Cassation on 30 June 1999, no. 366, case *Ets. Payen et Cie. v. FKI - FAI Komatsu Industries S.p.A.*, according to section 2, first paragraph, of Law 218/1995, the private international law provisions do not prevent the application of international conventions in force for Italy.

company exists, but it has come in existence on the basis of a legal system different from the Italian one.

3. The governing law according to section 25 of Law 218/1995. Seat of the management and the principal operation

Once identified the addressees of section 25 of Law 218/1995, the rule at hand goes on to define the law that shall govern said subjects, *i.e.* the law of the State in which their incorporation process has been concluded.

As anticipated above, the *lex incorporationis* criterion is provided with an exception clause that identifies an additional connecting criterion for pseudo-foreign corporations as the place of incorporation of the foreign entity mitigated by the last part of paragraph one of section 25, according to which Italian law shall apply if the seat of the management (*sede dell'amministrazione*), as well as the principal operation of said entities, are in Italy.

With the expression "seat of the management", the Italian legislator makes reference to the place in which the management bodies form and express the resolutions that represent the company's will; sometimes, the place in which the registered office is located could be different from the place in which management decisions are actually taken.

As far as the "principal operation" is concerned, it is the place where the fundamental or predominant part of the production or exchange of goods or services activities, carried out by the company, are actually performed. Examples can be manifold: foreign companies having as their corporate purpose object the management of participations held exclusively or mainly in Italian companies; or foreign companies that carry out transportation and distribution of goods activities essentially in Italian territory; or companies that produce and sell its products almost exclusively in Italy[82].

Italian law (applicable as governing law according to the corrective exception) and foreign law (applicable as governing law being the law of the place of incorporation) are intended to find joint and cumulative application; the real seat criterion would have the strength to even make Italian law applicable also to legal entities incorporated outside Italy which would be, in principle, subject to foreign law[83].

On that point, it should be noted that the exception at hand must be considered as implementation section 17 of Law 218/1995 - according to which the provisions of Law 218/1995 do not prejudice those provisions of Italian law which, because of their object and purpose, are applicable notwithstanding the reference made to a foreign law – with the consequence of the application also of Italian law to companies incorporated abroad, but with seat of the

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[82] According to T. BALLARINO, *Manuale breve di diritto internazionale privato*, Padova, 2002, p. 127, a literal interpretation of "principal operation" could imply a broad application of Italian law to companies incorporated abroad, and therefore it is preferable to consider as "principal operation" the company's management and not the carrying out of its activities. See also G. BROGGINI, *La riforma del diritto internazionale privato, Società ed altri enti*, in AA.VV. (eds), *La riforma del diritto internazionale privato*, Milano, 1996, p. 63, according to which "seat of the management" and "principal operation" shall compose a solo circumstance: seat of the management is the place from which actions forming the company's will come from. Place of principal operation is the place where the activities provided by the corporate purpose is reflected in the world of economic activity: management, supervision, impulse, control.

[83] On the idea of "dual nationality" of companies (cumulative application of two statutes – e.g. foreign one and Italian one) see T. BALLARINO, *Diritto internazionale privato*, Padova, 1999, p. 363 et seq., F. MOSCONI – C. CAMPIGLIO, *Diritto internazionale privato e processuale,* op. cit., p. 45 et seq.; see also F. GALGANO – F. MARRELLA, *Diritto e prassi del commercio internazionale*, in *Trattato Galgano*, vol. LIV, Padova, 2010, p. 139 and S .M. CARBONE, *Lex mercatus e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari*, in *Riv. dir. intern. priv. proc*., 2007, p. 33 et seq.. A. SANTA MARIA, voce *Società (Dir. int, priv.)*, in *Enc. giur. Treccani*, vol. XXIX, Roma, 1998, according to which the reference to Italian law does not have the negative purpose of excluding the reference to the competent foreign law, applicable to a company.

management (*sede dell'amministrazione*) or the principal operation in Italy. The law of the place of incorporation would govern, *ab initio*, companies; subsequently, from the time of the transfer to Italy of the seat of the management (*sede dell'amministrazione*) or of the principal operation in Italy, Italian law shall apply, becoming *lex societatis* pursuant to the corrective exception of "real seat"[84].

The approach that considers second part of paragraph 1 of section 25 as a limitation of the effectiveness of the foreign *lex societatis* - which therefore applies together with Italian law, upon the presence of the particular connection represented by the fact that the seat of the management (*sede dell'amministrazione*) is located in Italy or that the company has its principal operation in Italy – tracks the developments in legislation on corporate international law, remarking the differences form the original provisions of section 2505 of the Italian Civil Code (as better discussed above).

According to a particularly restrictive interpretation, the real location criterion must be interpreted rigorously, from both a quantitative and a qualitative point of view; in order to apply (in whole) Italian law, both the place in which the management bodies form and express the resolutions relevant to the management of the companies and the place in which the economic activities that are the purpose of the company actually take place, regardless of where the so-called registered office (*sede legale*) is located[85].

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[84] A. BERLINGUER, *Rapporti con il diritto comunitario,* in M. SANDULLI – V. SANTORO (eds), *La riforma delle società*, vol. 3, Torino, 2003, p. 507; P. MENGOZZI, *Il diritto internazionale privato,* Napoli, 2004, p. 104 et seq.; G. BROGGINI, *La riforma del diritto internazionale privato, Società ed altri enti*, op. cit., p. 61.

[85] G. PRESTI – M. RESCIGNO, *Corso di diritto commerciale*, *Le società*, Bologna, 2013, p. 358.

4. Subject matter of *lex societatis*

Paragraph two of section 25 contains an example list of matters that are submitted to the *lex societatis*. In the interest of efficiency, this dissertation does not enter into a detailed discussion of such matters, focusing in particular to the law applicable to mergers, debated in the following paragraphs.

As anticipated, according to a whole interpretation of the provision set forth in paragraph two of section 25 and the wording "in particular", such list must be considered for example purposes only[86], and, therefore, open and destined to be integrated with additional matters that fall within the ambit of the law of the State into which the incorporation process has been concluded[87].

Such matters are:

a) legal nature (*natura giuridica*). Legal nature of the company shall be considered as the entity's legal classification according to the laws of the legal system under which the incorporation process has been performed [88], with all the legal consequences that the qualification implies in terms of application of a given regulation[89];

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[86] F. FIMMANÒ, *Trasferimento della sede sociale all'estero e principio di incorporazione*, *Nota a Trib. Verona, 5 dicembre 1996*, in *Le società*, 1997, 5, p. 574 et seq.

[87] A. SANTA MARIA, voce *Società (Dir. int. priv.)*, op. cit.; F. POCAR, *Il nuovo diritto internazionale private italiano*, Milano, 2007, p. 77; S. TONOLO, *Persone giuridiche*, in G. CONETTI - S. TONOLO – F. VISMARA (eds.), *Commento alla riforma del diritto internazionale privato italiano*, Torino, 2009, p. 101.

[88] For example, whether the entity has been incorporated in Italy, concept of legal nature shall be considered as belonging to one form or type of entity provided by the Italian law (e.g. *associazione, fondazione, società semplice, società in nome collettivo, società in accomandita semplice, società per azioni, società a responsabilità limitata, società per azioni, società cooperativa a mutualità prevalente* or other *società cooperativa, società consortile, associazione temporanea di imprese* etc.).

[89] See case *Veneta Mineraria v. Ammainter*, Court of Appeal of Milan, 14 January 2000, in *Riv. dir. int. priv. proc.*, 2000, p. 172 et seq.

b) trade or corporate name (*la denominazione o ragione sociale*), which must be interpreted as including also any other distinctive sign (company seal, trade mark etc.) provided by the *lex societatis* (even if the Italian legislator has drafted the provision taking as a model Italian corporate law[90]);

c) incorporation, transformation and dissolution (*la costituzione, la trasformazione e l'estinzione*), which make reference to those proceedings and actions which compose the formation process of the entity[91], or those events relevant to the modification of the company's structure, or relevant to the dissolution of the company[92];

d) capacity *(la capacità*), which includes the legal capacity and the capacity to sue and be sued[93], together with the relevant limits;

e) establishment, powers and operational modalities of the internal bodies (*la formazione, i poteri e le modalità di funzionamento degli organi*); *lex societatis* shall apply also to the organization and to the decision-making process, including the formation of will within the company and the external expression of said will[94];

f) representation of the entity (*la rappresentanza dell'ente*). It has been highlighted the existence of a potential conflict between *lex*

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[90] M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, op. cit., p. 49.

[91] On the other hand, it has been stated that «*acts or preliminary contracts whose sole purpose is to create obligations between interested parties (promoters) with a view to forming a company*», M. GIULIANO – P. LAGARDE, *Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I*, in *Official Journal C 282*, 31 October 1980.

[92] *Lex societatis* shall also apply to coercive measures of dissolution of the entity ordered by the public authorities.

[93] According to the decision Italian Supreme Court of Cassation, United Sections, on 15 January 1996, no. 264, case *Iraqi government v. Soc. Breda meccanica bresciana*, in in *Riv. dir. int. priv. proc.*, 1997, p. 127 et seq., the capacity to sue and be sued of a representative of a foreign State, pursuant to section 25 of Law 218/1995, shall be assessed according to the foreign national law.

[94] F. MOSCONI – C. CAMPIGLIO, *Diritto internazionale privato e processuale*, op. cit., p. 48.

societatis, applicable to the representation of corporate bodies, and *lex contractus* (*i.e.* the law chosen by the parties for their contractual relationship), applicable to voluntary representation. Said conflict shall be resolved through the application of the *lex contractus* whether *lex societatis* does not provide for special rules for the representation of corporate bodies, but refers these issues to the general provisions of the civil law[95]. In this case, the applicable *lex contractus* would be identified according to section 60 of Law 218/1995[96].

g) modalities to acquire or lose shareholding status in the entity and relevant rights and obligations (*la modalità di acquisto e di perdita della qualità di socio nonché i diritti e gli obblighi inerenti a tale qualità*). The definition of shareholder shall be understood in a broad sense[97], so as to include not only those to whom *lex societatis* formally recognizes such status, but more in general all those who, having invested capital in the company, hold an interest in the same entity.

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[95] M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, op. cit., p. 54. According to the same author, the special power of attorney has as its object individual and specific business, and for that reason shall be related to section 60 of law no. 218/1995, M. V. BENEDETTELLI, *Commento all'articolo 25 della legge 218/1995*, in S. BARIATTI (ed.), *Riforma del sistema di diritto internazionale privato*, in *N. leggi civ.*, 1996, p. 1116.

[96] An English unofficial translation of the full text of section 60 of law no. 218 of 31 May 1995 is provided below:

1. Voluntary representation shall be governed by the law of the State in which the representative has his business establishment, provided that he acts in accordance with his professional qualification and that such place of business is known or knowable by third parties. In the absence of such conditions, the law of the State in which the representative primarily exercises his powers in the specific case shall apply.

2. The deed by which the representation powers are conferred shall be valid, as to its form, if it is valid either under the law governing its substance or under the law of the State in which the act is brought into effect.

[97] For a broad meaning of shareholder see, *ex multis*, M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, op. cit., p. 55; F. MOSCONI – C. CAMPIGLIO, *Diritto internazionale privato e processuale*, op. cit., p. 48.

It is understood that *lex societatis* shall apply to the modalities of issuance and circulation of the shares, their nominal value, their split, the nature of the financial instruments, the purchase by a company of its own shares and any other issue relevant to the their function as methods of participation in the share capital.

On the contrary *lex contractus*, as identified according to section 57 of Law 218/1995, shall apply to share sale and purchase agreements, for example to the consensus of the parties, the precontractual liability, the guarantees related to the sale[98]. Therefore, the cross-border sale and purchase of shares shall be regulated according to the conflict rules provided by the Rome I Regulation (Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations)[99].

h) liability for obligations undertaken by the entity (*la responsabilità per le obbligazioni dell'ente*). *Lex societatis* shall apply to all matters relevant to debt liability regime of the entity and to the possible joint liability of shareholders for the company's obligations. The main issues referred to *lex societatis* could be to determine (i) the limited liability or the personal liability of the shareholders with regard to the company's obligations; (ii) if the limited liability ceases in case of sole shareholder or fictitious multiple shareholder; (iii) the possibility to break the corporate veil in case of abuse of the legal personality;

i) consequences resulting from breach either of law or of the articles of incorporation (*le conseguenze delle violazioni della legge o*

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[98] T. BALLARINO, *Manuale breve di diritto internazionale privato*, op. cit., p. 128; T. BALLARINO, *Diritto internazionale privato*, op. cit., p. 378.

[99] Or by the 1980 Rome Convention on law applicable to contractual obligations, if the transaction has been performed before 17 December 2009.

dell'atto costitutivo); this last matter listed under paragraph two of section 25 of Law 218/1995 includes the contest of shareholders' meeting or board of directors' resolutions, liability action against the directors, liability of directors towards the company, the company's creditors and third parties, directors disqualification, liability of auditors, contest of the financial statements, breach of limits on circulation of shares provided by the law of the by-laws, the possible external audit by the judicial authority.

It has been observed that *lex societatis* shall apply in case a certain event or conduct is considered as source of liability pursuant to special law provisions. On the contrary, if according to the legal system of incorporation liability derives from general rules on breach of contract or tort, section 25 of Law 218/1995 shall not apply, and the applicable law should be identified according to the other relevant conflict rules[100].

5. "Any transfer of the registered office to a different State as well as mergers of entities having registered offices in different States"

5.1 Transfer of the registered office

The transfer of the registered office to a different State, according to paragraph three of section 25 of Law 31 May 1995, no. 218, is permitted and shall be effective in Italy, provided that it is carried out in full compliance with the laws of the relevant States: *i.e.* the country of arrival and the one of origin. The provision at hand does not provide for a conflict rules, but a material rule; according to the first two paragraphs of section 25 of Law 218/1995, the law of the

[100] M. V. BENEDETTELLI, *La legge regolatrice delle persone giuridiche dopo la riforma del diritto internazionale privato*, op. cit., p. 60.

country of incorporation apply to the transfer of the registered office, as well as to any other issue concerning the internal organization of the company. Anyway, the transfer will be effective in Italy only if it is valid according to the other legal systems involved[101].

In Italy, therefore, the transfer of the registered office, unlike what happens in those jurisdictions that adopt the "pure" real seat criterion, does not cause the extinction of the company, with the simultaneous creation of a new entity in the State of arrival[102], nor an automatic recognition of the legal continuity of the company, as the effectiveness of said transfer is subject to the compatibility of the provisions of the Italian legal system with that of the destination State[103].

Given the above, it is clear that:

a) there will be no continuity of the company in the event that, for example, the Italian company resolves to transfer its registered office in a country that does not permit such procedure - providing in any case the incorporation of a new entity in accordance with its laws laid down for foreign company. In this case, the transfer resolution shall be deemed as ineffective for the Italian legal system[104];
b) if, on the other hand, the law provisions of the countries are compatible each other, the transfer of the seat will be realized

[101] E. PEDERZINI, *Alla ricerca del diritto applicabile: società italiane e società straniere*, in E. PEDERZINI (ed.), *Percorsi di diritto societario europeo*, third edition, Torino, 2016, p. 34.
[102] F. CAVALLARO, *Il trasferimento della sede sociale all'estero tra norma civilistica e disciplina fiscale,* in *Dir. fall.,* 2005, p. 954.
[103] V. PISCHETOLA, *Il trasferimento della sede sociale da e per l'estero, ed il ministero notarile,* in *Vita not.,* 2002, p. 586.
[104] M. V. BENEDETTELLI, *Commento all'art. 25 legge 218 del 1995, Riforma del sistema di diritto internazionale privato*, S. BARIATTI (ed.), in *Nuove Leggi civ. comm.*, 1996, p. 1108 et seq.; P. DAL SOGLIO, *Il trasferimento della sede all'estero e procedimento ex art. 2409 c.c.*, in *Giur. comm.*, 2003, II, p. 560.

through the amendment of the bylaws of the Italian company, in compliance with the requirements imposed by the Civil Code[105].

The situation is different in the EU context, where, as better described below, the freedom of establishment, as well as evolved in the case law, should permit the transfer of the registered office, with its peculiarities. In particular, from the Italian law prospective, EU companies incorporated in another member State - even if they transfer in Italy the seat of the management and the principal operation - shall be always governed by the laws of the country of incorporation, notwithstanding with the provision of paragraph one, second part, of section 25 of Law 218/1995. Therefore, as pointed out by several authors[106], said provision must be considered implicitly repealed, as well as the provisions of paragraph three of the same section, since in the European Union the transfer of the seat cannot be considered subjected to any requirement.

In light of the above legislative and interpretive framework, with reference to the transfer of the registered office of a foreign company in Italy - as well as, on the other hand, the transfer of the registered office of an Italian company abroad – there are various possible solutions, depending on whether the transfers involves European countries or not.

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[105] F. CAVALLARO, *Il trasferimento della sede sociale all'estero tra norma civilistica e disciplina fiscale,* op. cit., p. 956.

[106] F. MUNARI, *Riforma del diritto societario italiano, diritto internazionale privato e diritto comunitario: prime riflessioni*, cit., p. 39; M. V. BENEDETTELLI, *Libertà comunitarie di circolazione e diritto internazionale privato delle società*, in *Riv. dir. inter. proc. civ*., 2001, p. 619; G. B. PORTALE, *Riforma delle società di capitali e limiti di effettività del diritto nazionale*, in *Corriere giur*., 2003, p. 148; F. AMBROSIANI, *Modernizzazione del diritto societario e società europea*, in *Dir. comm. internazionale*, 2003, p. 700; S. M. CARBONE, *La riforma societaria tra conflitti di legge e principi di diritto comunitario*, in *Dir. comm. internazionale*, p. 89 et seq.; G. PETRELLI, *Lo stabilimento delle società comunitarie in Italia*, op. cit., p. 361.

If the transfer takes place in Europe, according to the legislative and interpretive evolution of the European law, transfer of European limited companies in Italy, or *vice versa* of Italian company in other Member States should take place in continuity and, without prejudice to the existing registration requirements, companies should be regulated according to the rules of the country of incorporation. As a consequence, it will not be necessary, or allowed, to adapt, upon the transfer, the bylaws of the company to the mandatory provisions of Italian law, as on the other hand it would be necessary when transferring in Italy a non-EU company[107].

Therefore, legal continuity will be recognized to EU companies that move to Italy, and the law of the country where they have been incorporated shall regulate the same. With regard, on the other hand, to Italian companies transferring their registered office to another EU country, their legal continuity shall be granted, and they shall be always governed by the Italian law.

On the contrary, if the transfer involves a non-EU country, in order to assess the admissibility of the transfer toward (or from) Italy, it is necessary to verify the regime applied in the country of origin (or destination).

In case of transfer of a foreign company in Italy, should the country of origin adopt the incorporation theory, given the continuity recognized to the company by both countries, last part of paragraph 1 of section 25 of Law 218/95 shall apply. Therefore, as anticipated

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[107] G. PETRELLI, *Lo stabilimento delle società comunitarie in Italia*, op. cit., p. 378; A. BARONE, *Diritto comunitario e disciplina applicabile alle sedi secondarie di società estere* (7 settembre 2001), in *Studi e materiali*, I, Milano, 2002, p. 301; V. PISCHETOLA, *Il trasferimento della sede sociale da e per l'estero, ed il ministero notarile*, op. cit., p. 586; F. CAPOTORTI, *Il trasferimento di sede di una società da uno Stato all'altro*, in *Foro it.*, 1958, IV, p. 209; G. PETRELLI, *Formulario notarile commentato*, III, 1, 2003, p. 150 et seq.

above, the adaptation of the bylaws of the company to the mandatory provisions of the Italian law - in addition to the registration with the Italian Companies' Registry - is required[108], without prejudice to the proper incorporation abroad of the company[109].

If, on the contrary, the country of origin adopts the real seat theory, its laws would require the dissolution of the company and therefore its reincorporation should take place in Italy. Given the fact that the country of origin follows the real seat theory, the requirement provided for by Italian law for the transfer of the company - *i.e.* the eligibility of the transfer according to both countries involved - is not achieved, and therefore the transfer does not take place[110].

Also with regard to the transfer of an Italian company in non-EU country, since Italy recognizes continuity to the company that moved its seat abroad, it will be necessary to verify the treatment reserved to the same in the country of arrival. If this latter adopts the incorporation theory, the company shall continue to be governed – for both countries – by the Italian laws, as the place where which the incorporation process has been concluded[111].

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[108] The necessary adaptation of the foreign company to the Italian law should be considered as admissible since it does not affect the identity and continuity of the companies. C. ANGELICI, *Società costituite o operanti ancora all'estero*, in *Enc. giur. Treccani*, XXIX, 1988, p. 7 et seq.

[109] A. RIGHINI, *Il trasferimento transnazionale della sede sociale*, in *Contr. e impr.*, 2006, p. 760.

[110] As it has been observed, whether the country of origin imposes the extinction and dissolution of the company in the country of arrival, the transfer shall has also extinctive effects and the dissolution of the foreign company shall be also reincorporation, and therefore the company will be subject only to the law of the State of incorporation, without the possibility of incurring without the possibility of acquiring dual nationality. G. MARGIOTTA, *Il trasferimento della sede all'estero,* op. cit., p. 649 et seq.

[111] Thus, if the country of arrival adopts, as well as Italy, a connecting factor based on the place of the incorporation, the transferring Italian company does not acquire a foreign personal statute. In fact, as the laws (of private international law) of the country of origin and arrival are on that point concordant each other, the transferring company shall maintain the personal statute of the place where it has been incorporated, and therefore there will not be a new incorporation; the country of

Should, on the contrary, the real seat theory applies in the country of arrival, basing on paragraph 3 of section 25 of Law 218/1995 – which recognize the transfer only if allowed by the laws of both countries – the transfer could be deemed as ineffective for the Italian legal system. This because the real seat system does not recognize the transfer, as it requires the reincorporation of the entity in the State of arrival and, therefore, the requirement provided for paragraph 3 of section 25 would not be satisfied (and then the transfer would not be possible).

Within this regard, it has been theorized a sort of double citizenship of the company in case of its transfer from a country which adopts the incorporation theory to a country in which the real seat system applies (provided that the entity maintains the citizenship of the country of origin – in which the incorporation theory applies – and acquires also that one of the country of arrival, which adopts the real seat theory). However, this double citizenship would never be realized in Italy, as the transfer resolution would be ineffective, since it does not comply with paragraph 3 of section 25 of Law 218/1995[112].

According to a different reconstruction[113], the case at hand should be deemed as a transfer with change of the applicable laws and citizenship, and not as dissolution of the original company and incorporation of a new one, as supported by the Germany authors and case law[114].

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arrival shall recognize the company as foreign entity. P. DAL SOGLIO, *Il trasferimento della sede all'estero e procedimento ex art. 2409 c.c.*, op. cit., p. 561.

[112] P. DAL SOGLIO, *Il trasferimento della sede all'estero e procedimento ex art. 2409 c.c.*, op. cit., p. 562.

[113] F. FIMMANÒ, *Trasferimento della sede sociale all'estero e principio di incorporazione*, op. cit., p. 577.

[114] For a general overview see H. HERRMANN, *How to Classify Foreign Entities in Germany*, in *International Tax Review*, vol. 14, n. 1, 2003, p. 42 et seq.; K. HEINE, *Regulatory Competition Between Company Laws in the European Union: The*

In accordance with the above, it has been affirmed that whether an Italian company moves to a country that adopts the real seat criterion, notwithstanding the recognition of the legal continuity of the entity, the transfer will be accompanied by a change of the laws applicable to the company, that is to say that "corporate events" will be governed by the current regulations of the country of arrival[115].

5.2 Mergers of entities having registered offices in different States

Italian legal system legitimates cross-border mergers by referring to an assessment of compatibility with the national laws applicable to each company: in order to complete the transaction, all the legal systems involved – *i.e.* the laws applicable to all the companies that participate to the merger – must provide the institution

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Überseering Case, in *Intereconomics: Review of European Economic Policy,* 2003, 38, Issue 2, p. 102 et seq.

See also J. FINGERHUTH – J. RUMPF, *MoMiG und die grenzüberschreitende Sitzverlegung – Die Sitztheorie ein (lebendes) Fossil?*, in IPRax, 2008, p. 90 et seq.

Here is the English abstract:

The German government rendered a top-to-bottom reform of the German Law on Limited Liability Companies ('*GmbHG'*) with the governmental draft of the MoMiG dated 23 May 2007. The reform also covers the German law on Stock Corporations ('*AktG*') and general corporate law matters. It is intended by the reform to abandon the required concurrence of statutory seat and seat of the head office of a company and, therefore, to allow German GmbHs and AGs to move their head office to another country (cross-border relocation). Both GmbH and AG will have the same opportunities as entities from countries, where the incorporation theory is applicable. The article discusses the consequences of the MoMiG for cross-border relocations of German entities. In particular, by using the example of the GmbH & Co KG, the authors illustrate problems arising from the intentions of the MoMiG and the 'real seat' theory as it is currently applied in Germany. Furthermore, the authors discuss the need for German entities to completely apply the incorporation theory in Germany. The article comes to the conclusion that the 'real seat' theory will be entirely abandoned by the MoMiG becoming effective. The authors finally encourage the legislator to express this consequence literally within the reasoning of the MoMiG.

[115] F. CAVALLARO, *Il trasferimento della sede sociale all'estero tra norma civilistica e disciplina fiscale,* op. cit., p. 956. In the same sense A. SANTA MARIA, voce *Società (Dir. int, priv.)*, op. cit., p. 4, according to which in case of transfer of the registered office of an Italia company, and provided that the it shall became governed by the laws of the place of arrival, Italian laws shall cease to apply upon transfer abroad of the seat.

of merger of companies. According to paragraph 3 of section 25 of Law 218/1995, merger of entities having registered offices in different States is subject to the requirement that the extraordinary transaction must implemented in accordance with the laws of all the countries involved.

Based on the above, it can be stated that Italian companies may lawfully participate and successfully promote a cross-border merger among two or more legal entities incorporated in different States, even outside the territory of the European Union. However, the one and only condition of effectiveness of the cross-border merger is that the relevant procedure be carried out in full compliance with the laws of the relevant States involved[116].

First of all, it is necessary to verify if the law applicable to each company involved regulates companies' merger, allowing the implementation of mergers with respect to the company type at hand; and that its application is not excluded with reference to foreign law entities[117].

Each company shall therefore comply with the laws of its legal system without any reference to the provisions that regulate merger

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[116] In order to comply with paragraph 3 of section 25 of Law 218/1995, the Italian common practice has developed a conservative approach, according to which the merger procedure at domestic level shall also include and be consistent with those terms and provisions established by any of the other involved jurisdictions, whenever such terms appear to guarantee a higher degree of protection of those categories of stakeholders generally protected by the merger legislations in place at domestic level, such as minority shareholders, creditors, bondholders and employees. For instance, if one of the jurisdictions involved by the merger establishes a longer term for the bondholders or the creditors to raise objections to the merger, such longer term shall be applied by each of the merging companies, even if at domestic level the relevant mandatory term ordinarily required is shorter. Same example may be made for the legal form of the deed to be executed in case of merger by each merging company.

[117] E. PEDERZINI, *La libertà di stabilimento delle società europee nell'interpretazione evolutiva della Corte di Giustizia. Armonizzazione e concorrenza tra ordinamenti nazionali*, in E. PEDERZINI (ed.), *Percorsi di diritto societario europeo*, third edition, Torino, 2016, p. 95 et seq.

for the other company (or other companies) involved in the transaction. However, with regard to those aspects of the merger procedure that implies a joint activity of the different companies or that establishes anyway a relationship between the entities involved, all the *leges societatis* shall find joint and cumulative application[118]. For example, the disclosure requirements relevant to the resolutions adopted by the companies participating to the merger shall be regulated by the law of its country of origin; the filing (*iscrizione*) of the final deed of merger, executed by all the merging companies, shall be made according to a cumulative application of the different regulating laws[119].

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[118] See M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere (alla luce dello Schema di legge di recepimento della X Direttiva elaborato per conto del Consiglio Nazionale del Notariato e delle massime del Consiglio notarile di Milano)*, op. cit., p. 742 et seq.; P. MENTI, *Attuazione della direttiva 2005/56/CE, relativa alle fusioni transfrontaliere delle società di capitali (d.lgs. 30 maggio 2008, n. 108)*, in *Nuove leggi civ. comm.*, 2009, p. 1309; F. AMBROSIANI, *Società europea e fusione internazionale*, in *Le Società*, 2002, p. 1351; N. AL NAJJARI - S. PERON, *Le fusioni transfrontaliere di società di capitali: uno sguardo di insieme,* op. cit., p. 708; T. BALLARINO, *Manuale breve di diritto internazionale privato*, op. cit., p. 132; P. BERTOLI, *Le fusioni transfrontaliere alla luce del recepimento italiano della decima direttiva societaria*, in *Riv. dir. int. priv. e proc.*, 2010, p. 35; M. V. BENEDETTELLI, *Le fusioni transfrontaliere*, in *Il nuovo diritto delle società – Liber amicorum Gian Franco Campobasso*, P. ABBADESSA – G. B. PORTALE (eds.), 4, Torino, 2007, p. 367; A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1194 et seq.; F. SEATZU, *Sulla nuova disciplina delle società nel diritto internazionale privato*, in *Giur. comm.*, 1997, I, p. 839; D. DAMASCELLI, *I conflitti di legge in materia di società*, op. cit., p. 145; R. DESSÌ, *Le fusioni transfrontaliere*, in *Riv. dir. comm.*, 2009, I, p. 171; D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, in *Giur. comm*., 2008, I, p. 744; M. C. LUPETTI, *Le fusioni transfrontaliere delle società di capitali*, in F. PREITE (ed.) *Atti notarili. Diritto comunitario e internazionale,* Volume 4 Diritto Comunitario*,* Tomo 2, Milano, 2011, p. 1153; M. E. GURRADO, *Via libera alle fusioni transfrontaliere*, op. cit., p. 353; R. LUZZATTO - C. AZZOLINI, *Società (nazionalità e legge regolatrice)*, op. cit., p. 155.

[118] F. GALGANO – F. MARRELLA, *Diritto e prassi del commercio internazionale,* op. cit., p. 132; T. BALLARINO, *Manuale breve di diritto internazionale privato*, op. cit., p. 154.

Even if the Italian system seems to be consistent from the legislative point of view, it is not free from applicative issues. As described above, an overview of the domestic legislations of each of the companies involved in the merger should be performed, so as to verify and confirm that cross-border mergers are permitted in such jurisdictions. It may happen, in fact, that mergers among companies subject to the laws of different countries may be prohibited in certain jurisdictions. Sweden, Germany, Austria and Luxembourg essentially do not permit mergers that involve foreign law companies; Denmark, Finland, Belgium and Greece provide several limits to the possibility to perform cross-border mergers; United Kingdom, Ireland and the Netherlands do not provide institution fully comparable to merger.

With regard to Germany, for example, section 1 of the *Umwandlungsgesetz* regulates the transformation by merger, spin-off, transfer of assets and change of the company form only with reference to legal entities having its seat in the German territory ("internal mergers"): the realization of merger by absorption between an Italian company, as absorbed company, into a German company, as the absorbing one, should thus require the dissolution ad liquidation of the Italian company and the subsequent transfer of its assets to the German company or its reincorporation according German laws. Conversely, a merger according to which a German company is absorbed by an Italian one would be likewise unlawful, implying the transfer of the seat outside the German territory[120], and therefore the dissolution of the entity[121]. As a consequence, German companies are

[120] As already described, on the private international law level, Germany adopts the real seat theory.

[121] See M. POCCI, *Le fusioni societarie transfrontaliere nel mercato comune,* op. cit., p. 7, which remembers how the management of Telecom Italia tried to defend against the hostile takeover launched by Olivetti S.p.A. in February 1999, through an possible integration with Deutsche Telekom, hypothesis that has been frozen just

prevented from merging with a foreign company, both in the case in which the company resulting from the merger is a "foreign" company (*i.e.* having its registered office located in a country other than Germany) and in the opposite case, where the company resulting from the merger is a German company.

In the Netherlands and United Kingdom, mergers are not regulated as legal instruments of companies integration; with regard to Denmark, cross-border mergers are subject to the approval of the Central Assessment Board, whilst in Belgium, lacking an express provision and due to the application of the real seat criterion, the realization of the transactions at hand results difficult[122].

As it will better described hereinafter, laws of the member states that provides both the explicit or implicit prohibitions of mergers between companies having seat in different countries, and the restrictions and procedural impediments to said transactions, as well as any difference in regulatory treatment between domestic mergers and cross-border ones, could be deemed as void because in contrast with freedom of establishment provided by the Treaty on the functioning of the European Union.

According to the interpretation of the European Court of Justice - as it will be better described *infra* – right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of economic activities in that State, allowing stakeholders to participate effectively, and under the same conditions as national operators, in the economic life of the country. Cross-border mergers, as well as other company transformation

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by limits of the German legal system and the unavailability (at that time) of a EU instrument.

[122] For a more detailed overview see the *Survey on the Societas Europaea*, September 2003, International Bureau of Fiscal Documentation.

operations, meet the needs of cooperation, integration and formation of a group of companies established in different member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market «*and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC*»[123].

In application of this principle, the Luxembourg Court has ruled, in the SEVIC case[124], that the institutive Treaty rules do not permit to the laws of the individual member States to refuse the registration of the mergers in the national commercial registers only because one of the participating companies is established in another member State, thereby effectively preventing cross-border mergers.

The restrictive provisions through which several EU member States prevent or limit the exercise of freedom of establishment that articles 49 and 54 of the Treaty on the functioning of the European Union grant to companies may be justified, according to settled case-law of the Court of Justice, only by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary and proportionate for attaining that objective: *i.e.* does not exceed that which is strictly necessary in order to achieve the worthy purpose.

It is instead possible, as long as certain conditions are met, that national legal systems provide prohibitions and limitations when all companies involved in the merger have registered office in the territory of the same country. It is therefore highlighted the unresolved contradiction between, on one hand, the countries "of arrival" - which

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[123] Now article 49 of the Treaty on the functioning of the European Union.
[124] Case C-411/03, *SEVIC Systems AG* [2005] ECR I-10805.

shall not arbitrarily discriminate against companies incorporated under the laws of another EU member State – and, on the other hand, the countries "of origin", which still have the power to prevent domestic companies from transferring abroad its actual centre of administration, with consequent dissolution of the companies[125].

[125] G. B. PORTALE, *La riforma delle società di capitale tra diritto comunitario e diritto internazionale privato,* op. cit., p. 132.

CHAPTER III

Corporate mobility within the European Union and freedom of establishment

SUMMARY: 1. Companies' freedom of establishment – 2. Mergers and cross-border transfer of companies – 3. Freedom of establishment: the position of the Court of Justice of the European Union – 4. The earliest decisions of the European Court of Justice on Freedom of Establishment: Daily Mail, Centros, Überseering, Inspire Art – 4.1. Daily Mail – 4.2. Centros – 4.3. Überseering – 4.4. Inspire Art – 5. Cross-border mergers and freedom of establishment. The SEVIC Case. – 5.1. The case – 5.2. Opinion of the Advocate General – 5.3. The ECJ's decision – 5.4. Conclusions – 6. The recent decisions of the European Court of Justice. Brief comments.

1. Companies' freedom of establishment

One of the main purposes of the European integration process was, in order to «*ensure the economic and social progress of their countries*» and to «*ensure the development of their prosperity*»[126], the promotion of an «*harmonious development of economic activities, a continuous and balance expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it*» (article 2 of the TEC).

The complete achievement of the European Single Market, as known, is subject to the implementation of certain freedoms, as the right of free movement of goods, people, services and capital. Said implementation would be possible only with the abolition, as between Member States, of the obstacles to said free movement (article 3, first paragraph, letter c) of the TEC) and with the prohibition of any discrimination on grounds on nationality (article 12 of the TEC).

[126] See preamble of the Treaty of Rome.

In this scenario, the free movement of companies, as key player of the world economy, plays an essential role; in a liberal common market, whose aim is to remove the obstacles to free movement of trade, companies should have the maximum freedom to move abroad its registered office.[127]

According to these principles, the European integration process guarantees to natural and legal persons the right of establishment in a different Member State in order to take up and pursue economic activities under the same conditions provided for the nationals.

Articles 49 and 54 of the Treaty on the functioning of the European Union (formerly articles 43 and 48 TEC) provides for freedom of establishment. According to a classic reconstruction[128], said articles have three limbs: (i) the prohibition of restrictions on freedom of establishment of companies[129] in the territory of another Member State; (ii) the prohibition (similarly to the prohibition of restrictions on the freedom of establishment of companies) of restrictions to setting up agencies, branches or subsidiaries by companies in the territory of any Member State; and the principle that (iii) freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies under the conditions laid down

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127 T. BALLARINO, *Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie,* op. cit., p. 669 et seq.

128 V. EDWARDS, *EC Company Law*, Oxford University Press, Oxford, 1999, p. 337.

129 According to the definition provided by article 54 of the TFEU, «*companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purpose of this Chapter, be treated in the same way as natural persons who are national of Member States. "Companies or firms" means companies or firm constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are not-profit-making*».

for its own nationals by the law if the country where such establishment is affected.

The TFEU, on the other hand, failed to provide a definition of "establishment". The Court of Justice of the European Union has defined establishment for the first time as «*integration into a national economy*»[130]. Later, in SEVIC case, the Court made the Advocate General Tizzano's definition its own, holding that «*right of establishment covers all measures which permit or event merely facilitate access to another Member State and the pursuit of an economic activity in that Member State by allowing the persons concerned to participate in the economic life of the county effectively and under the same conditions as national operators*».

Anyway, article 49 provides for two different cases of exercise of the establishment right by companies: the carrying out of a professional activity or of economic relevance in its entirety in another country other than the one of origin, so that the economic activity is moved in the country "of arrival" and therefore will cease to be exercised in the country of origin, losing all links with it (so called "primary establishment"); or the carrying out of a professional activity or of economic relevance in another country other than the one of origin, but continuing the company to carry out its activities also in the country of origin, setting up in the "foreign" country agencies, branches, or subsidiaries ("secondary establishment").

Primary establishment can be performed by legal persons incorporating and managing enterprises and in particular companies «*under the conditions laid down for its own nationals by the law of the country where such establishment is effected*» (article 49, paragraph 2,

[130] Case C-81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 05483, Opinion of Mr Advocate General Darmon.

TFEU), moving the registered office or the principal place of business in a different Member State or, according to the Court of Justice, by means of a participation in the share capital of a company incorporated under the law of a different Member State[131].

Secondary establishment, on the other hand, is performed through the setting up of agencies, branches, or subsidiaries in a Member State other than the one where the registered office, central administration or principal place of business are located. The Treaty does not provide for a definition of agency, branch or subsidiary. According to the definition adopted by the European Court of Justice[132], «*the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension*»[133].

As it will be described more in detail in following paragraphs, the principles of companies' freedom of establishment have been fully realized only after the intervention of the Court of Justice of the

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[131] In addition to Daily Mail case (which will be discussed *infra* in detail), see Case C-251/98 *C. Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*; according to the judgement of the Court on 13 April 2000, a national of a Member State who holds a participation in the share capital of a company established in another Member State exercises his right of establishment if he owns the totality of the shared of it his holding gives him definitive influence over the company's decisions and allows him to determine its activities. In all other cases, the provisions of the Treaty relevant to free movement of capital shall apply. For scholars see also A. BERLINGUER, *Alla ricerca del diritto comunitario: appunti sul diritto di stabilimento delle società di capitali alla luce del d. lgs. N. 6 del 2003*, in *Contr. e Impr./Eur.*, 2003, p. 357.

[132] Case C-33/78 [1978] *Somafer SA v. Saar-Ferngas AG*.

[133] About the definition of subsidiary see also A. PIETROBON, *L'interpretazione della nozione comunitaria di filiale*, Padova, 1990.

European Union. With its judgements, the Court put an end to the difficulties relevant to the issue of mutual recognition of companies and the related dichotomy between the incorporation theory and the real seat theory, which placed serious obstacles to the recognition of the right of establishment for companies.

2. Mergers and cross-border transfer of companies

Cross-border mergers, as well as any other issue relevant to the cross-border mobility of companies within the European Union, is strictly linked to the progressive exercise and achievement of the freedom of establishment of the European companies.

In light of the above, cross-border mergers can be addressed as transactions that lead to the same effect usually desired by means of the transfer of the registered office, *i.e.* the change of the law applicable to the company.

A company subject to the laws of a Member State in which has been incorporated could departure from the application of the domestic laws through the incorporation of a shell company in a different Member State, subsequently merging with it. The company absorbed by the company incorporated under a different legal system will disappear as a subject of the legal system of origin, remaining in existence only the absorbing company, incorporated under the laws of the other country and being therefore subject to the laws of said legal system.

Cross-border mergers has been defined as a set of corporate transactions aimed to the legal integration of two or more companies in a sole corporate organization, which produces the following triple effect (i) the absorbing company (or the company resulting from the merger) takes on all assets and liabilities of a different company (the absorbed company); (ii) the absorbed company ceases to exist (without wind-up); and (ii) the shares of the absorbing company (or the company resulting from the merger) are assigned to the shareholder of the absorbed company, where one or more of the companies involved are incorporated under the laws of different Member States[134].

A definition of cross-border merger has been also provided for by the Court of Justice of the European Union in SEVIC case, according to which «*the instrument of merger is a particularly effective means of transforming a company in so far as it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing considerably the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company, the transfer of individual assets, and the exchange of title deeds, etc.*»[135], and therefore attributed to the exercise of freedom of establishment, with all the consequences in relation to restrictive national regulations.

3. Freedom of establishment: the position of the Court of Justice of the European Union

The considerations above seem conclusive enough to show that the adoption of the real seat criterion prevents the recognition of foreign companies, precluding companies from transferring their administrative seats to Member States that adopt said connecting factor.

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[134] M. V. BENEDETTELLI, *Le fusioni transfrontaliere*, op. cit., p. 367.
[135] Opinion of Mr Advocate General Tizzano delivered on 7 July 2005.

This raised the issue of compatibility of the real seat theory with the provision of the Treaty relevant to the freedom of primary establishment of legal persons, and in particular with the principle of national treatment, around which the whole discipline of the right of establishment has been construed. A literal interpretation of the provisions of the Treaty relevant to the right of establishment suggests that a company incorporated according the laws of a Member State automatically acquires the right to locate its activities anywhere in the European Union, as a result of the recognition in the State of origin, regardless of the fact that the legal system of incorporation adopts the incorporation theory or the real seat theory. Relevant is only that (i) the company is duly incorporated in the State of origin, (ii) the State of origin has recognized the legal existence of the entity, and (iii) the company maintain one of the three connecting factor provided by article 54 of the TFEU, first paragraph (formerly article 48 TEC).

In addition, the Treaty seems to put at the same level the primary and the secondary establishment. Literal wording of the provisions of the Treaty, therefore, seemed to recognize to EU companies a full freedom of establishment similar to what already recognized to natural persons under article 49 TFEU (formerly article 43 TEC).

However, the reality was different. It was widely thought that, on one side, the full achievement of a complete freedom of establishment was subject to the completion of the European harmonization process and, on the other side, the fact that the European legislator had no competence in the field of private international law was being interpreted as meaning that States remains fully free to introduce conflict of laws rules to prevent or limit the access of pseudo-foreign companies to their legal systems.

The issue of the compatibility of the real seat theory with the freedom of establishment has been addressed by the Court of Justice in several cases, given the absence of community harmonization of the conflict of laws rules for the applicable company law (*i.e. lex societatis*), which provides for a uniform connecting factor inspired by the incorporation theory.

4. The earliest decisions of the European Court of Justice on Freedom of Establishment: Daily Mail, Centros, Überseering, Inspire Art.

4.1. Daily Mail

The first of the above-mentioned cases, which is worth mentioning, is the Daily Mail case, when the European Court of Justice rendered, on 27 September 1988, one of the earliest decision concerning corporate mobility and freedom of establishment.

In the case at hand, the European Court of Justice had the opportunity to give its interpretation on the right of primary establishment and, in particular, on the consequences of the transfer of the administrative seat of a company, duly incorporated under the laws of a Member State, to a different Member State[136].

The Daily Mail case concerned the corporation Daily Mail and General Trust PLC (hereinafter "Daily Mail"), a limited liability company owner of the British newspaper "Daily Mail", duly incorporated under the law of the United Kingdom, with registered office in London, which wished to transfer its central administration from the United Kingdom to the Netherlands. In particular, Daily Mail

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[136] Case C–81/87 *The Queen v H. M. Treasury and Commissioners of Inland. Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483.

wanted to keep both the primary seat in London and the status as a United Kingdom legal person.

The purpose of the company was to enjoy, through the transfer of its seat to the Netherlands, the more favourable tax treatment applicable in the above-mentioned country. Daily Mail's purpose was motivated by its intention to sell a part of its non-permanent assets and then to buy, with the money obtained from such transaction, a part of its own shares.

This would have required Daily Mail to pay large taxes on income, as it was a company resident in the United Kingdom. In order to avoid such payment, Daily Mail submitted a request to the competent authority (the Treasury of the United Kingdom) for the transfer of Daily Mail's seat to another Member State. This choice was due to the fact that, according to the United Kingdom legislation, only companies having their tax domicile in the United Kingdom are subject to the local taxation. In this regard, it is generally believed that companies have their tax domicile where their central administrations are located. This is why Daily Mail planned to move its central administration to a European country where the tax system was more advantageous.

The above operation was likely to be successful, since both the United Kingdom and the Netherlands applied the incorporation criterion, according to which a company could transfer its seat to another Member State without losing its nationality and maintaining its legal personality[137].

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[137] In addition to the papers already cited, see L. CERIONI, *The Barriers to the International Mobility of Companies within the European Community: A Re-reading of the Case Law,* in *Journal of Business Law Review*, 1999, p. 59 et seq; P. BEHRENS, *Die Grenzüberschreitende Sitzverlegung von Gesellschaften in der EWG*, in *IPRax*, 1989, p. 354 et seq.

However, the competent authority did not provide the authorization for the transfer on the grounds that, according to local the tax law, the company should have previously sold at least a part of its assets, in order to obtain the consent for the transfer.

Therefore, Daily Mail brought the case before the High Court of Justice, claiming the right to transfer its seat in the Netherlands - under articles 52 and 58 of European Economic Community Treaty (now articles 43 and 48 of the Treaty on the Functioning of the European Union) - without obtaining the prior authorization from the Treasury of United Kingdom.

Due to the importance of the matter, the British Court decided to submit to the European Court of Justice the preliminary questions concerning the application of the Treaty rules on freedom of establishment.

In its judgement, the European Court of Justice pointed out that freedom of establishment had to be regarded as one of the fundamental freedoms guaranteed by provisions of the European Economic Community Treaty. With regard to such provisions, the Court observed that they had to be considered directly applicable in all Member States[138].

As a result of the above, even the rules governing the freedom of establishment were expressly qualified by the Court as directly applicable to the companies validly formed in all Member States.

According the above-mentioned rules, all the European companies, without any form of discrimination, have the right to set

[138] Judgement of the Court, Case C – 81/87, para. 15: «*Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period . Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58*».

up agencies, branches or secondary offices and to be re-incorporated in a Member State other than the one where they have been originally incorporated[139]. Therefore, according to the European Court of Justice, Daily Mail was entitled to the full right to transfer its central administration to the Netherlands. Notwithstanding the acknowledgment of the right of establishment, the Court cautiously observed that Member States were still free to set the conditions by which a corporation could transfer its seat into another Member State, especially in the event that such corporation wanted to continue to be governed by the law of the State of incorporation[140].

Following the European Court of Justice's reasoning, it should be underlined that, in the case at hand, the United Kingdom laws did not represent and obstacle to the companies' right of establishment, since they only placed procedural restrictions (*i.e.* authorization of the Treasury of the United Kingdom required for the seat transfer) on the above-mentioned right[141].

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[139] Judgement of the Court, Case C – 81/87, para. 17: «*In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52 . Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands. A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company*».

[140] The cautious approach of the Court was criticized by some authors among who S. LOMBARDO, *Libertà di stabilimento e mobilità delle società in Europa*, op. cit., p. 360 and P. CONCI, *Fusioni e scissioni come forme di esercizio del diritto comunitario di stabilimento*, in *Riv. dir. trib.*, 3/III, 2006, p. 86-87.

[141] Judgement of the Court, Case C – 81/87, paras. 18 and 19: «*The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above . Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company . It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company. In that regard it should be borne in mind that, unlike natural persons, companies are*

4.2 Centros

Eleven years after the Daily Mail ruling, the European Court of Justice ruled again about freedom of establishment, with the famous Centros case. This case dealt with Centros Ltd., a company duly incorporated under the laws of the United Kingdom, which had never implemented any business activity in the State of incorporation, but in Denmark. The objective of Centros Ltd.'s was to obtain the registration of its deed of incorporation with the Danish companies register, in order to open up a branch in Denmark[142].

Through a similar operation, Centros Ltd. wished to carry out its business activity efficiently and only within the Danish territory, without even losing its legal status of a British corporation and, in this way, avoiding the stricter Danish law provisions on the minimum required share capital.

However, the Danish competent authority refused registration, arguing that Centros Ltd. - being owned by shareholders with domicile in Denmark and operating its business only in the above-mentioned country - aimed at establishing, through the branch, its actual primary seat in Denmark.

After the refusal, the case was brought before the competent local Court, where Centros Ltd. invoked articles 52 and 58 of the

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creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning». With reference to the scholars papers on this point, P. BEHRENS, *Die Grenzüberschreitende Sitzverlegung von Gesellschaften in der EWG*, op. cit., p. 355; F. CAPELLI, *Trasferimento della sede amministrativa di società nella CEE: diritto di stabilimento e problematiche fiscali*, in *Dir. comm. scambi int.*, 1990, p. 43 et seq.; T. TRIDIMAS, *The Case-law of the European Court of Justice on Corporate Entities*, in *Yearbook of European Law,* 1993, p. 355 et seq.

[142] Case C – 212/97 Centros vs Erhvervs-og Selskabsstyrelsen, [1999] ECRI-1495.

European Economic Community Treaty (now articles 43 and 48 of the Treaty on the Functioning of the European Union).

Therefore, the case came to the European Court of Justice, which strongly affirmed the right of a company duly incorporated in a Member State to benefit of the Treaty provisions, even in case its economic activity was carried out not in the State of incorporation, but entirely in the State were its branch was located.

In its judgment, the European Court of Justice noted that both primary and secondary freedom of establishment was guaranteed by the Treaty rules[143]. Therefore, it was clear that a citizen of a Member State was absolutely free to establish a secondary office in another Member State, which had, in his opinion, a less restrictive corporate law[144].

On its side, the Member State where the secondary office was established would have been not allowed to refuse to register such

[143] Note that the Centros case was regarded by the European Court of Justice as a case concerning freedom of secondary establishment, even though the Court was aware of the pseudo foreign nature of the company. On this point, several commentators have glimpsed in Centros a case of primary establishment, but erroneously classified by the Court a secondary establishment. See, among them, S. LOMBARDO, *Libertà di stabilimento e mobilità delle società in Europa*, op. cit., p. 362; E. M. KIENINGER, *Niederlassungsfreiheit als Rechtswahlfreiheit,* in *ZGR*, 1999, p. 728.

[144] Judgement of the Court, Case C – 212/97, paras. 19 and 20 *«It must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.*

20 The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person».

office, on motivation that the company's aim consisted in avoiding the narrower corporate rules set out by the State of incorporation.

According to the European Court of Justice, the fact that a corporation intended to establish a secondary office in a Member State - where corporate rules were more favourable - and to operate in that territory, was not a valid reason for refusal. On this regard, the Court also explained that, in any case, the host Member State could prevent frauds and other illegal behaviours by adopting any appropriate national measure without breaching the fundamental European rules on corporate mobility[145].

Therefore, it was confirmed that setting up a firm or a branch in a Member State with the only purpose of taking advantage of the less

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[145] Judgement of the Court, Case C – 212/97, paras. 38 and 39: *«The fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State. The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned».*

restrictive corporate law or of the lower taxation did not constitute a violation of the European Treaty provisions[146].

The decision of the European Court of Justice had launched a debate in the context of private international law doctrine, with reference to the relationship between the freedom of establishment and the real seat theory.

In this regard, many commentators affirmed that, in light of the above-mentioned decision, the real seat theory could no longer be applied to European firms. They explained that the end of the real seat theory was related to the European Court of Justice's statements, according to which the establishment of company in a Member State and its branches in different Member States was an allowed operation under the Treaty rules[147].

Indeed, in order to preserve the real seat theory, other commentators suggested that the principles expressed by the European

[146] S. M. CARBONE, *Brevi riflessioni sull'abuso del diritto comunitario: commercio internazionale ed esercizio delle libertà individuali*, in *Dir. comm. int.*, 2011, p. 71 et seq.

[147] See for example U. FORSTHOFF, *Niederlassungsrecht für Gesellschaften nach dem Centros-Urteil des EuGH: Eine Bilanz*, in *EUR 2000*, p. 167; I. RAPPAPORT, *Freedom of Establishment – a new perspective*, in *JBL*, 2000, p. 628; A. ROUSSOS, *Realising the Free Movement of Companies*, in *European Business Law Review*, 7, 2001, pp. 13-14; M. GESTRI, *Mutuo riconoscimento delle società comunitarie, norme di conflitto nazionali e frode alla legge: il caso Centros,* op. cit., p. 86 (noting that the case blew a breach in the real seat theory); T. BACHNER - M. WINNER, *Das österreichische internationale Gesellschaftsrecht nach Centros*, in *Der Gesellschafter (GesRZ)*, 2000, p. 73; F. J. GARCIMARTÍN ALFÉREZ, *La sentencia "Centros": el status quaestionis un año después*, in *Noticias de la Unión Europea*, 2001, no. 195, p. 83; P. BEHRENS, *International Company Law in View of the Centros Decision of the ECJ*, European Business Organization Law Review, 1, 2000, p. 125 et seq.; but see also E. WYMEERSCH, *Centros: A Landmark decision in European Company Law*, in BAUMS, HOPT AND HORN (eds.), *Corporations, Capital Markets and Business in the Law. Liber Amicorum Richard M. Buxbaum*, London, 2000, pp. 642-644, according to which real seat theory can no longer be used to deny the recognition of a company, but may serve other purposes.

Court of Justice had to be considered applicable only in "incorporation theory countries" like Denmark[148].

4.3 Überseering

The discussion around the impact of the Centros case on the real seat theory had a turning point in a following case, commonly known as the Überseering case and dealing with Germany, which was defined as "*the real seat country par excellence*"[149].

This third case concerned Überseering BV, a company incorporated under the law of the Netherlands, which purchased a plot of land in Düsseldorf for implementing its business activity. A few years later, after its establishment, the share capital of Überseering BV was entirely acquired by two German shareholders.

On occasion of a dispute arisen between Überseering BV and a German company (Nordic Construction Company Baumanagement GmbH) in relation to a contract for building renovation, the German Court affirmed that Überseering BV had no longer the legal personality required to bring legal proceedings in Germany. According to the German Court, Überseering BV, which was originally incorporated in the Netherlands, had transferred its real seat to Germany by the time of the whole acquisition of its shares by the German shareholders. After the acquisition, the company had not yet

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[148] E. WERLAUFF, *The Main Seat Criterion in New Disguise – An Acceptable Version of the Classic Main Seat Criterion*, op. cit., p. 3 (which explains that Danish law applies the incorporation theory with a "genuine link" to the home country criterion).
In this regard, see also T. BALLARINO, *Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie,* op. cit., p. 681.

[149] T. BACHNER, *Freedom of Establishment for Companies: A Great Leap Forward*, in *Cambridge Law Journal*, 47, 2003, p. 49, according to which "*this is the end of the theory of the real seat*".

been reincorporated in Germany and, for this reason, the Court denied the existence of Überseering BV as a legal entity in Germany.

In 2002, the case was brought before the European Court of Justice, which was asked to evaluate whether the German law was in contrast with the Treaty provisions concerning corporate mobility and freedom of establishment.

In its judgement, the European Court of Justice clarified that the host Member State could not deny, through the application of its national provisions, the legal personality of a company, which had been validly incorporated in another Member State[150]. Thus, the Court stated that companies meeting the requirements set forth in article 48 of the Treaty on the Functioning of the European Union could benefit of the right of establishment under articles 43 and 48 of the above-mentioned Treaty[151].

The Überseering case represents a further confirmation that, since the Treaty rules are directly applicable to each Member State, no restriction to freedom of establishment is allowed[152], unless the

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[150] Case C–208/00 Überseering BV vs Nordic Construction Company Baumanagement GmbH [2002] ECR I-9919.

[151] Judgment of the Court, Case C – 208/00, para. 52: *«In limine and contrary to the submissions of both NCC and the German, Spanish and Italian Governments, the Court must make clear that where a company which is validly incorporated in one Member State (`A') in which it has its registered office is deemed, under the law of a second Member State (`B'), to have moved its actual centre of administration to Member State B following the transfer of all its shares to nationals of that State residing there, the rules which Member State B applies to that company do not, as Community law now stands, fall outside the scope of the Community provisions on freedom of establishment».*

[152] Judgment of the Court, Case C–208/00, para. 82: *«In those circumstances, the refusal by a host Member State (`B') to recognise the legal capacity of a company formed in accordance with the law of another Member State (`A') in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC».*

Member States adopt a whatever convention on the mutual recognition of companies, in order to set out possible reasonable restrictions.

With regard to the implications for the real seat theory, as already anticipated, the Überseering case had a strong impact not only on the German international corporate law, but also, in wider terms, on the international corporate law of the remaining "real seat theory countries". In many scholars' opinion, the ruling rendered by the European Court of Justice had completely abolished the real seat theory in the above countries[153].

Indeed, according to the interpretation supported by the minority of academics, the European Court of Justice has only contributed to modify the real seat doctrine, with the only purpose of ensuring legal recognition of corporations validly formed under the law of a Member State. Thus, the Court did not make any reference to the law applicable to the corporation concerned and to which of the two theories – incorporation and real seat - should have prevailed and should have been applied by the EU Member States[154]. The few scholars supporting the above interpretation also underlined that the decision of the European Court of Justice was exclusively focused on the following matter: whether the application of the real seat theory could end up excluding the existence of the legal personality of a corporation which had been validly formed and registered into another Member State.

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[153] P. PASCHALIDIS, *Freedom of Establishment and Private International Law for Corporations*, Oxford, Oxford University Press, 2012, p. 49.

[154] N. ROTHE, *Freedom of establishment of legal persons within the European Union: an analysis of the European Court of Justice decision in the Überseering Case*, in *American University Law Review*, 2004, p. 1134.

Therefore, the real seat theory would be still applicable notwithstanding the direct applicability of the Treaty rules governing the companies' right to mobility.

4.4. Inspire Art

In the Inspire Art case, the European Court of Justice was asked once again to deal with the provisions of the Treaty concerning freedom of secondary inbound establishment[155].

Similarly to the Centros case, the case at hand involved a pseudo-foreign corporation validly formed under the laws of a Member State, but operating in a different Member State, in order to avoid the narrower corporate law provisions applicable in the latter.

Such corporation, named Inspire Art Ltd., was incorporated under the laws of the United Kingdom, where its registered office was located. However, Inspire Art Ltd.'s sole director had its domicile in the Netherlands and the company did not carry out any economic activity within the United Kingdom territory, but exclusively or almost exclusively in the Netherlands, through a branch registered with the companies register of Amsterdam. Thus, the company did not have any real connection with the State of incorporation.

Notwithstanding the above, Inspire Art Ltd. obtained registration in the Netherlands without mentioning its status as a formally foreign company.

Indeed, the indication of such status was required by the local law, since it also provides several obligations concerning the foreign companies' registration in the companies' register. Besides the mandatory indication of the status of a formally foreign company in

[155] Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd., [2003] ECR I-10155.

all the relevant documents, the above-mentioned obligations include the compliance with the rule concerning the minimum share capital required for incorporation.

For the above reasons, the Netherlands Chamber of Commerce asked the competent Court to declare that Inspire Art Ltd. was a "formally foreign company" and, consequently, to file an amendment in the companies' register, indicating the correct legal status of the company.

At this point, since Inspire Art Ltd. argued that the rules applied by the Netherlands Chamber of Commerce were contrary to the freedoms set forth in the European Treaty, the case came to the European Court of Justice.

In its judgment the Court, reaffirming the rulings of its previous judgments, stated that a corporation, which had been regularly incorporated in a Member State, was free to establish itself into another Member State, even if its only purpose was to carry out the whole business activity therein. This because the freedom of establishment guaranteed by the Treaty allowed companies to operate entirely or mainly in a Member State other than the one of incorporation, even when such operation was justified by the only objective of enjoying a legislation which is more suitable for the company's economic interests[156].

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[156] More specifically, the European Court of Justice ruled as follows: *«It is contrary to Articles 43 EC and 48 EC for national legislation such as the Wet op de Formeel Buitenlandse Vennootschappen to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis»*.

In this regard, the European Court of Justice also observed that the rules applied by the Netherlands Chamber of Commerce, in particular the provisions concerning the minimum share capital required for incorporation, constituted an obstacle to the correct implementation of the right of secondary establishment. As already explained by the Court in its previous judgements, restrictions to freedom of establishment are allowed only if the following conditions are met: such restrictions cannot be applied in a discriminatory manner; their existence must be justified by a real public interest; they must aim at only ensuring the attainment of the objective pursued, without going beyond such objective[157].

In light of the above criteria and of the lack of proof of somewhat fraudulent conduct of Inspire Art Ltd., the Court observed that the rules invoked by the Netherlands Chamber of Commerce contained restrictions not allowed under the Treaty[158]. In fact, no arguments concerning protection of creditors, fight against possible abuses, guarantee of fairness in economic activities and the efficiency of tax system could justify national restrictions of the freedoms guaranteed by the Treaty[159].

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[157] Judgment of the Court, Case C-167/01, para. 133: *«It must be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it»* (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Centros*, paragraph 34).

[158] W. F. EBKE, *The European Conflict of Corporate Laws Revolution: Überseering, Inspire Art and Beyond*, op. cit., p. 32 and 33.

[159] Judgment of the Court, Case C-167/01, para. 139: «*It is clear from settled case-law (Segers, paragraph 16, and Centros, paragraph 29) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the*

5. Cross-border mergers and freedom of establishment. The SEVIC Case

As seen in the previous paragraphs, the European Court of Justice has progressively affirmed the right of the companies incorporated in all Member States to freely establish their primary or secondary seat within the territory of the European Union. Thanks to the Court's interpretation, it became possible to incorporate a company in any Member State and to set up a branch office in any other Member State. However, none of the cases previously analysed was a case dealing with a cross-border merger. Until recently, in fact, it was highly disputed whether such transactions can be implemented. The first case in this sense, that will be explained in the following pages, is commonly known as the SEVIC case[160].

This case deserves to be taken in consideration, representing a specific application of the European Court of Justice's rulings on freedom of establishment to a case of cross-border merger. In particular, the decision made by the Court on occasion of the SEVIC case has certainly contributed to remove the remaining obstacles to the free movement of the corporations within the European Union.

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benefit of the provisions of Community law relating to the right of establishment». For a complete overview, see also the following para. 139: «*It is contrary to Articles 43 EC and 48 EC for national legislation such as the WFBV to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis*».

[160] Case C-411/03 SEVIC Systems [2005] ECR I-10825.

Before dealing with the facts that led to the decision at hand, it is necessary to focus on the relationship between cross-border mergers and freedom of establishment. More specifically, it should be clarified whether cross-border mergers consist in a particular way of exercising freedom of establishment.

The scholars have different opinions in this regard. According to the majority of them, cross-border mergers are a form of implementation of the companies' right to primary establishment[161]. Thus, such transactions would allow corporations to transfer their business activity from a Member State to another Member State, without incurring in dissolution[162]. In particular, in case of a merger by absorption, the absorbed company actually moves its seat into the State where the absorbing company was incorporated. Indeed, in case of merger by incorporation of a new company, at least one of the corporations involved - or eventually even the others – move their real seat into the State where the new company is incorporated.

According to a different opinion, supported by the minority of the scholars, cross-border mergers have no connection with the exercise of the companies' right of establishment. In this regard, it has been observed that, when a corporation is merged or absorbed, it loose its legal personality. As a result of that, any cross-border transfer of

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[161] H. F. MÜLLER, *Die grenzüberschreitende Verschmelzung nach dem neuen Richtlinienentwurf der Eu-Kommission*, in *ZIP*, 2004, p. 1791; N. AL NAJJARI - S. PERON, *Le fusioni transfrontaliere di società di capitali: uno sguardo di insieme*, op. cit., p. 717; F. M. MUCCIARELLI, *Fusioni transfrontaliere e libertà di stabilimento delle società nell'Unione Europea: il caso "Sevic"*, in *Riv. soc*., 2006, p. 427.

[162] Of the same opinion is the Advocate General Antonio Tizzano, who in the conclusions formulated in the SEVIC case and referred to in paragraph 21 of the ECJ ruling said that the cross-border merger «*constitutes an effective means of transforming companies in that it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter*».

the seat is carried out. More specifically, it has been affirmed that an entity, which is no longer exiting, is obviously not able to establish its seat in a State other than the one where it had been incorporated when still existing[163]. The above interpretation is justified by the general idea that mergers have extinctive effects.

That being said, it should be noted that the second theory concerning the relationship between cross-border mergers and freedom of establishment is definitely weaker than the first one. In fact, besides the extinctive events and on their impact on corporations' legal personality, cross-border mergers guarantee continuity in business activities in any case. It basically means that, through such transactions, freedom of establishment is fully achieved[164].

In other words, in order to invoke freedom of establishment in connection with cross-border mergers, it should be considered the substantial circumstance that the company, after the transaction is completed, is still able to carry out its economic activity without any interruptions. Therefore, it does not matter whether the original corporation stops existing as a legal entity.

In this regard, the Italian doctrine observed that corporations are entities aimed at carrying out business activity and, therefore, in relation to them, freedom of establishment corresponds to the freedom of movement of their seats[165].

Other scholars embracing the first theory pointed out that mergers do not cause the extinction of the corporations involved, but only the amendment of their deeds of incorporation. A confirmation of

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[163] P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, in *Banca borsa tit. cred.*, 2006, p. 481.

[164] G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, in *Studi e Materiali CNN*, 1, 2007, p. 399 et seq.

[165] *Ibidem*, p. 399 et seq.

that is found in the provisions of the Italian Civil Code, in particular in paragraph 1 of article 2504-bis – named *"Consequences of the merger"* according to which: *"The company generated by the merger or the surviving entity take on the merging companies' rights and obligations and continue with all of their relations existing prior to the merger, lawsuits included. The merger takes effect when the last".* As it can be seen form the above, the Italian Civil Code contains no reference to the extinction of the company. On the contrary, it expressly stressed the concept of the continuation of the relations existing before the transaction.

On this point, the Italian Courts confirmed what is literally stated in the above-mentioned article. In particular, they held that mergers did not cause extinction of an entity and correlative creation of a new entity, but they only modified the original entity, which still kept its own identity within a modified structure[166].

Furthermore, Italian scholars noted that section 2504-bis of the Italian Civil Code seemed to be in contrast with the wording both of the Third Council Directive 78/855/EEC of 9 October 1978, concerning mergers of public limited liability companies, and of the Tenth Directive on cross-border mergers[167]. The Third Directive in effect defines merger as «*the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company*» (section 3), clarifying that as a

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[166] Ruling of the Court of Cassation, United Sections, 8 February 2006, no. 2637, commented by F. DIMUNDO, *Effetti processuali della fusione: le Sezioni Unite pongono fine all'interruzione dei processi civili*, in *Società*, 4, 2006, p. 459 and also by D. DALFINO, in *Foro it.*, I, 2, 2006, p. 1740 e seq.

[167] E. A. TINO, *Fusione: evento modificativo o estintivo? Brevi riflessioni a seguito della riforma (nota a Trib. Milano, 4 febbraio 2005)*, in *Banca borsa tit. cred.*, 2006, p. 232.

consequence of said transfer the company being acquired or participating to the merger will cease to exist (sections 19 and 23). Similarly, the Tenth Directive – as better described hereinafter – defines mergers as the operations through which a transfer of assets is realized being the companies involved dissolved without going into liquidation (section 2) and, as far as the effects of the merger are concerned, points out that company being acquired or participating to the merger will cease to exist (section 14). Then, as the domestic rules must be interpreted in accordance with the EU laws, and therefore in compliance with the purposes of the directives – in order to ensure their achievements – the literal meaning of section 2504-bis of the Italian Civil Code does not seem sufficient to exclude that mergers have extinctive effects.

Conversely, the provisions of the Third and Tenth Directive would seem to support the arguments of the German scholars and case law, aimed at excluding that companies exercise through mergers the right of establishment[168]. However, it has been noted that the literal wording of the directives is too ambiguous to be decisive[169].

The directives at hand do not exclude indeed that merger is basically an amendment of the articles of incorporation and of the organizational structure of the company, and that the extinction of the company is just and effect of the amendment of the bylaws. In addition, the directives do not exclude that the extinctive effect occurs only after the date on which the merger takes effect, and therefore, when the operation becomes effective, the company is not yet

[168] G. B. PORTALE, *La riforma delle società di capitali tra diritto comunitario e diritto internazionale privato*, op. cit., p. 115 et seq.

[169] F. M. MUCCIARELLI, *Fusioni transfrontaliere e libertà di stabilimento delle società nell'Unione Europea: il caso "Sevic"*, op. cit., p. 424; C. SANTAGATA, *Le Fusioni,* in G. E. COLOMBO- G. B. PORTALE (eds.), *Trattato delle società per azioni*, vol. VII, Torino, 2004, p. 6.

dissolved and could still exercise its right of establishment[170]. Therefore, in order to exclude that cross-border merger is an exercise mode of the right of establishment, it is necessary to demonstrate that the extinction of the company involved occurs before the date on which the merger takes effect.

Within this regard, the Tenth Directive provides that the date on which the transaction takes effect is determined in accordance with the law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject (section 12). From that date, the companies being acquired or participating to the merger will cease to exist (section 14). The rules provided by the directive just clarify that the extinction of the company may not occur before the merger, but do not exclude that the two moments can be contextual. The directive, therefore, just clarifies that the effectiveness of the merger logically precedes the moment in which the participating companies cease to exist, but it does not specify whether the merger should necessarily precede also chronologically the extinction. In conclusion, from the exam of the Tenth Directive, it is not clear whether the companies, when they proceed with the merger, have still legal personality and can therefore exercise the right of establishment. Anyway, the thesis according to which cross-border mergers are a mode of exercise of the right of establishment is in line with the scope attributed to freedom of establishment by the SEVIC ruling where the Court - as already remembered above - made the Advocate General Tizzano's definition its own, holding that «*right of establishment covers all measures which permit or event merely facilitate access to another Member State and the pursuit of an economic activity in that Member State by allowing the persons*

[170] This was also supported by the Advocate General in SEVIC case, as better described hereinafter.

concerned to participate in the economic life of the county effectively and under the same conditions as national operators».

5.1 The case

It has been observed how in the Daily Maily, Centros, Überseering and Inspire Art cases, corporate mobility within the European Union has been under the European Court of Justice's scrutiny. However, *SEVIC* is the first case dealing with a cross-border merger. SEVIC Systems Aktiengesellschaft a German company having its registered office in its registered office in Neuwied (Germany), in 2002 entered into a merger agreement with the Luxembourgish company Security Vision Concept SA, according to which in which they agreed to dissolve Security Vision Concept without liquidation and to transfer the entirety of its assets to SEVIC.

After the execution of the merger agreement, SEVIC applied for the registration of the deed of merger in the companies' register of Neuwied, in order to give effect to the merger, according to what provided by the German law[171].

The Amtsgericht in Neuwied (the local Court) refused the application for registration of the merger in the German companies' register, arguing that Para. 1(1) of the German Reorganization Act (Umwandlungsgesetz – UmwG) provides solely for mergers between

[171] Para. 20(1) of the German Reorganization Act (Umwandlungsgesetz – UmwG).

legal entities having seat in Germany[172], therefore excluding cross-border mergers[173].

The German Court, in accordance with the most widespread opinion among German scholars, interpreted the provision as prohibiting German companies to merge with foreign companies, allowing only domestic mergers between companies established in Germany and thus prohibiting cross-border mergers; also, taking into account the intention of the German legislature to wait for the imminent intervention of the Community legislature, which in 1985 already developed a first proposal on cross-border mergers Directive[174].

SEVIC appealed against that rejection decision before the Landgericht (regional court) in Koblenz. Since the latter had doubts as to whether Para. 1(1) UmwG complies with articles 43 and 48 TEC (now articles 49 and 54 of the Treaty on the functioning of the European Union), it decided to stay the proceedings and referred to the European Court of Justice the following question for a preliminary ruling according to article 234 TEC (article 267 TFUE):

"Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign

[172]§ 1(1) of the UmwG: «*Rechtsträger mit Sitz im Inland…*[*omissis*]». As explained by P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 479, the UmwG provisions make reference to the seat reference at the time of the resolution relevant to the extraordinary transaction.

[173] F. M. MUCCIARELLI, *Fusioni transfrontaliere e libertà di stabilimento delle società nell'Unione Europea: il caso "Sevic", op. cit., p. 418;* C. E. DECHER, *Cross Border Mergers: Traditional Structures and SE-Merger Structures*, op. cit., p. 5;

[174] P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 479. On the implementation of the Tenth Directive by Germany and the relevant amendments to the UmwG see G. BALP, *Recepimento della direttiva UE 2005/56 sulla fusione c.d. cross-border in Germania e conseguenti modificazioni alla legge sulle operazioni di finanza straordinaria (Umwandlungsgesetz)*, in *Riv. soc.*, 2007, p. 652.

European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that Paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?"

The dispute therefore concerned the exercise of the right of primary inbound establishment (inbound merger) [175] of the Luxembourgish company Security Vision, *i.e.* restrictions to the freedom of establishment provided by the State of arrival – but also, according to the Advocate General Antonio Tizzano, as a case of secondary Freedom of Establishment, due to the fact SEVIC System has been prevented to exercise, through the merger, the right of secondary outbound establishment[176].

5.2 Opinion of the Advocate General

In his opinion on 7 July 2005, Advocate General Antonio Tizzano proposed that articles 43 and 48 TEC (articles 49 and 54 TFUE) preclude legislation of a Member State not permitting the registration in the national companies register of mergers between companies established in that Member State and companies of other Member States.

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[175] P. STORM, *Cross-border Mergers, the Rule of Reason and Employee Participation*, op. cit., p. 131; W. SCHÖN, *The Mobility of Companies in Europe and the Organizational Freedom of Company Founders*, op. cit., p. 130 et seq.

[176] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 35: «*I am referring in particular to the fact that the merger in question could be seen not only as a case of primary establishment but also as a case of secondary establishment. That is because the takeover of a company established in another Member State (in this case the Luxembourg company) does not prevent the incorporating company (in this case the German company) from being in a situation, precisely as a consequence of the merger, of operating on a stable basis in the Member State in which the incorporated company was established, and thus in a Member State other than its own, with the result that it forms there an establishment, albeit a secondary one*».

German Government contends that mergers do not give rise to an "establishment" within the meaning of the relevant right granted by the Treaty. With particular regard to the case under exam, the Luxembourg company is taken over - by way of merger - by the incorporating German company and consequently dissolved and loses its legal personality. Since a dissolved company cannot, by definition, be "established" either as a primary or secondary place of business in another Member State, it must be concluded, in the view of the German Government, that the conditions for the application of articles 43 and 48 TEC (articles 49 and 54 TFUE) of the are not satisfied in this case.

However, according to the Advocate General, this view follows an "inverted logic"[177], because the dissolution of the incorporated company is not a reason of the merger, but a consequence of it[178].

Merger is indeed just an organizational matter of the companies involved, as it does not require the execution of a new "agreement" with termination of the previous ones, but just an amendment of the existing agreement[179]. Until the filing of the merger deed with the companies' register, the merger resolutions remain documents internal to the company subject to revocation[180]. Only after the registration of

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177 Critic on this point is P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 481, according to which, on the contrary, the Advocate General and the European Court of Justice followed an inverted logic.

178 Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 25: «*...because it appears to me that it follows an inverted logic in the sense that it concludes that a consequence of the merger, namely the dissolution of the incorporated company, is the reason why that company is unable (even before it is dissolved!) to carry out the merger and therefore the justification for the prohibition on registration which precisely precludes this operation*».

179 F. GALGANO, *Diritto civile e commerciale*, vol. II, Padova, 2004, p. 483.

180 See chapter "*XIX: Trasformazione, fusione e scissione delle società*" in F. GALGANO - R. GHEDINI, *Il nuovo diritto societario*, Tomo I, in F. GALGANO (ed.), *Trattato di diritto commerciale e di diritto pubblico dell'economia*, third edition, Padova, 2006.

the merger with the companies' register, the unification of ownership of assets of the companies involved and the dissolution of the absorbed company, or of the merging companies, occur without interruption[181].

Then, the Advocate General conceded that the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that Member State, by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators. In any case, it has been highlighted that the right of establishment does not concern only the right to move to another Member State in order to purse an activity there, «*but also all the aspects which are linked in any way in*

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[181] Traditionally, Italian legal scholars had considered merger as a fact concerning primarily the assets of the absorbed or merged companies; on that point see C. VIVANTE, *Trattato di diritto commerciale*, vol. II, Vallardi, 1923, p. 474; on the comparison of the merger with the death of the natural person see G. GIORGI, *La dottrina della persone giuridiche o corpi morali esposta con speciale considerazione del diritto moderno italiano*, Firenze, 1899, p. 208; U. NAVARRINI, *Società e associazioni commerciali*, in *Commentario Vallardi*, Milano, no date, p. 739; A. MARGHERI, *Delle società*, in *Commentario Utet*, Torino, 1929, n. 531; A. BRUNETTI, *Trattato del diritto delle società*, Milano, 1948, II, p. 630. Later reconstructions considered merger as "succession without liquidation", *cf* G. DE SEMO, *La fusione delle società commerciali*, Roma, 1921, p. 241; G. FERRI, *La fusione di società commerciali*, Roma, 1936, p. 50 et seq; B. VISENTINI, *La fusione tra società*, Roma, 1942; F. MESSINEO, *Manuale di diritto civile e commerciale*, III, p. I, tomo I, Milano, 1954, p. 558. Finally, the thesis which considered mergers as a phenomenon involving the dissolution the incorporated or merged company and the creation of a new entity was definitely abandoned., *cf* C. SANTAGATA, *La fusione tra società*, Napoli, 1964, p. 29 et seq., E. SIMONETTO, *Della trasformazione e della fusione delle società*, in A. SCIALOJA–F. BRANCA (eds.), *Commentario del codice civile*, Bologna-Roma, 1968, p. 102 et seq.; F. DI SABATO, *Manuale delle società*, Torino, 1984, p. 575; G. TANTINI, *Trasformazione e fusione delle società*, in F. GALGANO (ed.), *Trattato di diritto commerciale*, vol. VII, Padova, 1985, p. 282; A. SERRA, *La trasformazione e la fusione di società*, in P. RESCIGNO (ed.), *Trattato di diritto privato*, vol. XVII, t. III, Torino, 1985, p. 339; F. SCARDULLA, *La trasformazione e la fusione delle società*, in A. CICU - F. MESSINEO (eds.), *Trattato di diritto civile e commerciale*, Milano, 1989, p. 324; D. CORAPI, *Gli statuti delle società per azioni*, Milano, 1971, p. 306 et seq.; G. COTTINO, *Diritto commerciale*, Padova, 1987, p. et 841 seq.; F. FERRARA, *Gli imprenditori e le società*, Milano, 1980, p. 637.

complementary or functional terms with the pursuit of that activity»[182].

Following this line of argumentation, the Advocate General found that the instrument of merger is a particularly effective means of transforming a company insofar as it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, hereby reducing considerably the complications, times and costs associated with other forms of company consolidation[183]. Without having this opportunity one is deprived of a possibility of considerable and manifest importance in a common market. Therefore, the lack of provisions on cross-border mergers constitutes an "obstacle" likely to have a direct effect on the decision by German undertakings to establish themselves or expand their presence in other Member States and consequently exercise the freedom to which they are entitled under articles 43 and 48 TEC (articles 49 and 54 TFUE).

With reference to the validity of the restrictions on freedom of establishment provided by the Germany law, the German Government argues that domestic mergers are subject to conditions more particularly designed to protect the interests of creditors, minority shareholders and employees, and to preserve the effectiveness of fiscal supervision and the fairness of commercial transactions. On the contrary, specific problems arise in relation to cross-border mergers, whose solution presupposes the existence of specific rules designed to protect those interests in the context of a cross-border merger that involves the application of several national legal systems in a single

[182] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 32.

[183] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 47: «*...such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company, the transfer of individual assets, and the exchange of title deeds, etc.*».

legal operation. Such rules, as argued by the German Government, presuppose a harmonisation of the legislation at the Community level, as the heterogeneity of the rules provided by national legal systems is not appropriate for ensuring protection of the interests of the parties involved in this type of transactions.

In the Advocate General's view, the provisions under Para. 1(1) UmwG constitutes a discriminatory rule, since the provision at hand treats companies quite differently depending on their place of establishment, by permitting mergers if the companies in question are established in Germany and prohibiting them if one of those companies is established abroad. In his opinion the Advocate General upheld the strict differentiation of discriminatory measures vs. restrictions. Accordingly, he stated that the case at end concerns an open discrimination[184]; in such cases the only derogation which could apply is the one laid down in article 46 TEC, according to which discriminatory measures can be justified only on grounds of public policy, public security or public health[185].

However, none of the above mentioned reasons may be invoked in the present case, since according to the interpretation given by the Court of Justice[186], the applicability of the provision at hand depends on the existence of a «*genuine and sufficiently serious threat to the*

[184] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 56: «*The present case clearly concerns a discriminatory rule. As we have seen, the provision in question treats companies quite differently in accordance with their place of establishment since it permits mergers if the companies in question are established in Germany but precludes them if one of those companies is established abroad*».

[185] See also C. P. SCHINDLER , *Cross-Border Mergers in Europe – Company Law in Catching Up!. Commentary on the ECJ's Decision in SEVIC System AG*, op. cit., p. 112-114.

[186] See, among many, Case C-30/77 *Bouchereau* [1977] ECR 1999, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981.

requirements of public policy affecting one of the fundamental interests of society»[187].

In addition, as already anticipated above, a brief mention deserves the Advocate General's view that the merger in question could be seen not only as a case of primary establishment but also as a case of secondary establishment. The prohibition to carry out the cross-border mergers has not only prevented the Luxembourgish company (absorbed) from exercising the right of primary establishment (inbound), but also the Germany company (absorbing) from exercising, through the merger, the right of secondary establishment (outbound). Following the merger with Security Vision, SEVIC could in fact open a branch in Luxembourg (home State of the merged company), maintaining in Luxembourg assets, personnel and means of production belonging to the incorporated company (Security Vision) and thus having a "secondary" place of business abroad[188].

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[187] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 57. However, as it will be better described hereinafter, the Court of Justice considered such a difference in treatment as a restriction within the meaning of articles 43 and 48 TEC (and not as discriminatory measures, according to Advocate General's view), verifying whether it is justified by imperative reasons in the public interest and whether it does not go beyond what is necessary to attain it. According to settled European Court of Justice case-law, restriction measures can be permitted only if they fulfil four conditions: (i) they must be applied in a non-discriminatory manner; (ii) they must be justified by imperative requirements in the general interest; (iii) they must be suitable for securing the attainment of the objective which they pursue; (iv) and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663 and Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165).

[188] Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, para. 35: «*That is because the takeover of a company established in another Member State (in this case the Luxembourg company) does not prevent the incorporating company (in this case the German company) from being in a situation, precisely as a consequence of the merger, of operating on a stable basis in the Member State in which the incorporated company was established, and thus in a Member State other than its own, with the result that it forms there an establishment, albeit a secondary one*». See, *contra*, P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 481-482, according to which the case at hand could not refer to the exercise of a right of secondary establishment, since the opening of a branch in Luxembourg, to which the

Finally, the Advocate General concluded that if the contested legislation was not discriminatory this would not change the outcome, since restrictions could only be justified by certain overriding requirements, providing they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary for that purpose. An absolute and automatic prohibition which is consequently applicable in a general and preventative manner to all cases of cross-border mergers, cannot satisfy this test, irrespective of the possible harm or risks associated with them[189].

5.3 The ECJ's decision

Following the Advocate General's reasoning, the European Court of Justice stated that articles 43 and 48 TEC (now articles 49 and 54 of the Treaty on the functioning of the European Union) clearly apply to a merger situation such as that at issue and hereby denied the notion, held by the German Government, that the freedom of establishment is not applicable, because the transferring company cannot establish a (primary or secondary) place of business abroad after losing its legal personality as a result of the merger.

The Court of Justice affirmed that cross-border mergers constitute «*particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC*»[190]. Within this regard, the Court has shared the Advocate General's opinion,

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Advocate General made reference represented a merely accidental result of the transaction.

189 Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, paras. 54-56.

190 Judgment of the Court, Case C-411/03, para. 19.

reaffirming that «*the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators*»[191].

With the decision of the European Court of Justice it is now clarified that both the transferring company as well as the acquiring company enjoy the protection of the freedom of establishment.

Following its reasoning, the Court held that the provision at hand constitutes a restriction of the freedom of establishment, thus not following follow the Advocate General as regards the existence of a discriminatory rule[192]. The mere fact that in German Law – unlike what exists for internal mergers – no provisions for registration of cross-border mergers exist (thus making not possible the recourse to such operations), represents a difference in treatment between companies according to the internal or cross-border nature of the merger[193].

That said, the Court stated that such a difference in treatment constitutes a restriction to the right of establishment within the meaning of articles 43 and 48 TEC (now articles 49 and 54 TFUE); according to the Court's earlier judicature[194], any provision potentially able to deter the exercise of the fundamental freedoms[195] is prohibited.

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[191] Judgment of the Court, Case C-411/03, para. 18.

[192] C. P. SCHINDLER , *Cross-Border Mergers in Europe – Company Law in Catching Up!. Commentary on the ECJ's Decision in SEVIC System AG*, op. cit., p. 114.

[193] Judgment of the Court, Case C-411/03, para. 22.

[194] Case C-81/87 *Daily Mail and General Trust* [1988] ECR 5483; Case C-264/96 *ICI* [1998] ECR I-4695; Case C-200/98 *X and Y* [1999] ECR I-0000; and Case C-251/98 *Baars* [2000] ECR I-2787.

[195] Including minor restrictions, according to case C-34/98 *Commission vs. France* [2000] ECR I-995.

However, such restrictions can be permitted only if they are justified by imperative reasons in the public interest[196] and pursue a legitimate objective compatible with the Treaty[197].

The Court, however, recalled that restrictions safeguarding such imperative reasons in the public interest must be appropriate to ensuring the attainment of the objective thus pursued, and must not go beyond what is necessary to attain it[198].

Following, the Court of Justice focused on the possible justification for the restriction submitted by the German Government, which argued that an harmonisation of the legislation on cross-border mergers at the Community level is necessary, as specific problems arise in relation to cross-border mergers, whose solution presupposes the existence of specific rules designed to protect the interests of «*creditors, minority shareholders and employees*», as well as to «*preserve the effectiveness of fiscal supervision and the fairness of commercial transactions*». Such operations involve the application of several national legal systems in a single legal operation and - according to the Germany's view - domestic rules are not adequate to protect the interests at hand.

However, despite harmonization rules might facilitate cross-border mergers, the court restated - as already seen above in Überseering - that «*the existence of such rules cannot be made a*

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[196] Such as protection of the interests of creditors, minority shareholders and employees (see Case C-208/00 *Überseering* [2002] ECR I-9919), and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions (see Case C-167/01 *Inspire Art* [2003] ECR I-10155).

[197] Judgment of the Court, Case C-411/03, para. 23.

[198] See Case C-19/92 *Kraus* [1993] ECR I-1663; Case C-55/94 *Gebhard* [1995] ECR I-4165; Case C-212/97 *Centros* [1999] ECR I-1459; Case C-442/02 *Caixa Bank* n.y.r.

precondition for the implementation of the freedom of establishment laid down by sections 43 and 48 TEC»[199], which have direct effect[200].

Secondly, the Court conceded that imperative reasons in the public interest such as the protection of the interests of creditors, minority shareholders, employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions may be relevant in such cases and under certain conditions justify a measure restricting the freedom of establishment. In particular, a «*restrictive measure would also have to be appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them*»[201].

Given the fact, however, that Para. 1(1) UmwG generally refuses the registration of cross-border mergers, according to the European Court of Justice such a rule goes beyond what is necessary to protect those interests, therefore not respecting the principle of proportionality[202].

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[199] Judgment of the Court, Case C-411/03, para. 23. See, to that effect, also Case C-204/90 *Bachmann* [1992] ECR I-249.

[200] The Court thus restated the principle affirmed for the first time in Case C-2/74 *Reyners* [1974] ECR 631. For an interesting parallel examination between Reyners and SEVIC cases see F. CAPELLI, *La direttiva CE n. 2005/56 sulle fusioni societarie transfrontaliere e gli effetti giuridici che essa è in grado di produrre*, in *Dir. Comun. e degli scambi internaz.*, 3, 2006, p. 623 et seq.

[201] Judgment of the Court, Case C-411/03, para. 29.

[202] As remembered above, The Advocate General additionally examined the case submitted under the free movement of capital, and for the same reasons as those given under the freedom of establishment considered Para. 1(1) UmwG to violate Article 56 TEC (Opinion of Mr Tizzano of 7 July 2005 – Case C-411/03, paras. 71-78). However, as seen, the Court did not scrutinize Para. 1(1) UmwG under the free movement of capital, since it is well established that where the Court previously found a restriction on the freedom of establishment, it considered it unnecessary to examine whether a particular measure also ran counter to article 56 TEC (see Case C-118/96 *Safir* [1998] ECR I-1897; Case C-200/98 *X and Y* [1999] ECR I-8261; Case C-251/98 *Baars* [2000] ECR I-2787; joint Cases C-397/98 and C-410/98 *Metallgesellschaft and others* [2001] ECR I-1727).

The Court of Justice therefore answered to the questioned referred for preliminary ruling:

"[...] that Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State."[203]

5.4. Conclusions

The arguments of the decision of the European Court of Justice has been criticized by some legal scholars as incomplete, superficial and unsupported by adequate grounds[204]. However, it is difficult to disagree with the substance of the ruling.

Anyway, the decision seems to leave open three questions on how the law should deal with cross-border mergers.

First, not only inbound mergers but also outbound mergers have to be allowed under the freedom of establishment. As anticipated in the previous paragraph, Advocate General's observed that the merger in question could be seen not only as a case of primary inbound establishment by Security Vision, but also as a case of secondary outbound establishment by Sevic Systems. However, the European Court of Justice did not analyse the legal situation of outbound

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[203] Judgment of the Court, Case C-411/03, para. 32.

[204] F. M. MUCCIARELLI, *Fusioni transfrontaliere e libertà di stabilimento delle società nell'Unione Europea: il caso "Sevic"*, op. cit., p. 421; P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 481.

mergers. Some parts of the decision mention inbound mergers only[205], whereas other parts talk about cross-border mergers in general[206].

The Court lost an excellent opportunity to rule about outbound establishment and to overcome the principles expressed in Daily Mail case. In this decision – as better explained above - the European Court of Justice stated that «*companies are [...] creatures of national law»*[207], which means that it is for the Member States to decide about the "birth" and "death" of companies[208].

In addition, since only public limited liability companies[209] were involved in the case referred to the Court, it might be doubtful whether the SEVIC case is also applicable to other types of companies[210]. First, it has to be considered that, since article 48 TEC (article 54 TFEU) - invoked by the Court in support of its conclusions - does not distinguish between public and private companies. The judicature of the Court of Justice, however, does not contain any hints that private limited liability companies should be excluded. In addition, The Tenth Directive on cross-border mergers (which will be examined in the next chapter) applies to both public and private limited liability companies. Private limited liability companies can therefore equally rely on the SEVIC decision when participating in a cross-border merger.

Finally, as we have seen, the SEVIC ruling examined only issues closely related to the exercise of freedom of establishment, and

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[205] Judgment of the Court, Case C-411/03, paras. 18, 20 and 22.

[206] Judgment of the Court, Case C-411/03, paras. 19, 21 and 30.

[207] Judgment of the Court, Case C-81/87 *Daily Mail*, para. 19.

[208] M. M. SIEMS, *Sevic: beyond cross-border mergers*, in *European Business Organization Law Review*, 8, 2007, p. 309.

[209] *Società per azioni* in the Italian legal system.

[210] See also C. P. SCHINDLER , *Cross-Border Mergers in Europe – Company Law in Catching Up!. Commentary on the ECJ's Decision in SEVIC System AG*, op. cit., p. 116.

did not deal with any private international law issue. In other words, no issues relevant to the law applicable to cross-border mergers - in which are involved entities subject to the legislation of different Member States - have been treated.

The European Court of Justice, in fact, just stated that the German companies' register must not reject the registration of the merger, but not how the cross-border merger itself should be undertaken. As already noted, the application of the law on domestic mergers could create problems, because the law of the countries involved (Germany and Luxembourg with regard to the case at hand) may differ, for instance, in relation to the items which have to be mentioned in the merger prospectus[211]. Thus, it has been suggested to apply Directive 78/855/EEC on domestic mergers directly to cross-border merger[212]. However, it has been noted that this would also be inadequate[213]; more extensive protection should be granted, such as the right to exit for compensation in analogy to the law applying to the European Company (*Societas Europaea*)[214].

It seems significant that the SEVIC ruling was issued a few weeks after the approval of the Tenth Directive on cross-border mergers, whose aim is also to protect the interests argued by German law as the basis for the rejection of the registration of the cross-border merger at hand. The Court, therefore, once again reiterated that the

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[211] M. M. SIEMS, *Sevic: beyond cross-border mergers*, op. cit., p. 309.

[212] M. LUTTER - T. DRYGALA, in M. LUTTER (ed.), *UmwG*, 5th ed., Cologne, 2004, p. 27 et seq.

[213] M. M. SIEMS, *Sevic: beyond cross-border mergers*, op. cit., p. 309, according to which «*cross-border mergers differ from domestic mergers because the shareholders, creditors and employees of the company being acquired will not only become shareholders, creditors, and employees of a different company but also of a company to which different legal rules apply*».

[214] Council Regulation no. 2157/2001/EC on 8 October 2001, on a Statute for an European Company, Official Journal of the European Communities, L 294, 10 November 2001.

process of harmonization cannot affect in any case the exercise of the right of establishment. The effect of this decision will be that cross-border mergers may be justified on a dual legal basis, *i.e.* the provisions of the Tenth Directive on cross-border mergers and the freedom of establishment pursuant to article 48 TEC (article 54 TFUE) as interpreted according to SEVIC ruling[215].

On this basis could then further added the Regulations on the *Societas Europaea* which provides, among the possible ways of incorporation of an European Company, the merger between two or more EU companies.

6. The recent decisions of the European Court of Justice. Brief comments

After SEVIC case, corporate mobility within the European Union has been under the European Court of Justice's scrutiny in other occasions.

In *Cartesio* case [216], concerning a limited partnership incorporated in Hungary and seeking to transfer its seat to Italy while

[215] Case C-210/06 *Cartesio* [2008] ECR I-9641.

[216] Judgment of the Court, Case C-210/06, para. 124. For a more detailed analysis of Cartesio case see A. F. DE SOUSA, *Company's cross-border transfer of seat in the EU after Cartesio*, in *Jean Monet Working papers*, no. 7/2009, available at http://www.jeanmonnetprogram.org/papers/paper-serie/2009; D. DEAK, *Outbound establishment revisited in Cartesio*, in *EC Tax Review*, vol. 17, no. 6, 2008 p. 250 et seq.; V. KOROM - P. METZINGER, *Freedom of Establishment for companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06*, in *European Company and Financial Law Review,* 6 (1), 2009, p. 125 et seq.; V. PETRONELLA, T*he cross-border transfer of the seat after Cartesio and the non-portable nationality of the company*, in *European Business law review*, 21(2), 2010, p. 245 et seq.; O. VALK, *C-210/06 Cartesio increasing corporate mobility through outbound establishment*, in *Utrecht Law Review,* 6 (1), 2010, p. 151 et seq.; A. W. WISNIEWSKI - A. OPALSKI, *Companies' Freedom of Establishment after the ECJ Cartesio Judgment*, in *European Business Organization Law Review*, 2009, p. 595 et seq.; R. SZUDOCZKY, *How Does the European Court of Justice Treat Precedents in Its Case Law? Cartesio and Damseaux from a Different Perspective: Part I,* in *Intertax*, 2009, Vol. 37, Issue 6/7, p 346 et seq.; F.M.

maintaining its legal status under Hungarian law, the European Court of Justice uphold – contrary to the Advocate General recommendation - a position expressed twenty years earlier in the *Daily Mail* Case. The Court of Justice stated that, at the current state of Community law, «*articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation*»[217].

More recently, in VALE case[218], concerning a cross-border conversion of a company established under Italian law, VALE Costruzioni S.r.l., into a company incorporated under Hungarian law, VALE Építési kft.

The Court of Justice, in this case - which can be considered as the 'mirror image' of the Cartesio case - ruled that «*articles 49 TFEU and 54 TFEU are to be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the*

MUCCIARELLI, *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited*, in *European Business Organization Law Review*, op. cit., p. 267 et seq.; C. GERNER - BEUERLE - M. SCHILLIG, *The Mysteries of Freedom of Establishment after Cartesio (February 11, 2009)*, in *International & Comparative Law Quarterly*, Vol. 59, No. 2, 2010. Available at SSRN: https://ssrn.com/abstract=1340964; J. B. HAMBURG, *Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies?*, in *European Law Reporter*, no. 3, 2009; G. J. VOSSESTEIN, *Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment - Some Considerations on the Court of Justice's Cartesio Judgment*, in *European Company Law*, 2009, p. 115 et seq.; S. LOMBARDO, *Regulatory Competition in Company Law in the European Union After Cartesio*, in *European Business Organization Law Review*, 10, 2009, p. 627.

[217] Judgment of the Court, Case C-210/06, para. 124.

[218] Case C-378/10 *VALE Építési* [2012] ECR I-0000.

law of another Member State to convert to companies governed by national law by incorporating such a company»[219].

Said cases represent undoubtedly important steps about the recognition of companies' freedom of establishment; however, also in consideration of the fact that the same do not refer specifically to cases of merger, their examination will not be discussed here[220].

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[219] Judgement of the Court, Case C-378/10, para 62. The Court goes on stating that «*articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host Member State from*

- *refusing, in relation to cross-border conversions, to record the company which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and*
- *refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin*».

[220] For a more detailed analysis of Cartesio case see A. F. DE SOUSA, *Company's cross-border transfer of seat in the EU after Cartesio*, in *Jean Monet Working papers*, no. 7/2009, available at http://www.jeanmonnetprogram.org/papers/paper-serie/2009; D. DEAK, *Outbound establishment revisited in Cartesio*, in *EC Tax Review*, vol. 17, no. 6, 2008 p. 250 et seq.; V. KOROM - P. METZINGER, *Freedom of Establishment for companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06*, in *European Company and Financial Law Review,* 6 (1), 2009, p. 125 et seq.; V. PETRONELLA, T*he cross-border transfer of the seat after Cartesio and the non-portable nationality of the company*, in *European Business law review*, 21(2), 2010, p. 245 et seq.; O. VALK, *C-210/06 Cartesio increasing corporate mobility through outbound establishment*, in *Utrecht Law Review,* 6 (1), 2010, p. 151 et seq.; A. W. WISNIEWSKI - A. OPALSKI, *Companies' Freedom of Establishment after the ECJ Cartesio Judgment*, in *European Business Organization Law Review*, 2009, p. 595 et seq.;. R. SZUDOCZKY, *How Does the European Court of Justice Treat Precedents in Its Case Law? Cartesio and Damseaux from a Different Perspective: Part I,* in *Intertax*, 2009, Vol. 37, Issue 6/7, p 346 et seq.; F.M. MUCCIARELLI, *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited*, in *European Business Organization Law Review*, 2008, p. 267 et seq.; C. GERNER-BEUERLE - M. SCHILLIG, *The Mysteries of Freedom of Establishment after Cartesio (February 11, 2009)*, in *International & Comparative Law Quarterly*, Vol. 59, No. 2, 2010. Available at SSRN: https://ssrn.com/abstract=1340964; J. B. HAMBURG, *Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies?*, in *European Law Reporter*, no. 3, 2009; G. J. VOSSESTEIN, *Cross-Border Transfer of*

Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment - Some Considerations on the Court of Justice's Cartesio Judgment, in *European Company Law*, 2009, p. 115 et seq.; S. LOMBARDO, *Regulatory Competition in Company Law in the European Union After Cartesio*, in *European Business Organization Law Review*, 10, 2009, p. 627.

For a more detailed analysis of VALE case see D. G. SZABÓ - K. E. SØRENSEN, *Cross-Border Conversion of Companies in the EU: The Impact of the VALE Judgement (January 9, 2013)*, Nordic & European Company Law Working Paper No. 10-33. Available at SSRN: https://ssrn.com/abstract=2198364; H. J. LAU, *The Vale Decision and the Court's Case Law on the Nationality of Companies*, in *European Company and Financial Law Review*, Vol. 10, no. 1, 2013, pp. 1-17; H. HORAK – K. DUMANČIĆ, *Freedom of Establishment: VALE Case - Direction for New Rules: Dreams or Reality?*, in N. BODIROGA-VUKOBRAT – S. RODIN – G. G. SANDER (eds.), *New Europe - Old Values? Reform and Perseverance*, 2016 p. 165 et seq.; L. CERIONI, *The "Final Word" on the Free Movement of Companies in European Following the ECJ's VALE Ruling and a Further Exit Tax Case?*, in *European Taxation*, Vol. 53, no. 7, 2013, pp. 329-340; J. BORG-BARTHET, *Free at Last? Choice of Corporate Law in the EU Following the Judgment in Vale*, in *International and Comparative Law Quarterly*, 2013, p. 503 et seq.; G. C. VAN ECK – E. R. ROELOFS, *Vale: Increasing Corporate Mobility from Outbound to Inbound Cross-Border Conversion?*, in *European Company Law*, Vol. 9, 2012, p. 319 et seq.; S. RAMMELOO, *Case C-378/10, VALE Építési Kft., pending, lodged on July 28, 2010, Freedom of establishment: cross-border transfer of company "seat", in Maastricht Journal of European and Comparative Law*, Vol. 18, no. 3, 2011, p. 353 et seq.; S. LOMBARDO, *Some reflections on freedom of establishment of non-profit entities in the European Union*, in *European Business Organization Law Review*, Vol. 14, no. 2, 2013, pp. 225-263.

CHAPTER IV

The Tenth Directive on cross-border merger of limited liability companies

SUMMARY: 1. The long path towards the adoption of the Tenth Directive on cross-border mergers – 2. The Tenth Directive on cross-border mergers: structure, character and purpose – 3. Limits of the European regulation on cross-border mergers – 4. Scope of the Tenth Directive – 4.1. Objective scope – 4.2. Personal scope – 4.3. EU and non-EU cross-border mergers – 4.4 Cross-border merger having "transformative" effects – 5. General provisions and conflict rules – 6. The cross-border merger procedure – 6.1. The common draft terms of cross-border merger – 6.2. The publicity of the common draft terms – 6.3. Report of the management and of the independent expert – 6.4. Cross-border merger leveraged buy out – 6.5. Approval by the general meeting and simplified formalities – 6.6. Preventive and subsequent scrutiny of the legality of the cross-border merger: A) Pre-merger certificate; B) The scrutiny of the legality of the cross-border merger. The final certificate – 6.7. The cross-border merger deed – 6.8. Publicity of the merger; effects and effectiveness of the transaction – 7. Protection of dissenting (minority) shareholders – 7.1 The interests deserving protection – 7.2 Tenth Directive and protection of dissenting shareholders – 7.3 The protection instruments – 8. Creditors' protection – 9. Employee participation.

1. The long path towards the adoption of the Tenth Directive on cross-border mergers

Notwithstanding the urgency of the adoption of international rules on the cross-border mergers, the Tenth Directive has been adopted only at the end of a long and difficult debate started thirty years before. The European Commission filed the first proposal for a cross-border merger international Convention on 1972, as a result of the studies of a panel of experts created in 1965, according to section 220 (now 293) of EC Treaty[221].

The main oppositions to said proposal became from Germany, in particular due to the debate regarding the labour law applicable and the protection of joint management rules – which are a peculiar institution of Germany company law – even in cross-border mergers, according to which the resulting company has registered office in a Country where said institution is not applied. In particular, Germany fears that companies would use "unlawfully" cross-border mergers in order to avoid the application of the strict rules on the workers participation applied in certain countries, such as Germany.

Once laws on mergers of the member States have been put close by means of the Council Directive 78/855/EEC of 9 October 1978[222] ("Third Directive"), and once the differences between the tax rules relevant to the transactions at hand have been removed trough the harmonization pursuant to the Directive 90/434/EC and Directive 2005/19/EC[223] (which has amended Directive 90/434/EC)[224], the main reason of resistance remains the issue of the participation of workers to the corporate events.

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[221] On the long process of adoption of the Tenth Directive see M.V. BENEDETTELLI, *Le fusioni transfrontaliere*, op. cit., p. 367 et seq.; A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, in *Giur. Comm.*, 6, 2008, p. 1194 et seq.; G. ARNÒ – G. FISCHETTI, *Le fusioni transfrontaliere, Milano*, 2009, p. 15 et seq and F. MAGLIULO, *La fusione di società*, Milano, 2009, p. 8.

[222] Official Journal of the European Communities, L 295, 20 October 1978.

[223] Official Journal of the European Union L 58/19, 4 March 2005.

[224] On tax exits and the relevant barriers see F. VANISTENDAEL, *The Compatibility of the basic Freedom with the Sovereign National System of the Member State*, in *EC Tax review*, 12, 3, 2003, p. 142 et seq.; B. KNOBBE – KEUK, *The EC corporate tax directives - anti-abuse provisions, direct effect, German implementation law*, Intertax, 1992, p. 6 et seq.; P. VALENTE, *Profili comparatistici delle modalità di recepimento della direttiva comunitaria 90/434/CEE in alcuni Paesi dell'Unione Europea*, in *Dir. e prat. trib.*, 5, 1996, p. 1531. For a framework in light of cross-border mergers see also J. WERBROUCK, *Tax rules applicable to cross-border mergers*, in D. VAN GERVEN (ed.), *Cross-Border Mergers in Europe*, I, Cambridge, 2010.

As known, this is one of the main issue that highlight differences between labour laws of the member States and on which the debate was - and is still - opened[225]. The corporate governance models of the member States, with regard to the participation of workers, goes from disjunctive participation models, where workers remains opposed to the companies, to integration models where they are involved in contributing to the management of companies from the inside[226]. As it will be discussed more in detail in this essay, the solution finally adopted can give rise to perplexity; a sort of imposition of the German *Mittbestimmung* on the corporate governance of other member States can be revealed as an incautious choice, which can giver rise to "crisis of rejection", or in any case to unpredictable consequences[227].

However said circumstance and, more generally, the differences between the applicable laws of member States, has prevented to reach an agreement on the participation regime applicable to the company resulting from merger between companies operating in different member States.

The proposal for a Convention was therefore abandoned, and was resumed more than ten years later, on 14 December 1984, by the

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[225] For the debate in Italy see in particular B. VISENTINI, *L'utopia della cogestione*, in *Riv. Soc.*, 2, 1977, p. 116 et seq. and L. MENGONI, *Diritto e valori*, Bologna, 1985, p. 333 et seq.

[226] M. J. BONELL, *Partecipazione operaia e diritto dell'impresa*, Milano, 1983, p. 5 et seq.

[227] Moreover, the adopted solution was also contrary to the results of the Report of the High Level Group of company law, which suggested solutions that does not impact significantly on corporate governance structure of the member States; A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1196. The Italian government, as noted by A. PRETO – C. DESOGUS, *La direttiva comunitaria sulle fusioni transfrontaliere di società di capitali*, in *Contr. e Impr./Eur.*, 1, 2006, p. 258 et seq., was the only member State that voted against the introduction of the workers participation system.

European Commission, as proposal[228] for the Tenth company law Directive.

In the meantime, as anticipated above, the Third Directive, based on Article 54(3)(g) of the Treaty, had harmonized the applicable laws on in-border mergers of public limited liability companies. Said directive has been used as starting model for the Commission proposal for cross-border mergers; however, the Third Directive did not provide for a workers participation model where the Commission would draw inspiration.

The proposal was discussed in the European Parliament, but it was considered once again that cross-border mergers could be used in order to circumvent the rules on workers participation in decision-making process applicable in certain member States. A report was prepared and presented to the Parliament on 21 October 1987, but the Parliament was never able to reach an agreement on it.

Only the adoption of the Statute for a European Company (*Societas Europaea*)[229] and the Council Directive 2001/86/EC of 8 October 2001[230], supplementing the Statute for a European company with regard to the involvement of employees, finally allowed the deadlock with respect to employee participation in cross-border mergers to be broken, by referring the rules applicable to the formation of an European Company by merger[231].

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[228] Official Journal of the European Communities, C 23, 25 January 1985.

[229] Council Regulation no. 2157/2001/EC on 8 October 2001, on a Statute for an European Company, Official Journal of the European Communities, L 294, 10 November 2001. For a discussion of the rules applicable to the European Company, see P. FRANÇOIS - J. HICK, *Employee Involvement: Rights and Obligations*, in D. VAN GERVEN AND P. STORM (eds.), *The European Company*, I, Cambridge, 2006, p. 77 et seq.

[230] Official Journal of the European Communities, L 294, 10 November 2001.

[231] D. VAN GERVEN, *Community rules applicable to cross-border mergers*, in D. VAN GERVEN (ed.), *Cross-Border Mergers in Europe*, op. cit., p. 4.

In light of the above mentioned new regulations, the European Commission - which in 2001 has withdrew the proposal for the Tenth Directive – on 18 November 2003 approved a new directive proposal which provided for a participation model largely inspired to that of the European Company.

The proposal, which was the first measure of the European Commission company law and corporate governance Action Plan of 21 May 2003[232], was submitted to the European Parliament, and, since then, has been considered as the subject of the attention of the Commission itself[233]. The Economic and Social Committee issued its opinion on the proposed directive on 28 April 2004[234]. On 10 May 2005 the European Parliament, according to a report of its Committee on Legal Affairs of 25 April 2005[235], approved certain amendments to the proposal and sent the amended proposal back to the European Commission[236] for final approval. The Commission accepted several amendments and incorporated them into the final draft of the Tenth Directive 2005/56/EC[237], approved on 26 October 2005[238].

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[232] European Commission, *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, COM (2003) 284 def., Brussels, 21 May 2003.

[233] European Commission, *Report of the Reflection Group on the Future of EU Company Law*, COM (2011), 5 April 2011, available at http://ec.europa.eu, *Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies*, COM (2012) 740 final, 12 December 2012, 13; BECH-BRUUN/LEXIDALE, *Study on the Application of the Cross-border Mergers Directive*, September 2013, available at http://ec.europa.eu.

[234] Official Journal of the European Union, C 110, 30 April 2004.

[235] A6-0089/2005, Committee on Legal Affairs, Rapporteur: Klaus-Heiner Lehne.

[236] Official Journal of the European Union, C 92, 20 April 2006.

[237] Official Journal of the European Union, L 310, 25 November 2005.

[238] Italy was the only member State to vote against the approval of the Tenth Directive during its adoption. Italian government was opposed to the rules on the participation of employees as provided for by the directive, as it considered that no participation regime should apply in case of the company resulting from a merger is established in a member State which does not provided for the worker's

2. The Tenth Directive on cross-border mergers: structure, character and purpose

The Tenth Directive has been issued pursuant to article 44 (now section 50 of the Treaty on the Functioning of the European Union), paragraph 2, letter g), of the EC Treaty which regulates the Community's action in the field of company law, in order to full realize the freedom of establishment. As known, the aim of this provision of the Treaty is to coordinate to the necessary extent the safeguards which are required by Member States of companies, for the protection of the interests of shareholders and third parties, with a view to making such safeguards equivalent throughout the Union by means of a directive[239].

The Tenth Directive has provided, for the first time, uniform Community rules addressed to all limited companies – and not only to joint stock company (in Italy: *società per azioni*), as provided in the

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participation in management. On the reasons of such resistance see M. M. SIEMS, *The European Directive on Cross-Border Mergers: An International Model?*, *Columbia Journal of European Law*, 11, 2005, p. 167 et seq.; F. CAPELLI, *La direttiva CE n. 2005/56 sulle fusioni societarie transfrontaliere e gli effetti giuridici che essa è in grado di produrre*, op. cit., p. 628 and A. PRETO – C. DESOGUS, *La direttiva comunitaria sulle fusioni transfrontaliere di società di capitali*, op. cit., p. 259.

[239] According to M. M. SIEMS, *The European Directive on Cross-Border Mergers: An International Model?*, *Columbia Journal of European Law*, op. cit., p. 168 and N. AL NAJJARI – S. PERON, *Le fusioni transfrontaliere di Società di capitali: uno sguardo di insieme*, in *Contr. e Impr./Eur.*, 2005, 2, p. 712, the legal basis of the Tenth Directive was also article 293 (which has been repealed) of the EC Treaty, according to which «*member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...]the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries*». However, said provision should be deemed to constitute the legal basis of international conventions, and not directives.

first directive proposal – which intend to proceed with a cross-border merger.

As briefly mentioned in the paragraph above, before the adoption of the Directive 2005/56/EC, cross-border mergers have been regulated by the European Community only because they constituted one of the procedures provided for by Council Regulation 2157/2001/EC for the establishment of the European Company[240]. However, such Regulation applies in Italy only to *società per azioni*[241], provided that the remaining limited companies were prevented from merge in order to create a European Company.

Anyway, in practice, given the preclusion to certain type of limited companies (e.g. *società a resposabilità limitata* in Italy) and given that the creation of an European Company requires a minimum

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[240] According to Article 2, paragraph 1, of the Council Regulation no. 2157/2001/EC, «*public limited-liability companies [...] formed under the law of a Member State, with registered offices and head offices within the Community may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States*».

[241] According to Annex I, public limited-liability companies which can form an SE by means of a merger are:

- BELGIUM: la société anonyme / de naamloze vennootschap.
- DENMARK: aktieselskaber.
- GERMANY: die Aktiengesellschaft.
- GREECE: ανώνυμη εταιρία.
- SPAIN: la sociedad anónima.
- FRANCE: la société anonyme.
- IRELAND: public companies limited by shares; public companies limited by guarantee having a share capital.
- ITALY: società per azioni.
- LUXEMBOURG: la société anonyme.
- NETHERLANDS: de naamloze vennootschap.
- AUSTRIA: die Aktiengesellschaft.
- PORTUGAL: a sociedade anónima de responsabilidade limitada.
- FINLAND: julkinen osakeyhtiö / publikt aktiebolag.
- SWEDEN: publikt aktiebolag.
- UNITED KINGDOM: public companies limited by shares; public companies limited by guarantee having a share capital.

corporate capital of Euro 120,000, the only companies that should be able to establish an European Company through merger are large multinational companies, concerned in carrying out their activities in the whole territory of the European Union.

It was therefore necessary to provide also small and medium enterprises with suitable instruments to stimulate dynamism and to strengthen market competitiveness, in order to allow implementation of the freedom of establishment and to ensure the functioning of the Single Market and the free movement capital. At the same time, choosing the most appropriate legal instrument was strategic. As stated in the first recital of the Tenth Directive, there was «*a need for cooperation and consolidation between limited liability companies from different Member States*», and cross-border mergers of limited liability companies «*encounter many legislative and administrative difficulties in the Community*». It was therefore necessary a set of rules to «*facilitate*» - continues the first recital - «*the carrying-out of cross-border mergers between various types of limited liability company governed by the laws of different Member States*»[242]. The European Community therefore did not introduce a new legal instrument – such as the European Company – but provided just to facilitate the carrying out of transactions that, before the adoption of the Tenth Directive, could be in any case realized according to European Union principles regarding freedom of establishment, even thought said transaction were subject to restrictive conditions imposed by the national laws and control authorities.

[242] Of the same tenor is recital 2 of the Tenth Directive, according to which the Directive «*facilitates the cross-border merger of limited liability companies as defined herein. The laws of the Member States are to allow the cross-border merger of a national limited liability company with a limited liability company from another Member State if the national law of the relevant Member States permits mergers between such types of company*».

In order to realize said facilitation, the only instrument was a directive that would be able, from one side, to determine the law applicable to the individual aspects of the cross-border mergers regulation, providing a uniform set of conflict rules, in order to eliminate any uncertainty relevant to the application and interpretation of the rules of private international law of the individual Member States; and, on the other hand, to introduce an harmonized substantive law, providing uniform material rules to regulate certain sensitive issues, mostly relevant to the protection of the interests of "vulnerable groups" of the parties involved (creditors, minority shareholders and employees, etc.), in order to avoid the risk that inadequate national rules apply in those aspects.

The Tenth Directive met the above-mentioned needs, with a combination of substantive law rules and international private law rules. The harmonization - in compliance with the principle of subsidiarity and proportionality[243] - is minimal, and relates with particular regard to international private law rules.

As a general rule - save as otherwise provided by the Directive due to the cross-border nature of the merger - the procedure is governed in each Member State by the principles and rules applicable to mergers between companies governed exclusively by the law of that State for domestic mergers[244]. The aim of this choice, as

[243] According to the recital 15 of the Tenth Directive, «*since the objective of the proposed action, namely laying down rules with common features applicable at transnational level, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective*».

[244] About the existence of a principle of "equalization" of cross-border mergers to domestic mergers see G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, in *Riv. dir. soc.*, 2007, 1, p. 51.

underlined by the explanatory memorandum enclosed to the proposal of Tenth Directive, is to approximate the cross-border merger procedure with the domestic merger procedures with which operators are already familiar through use. This has been undoubtedly facilitated by the harmonization of domestic merger rules provided by the Third company law Directive on domestic merger. Said Directive, although relating to domestic mergers, has contributed to remove one of the main obstacles to cross-border mergers, reducing the differences between national rules on domestic mergers[245].

In any case, it could be argued that the concurrence of different law provisions to the same merger transaction can give rise to conflicts, as it cannot be excluded that the applicable laws provide incompatible terms and conditions[246]. However, as results from the text of the Tenth Directive, the conflict rules that refer to domestic laws are limited to those aspects which had already been harmonized at Community level (e.g. by the Third company law Directive); on the other hand, the most delicate and controversial aspects, such as workers' participation in management, has been directly covered by the Directive.

Anyway, the cross-border nature of the merger and the interests of the parties involved, as well as the need of legal certainty, have made it necessary to integrate the international private law provisions of the Tenth Directive with several substantive law rules in order to ensure a minimum harmonization of the rules of cross-border mergers. And this, as mentioned below, has been carried out in compliance with the principles of subsidiarity and proportionality, and therefore to

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[245] F. MASCARDI, *La fusione di società nel diritto comunitario*, in *Riv. soc.*, 1991, p. 1750 et seq.

[246] M. V. BENEDETTELLI, *Per rafforzare il mercato unico operazioni tra società più semplici*, in *Dir. comunit. e internaz.*, 1, 2006, p. 49.

the extent strictly necessary to ensure adequate protection of the interests of the “weak” parties involved in the transaction, which might not be sufficiently protected by national laws. This represents a minimum protection level, which could be undoubtedly increased by the national legislature – in a way that respects the freedom of establishment – as confirmed by paragraph 2 of section 4 of the Tenth Directive, which does not affect the right of member States to adopt measures to protect creditors, bondholders, minority shareholders, holders of securities other than shares of the merging companies, as well as workers as regards rights other than those of participation in company[247].

As pointed out by the ninth recital of the Tenth Directive, the provisions of the same are without prejudice to the application of the legislation on the control of concentrations between undertakings, both at Community level[248], and at the level of member States.

Italy has implemented the Directive 2005/56/EC by virtue of Legislative Decree (*decreto legislativo*) 30 May 2008, no. 108, as recently slightly amended by section 27, paragraph 2, of Law 30 October 2014, no. 161 (so-called “European law 2013bis”).

In order to better understand the innovative impact of the Tenth Directive from the Italian perspective, its contents will be described in

[247] In this regard, the explanatory memorandum to the proposal for a Tenth Directive considered useful make reference, as applicable also to companies created by a cross-border merger «*to Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, and Council Directive 94/45/EC of 22 September 1994 and Council Directive 97/74/EC of 15 December 1997, both of which concern the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*».

[248] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

the following of this dissertation in parallel with the implementing provisions provided by Legislative Decree no. 108/2008. Where needed, it will be provided an unofficial English translation of the Italian language law provision, in order to offer a clear reading also to non-Italian speaking reader[249].

3. Limits of the European regulation on cross-border mergers

Notwithstanding the important achievement, the Tenth Directive seems to get only in part the goals of regulating cross-border mergers with respect to the domestic ones. As observed[250], the European legislator, due to "political pragmatism", has given up to establish common and standardised rules for cross-border mergers, and the Directive is limited to just a link between existing national regulations and the existing harmonised rules, which has been updated in the light of the development and experience gained during the implementation.

The European legislator, notwithstanding the market was already economically integrated, has only offered partial support in

[249] For cross-border merger before Legislative Decree no. 108/2008 see G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 47 et seq.; M. V. BENEDETTELLI, *Le fusioni transfrontaliere*, op. cit., p. 365 et seq.; D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, op. cit., p. 744 et seq.; after Legislative Decree no. 108/2008 see R. DESSÌ, Fusione transfrontaliera, in *Enc. giur. Treccani*, vol. XVIII, Roma, 2009, p. 1 et seq.; M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere*, op. cit., p. 742 et seq.; P. MENTI, *Attuazione della direttiva 2005/56/CE, relativa alle fusioni transfrontaliere delle società di capitali (d.lgs. 30 maggio 2008, n. 108)*, op. cit., p. 1309 et seq.; M. V. BENEDETTELLI, *Profili di diritto internazionale privato ed europeo delle società*, in *Riv. dir. soc.*, 2015, pp. 35-94, also in P. ABBADESSA, G.P. PORTALE (eds.), *Le società per azioni – Codice civile e norme complementari*, Milan (Giuffrè), 2016, I, pp. 67-116; F. MAGLIULO, *La fusione delle società*, op. cit., p. 8 et seq..

[250] M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, in M.V. BENEDETTELLI - M. LAMANDINI (eds.), *Diritto societario europeo e internazionale*, Milanofiori, Assago, UTET Giuridica, 2016, p. 512.

the promotion of merger operations between companies in Member States, as well as partially effective simplification and facilitation of merger procedures, which are characterized by high transaction costs and by too many different applicable laws. The Directive indeed presupposes a minimum harmonisation of the legislation at the Community/European level[251], since it is inadequate to establish a really simplified and harmonised system of rules. This means that the European legislator – while establishing the types of intra-EU cross-border merging – did not yet lay down simple and autonomous Community/European provisions to facilitate the carrying-out of cross-border mergers as much as the domestic mergers. The European legislator preferred to combine – as mentioned above – on one side international private law conflict rules and, on the other side, substantive law rules (drafting choice strongly criticized by Italian scholars[252]); the first ones, aimed at regulating the distributive or cumulative parameter of application of the applicable national laws and regulations, the second ones, aimed at setting some (minimum) rules of harmonisation, such as rules on common draft terms and merger effectiveness[253].

The result is that several issues remain unresolved. First, the Directive does not provide for European general rules which preclude Member States from providing intra-EU cross-border merger rules which are different from those laid down for domestic mergers, while, on the contrary, Section 4, paragraph 2 provides that «*A Member State*

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[251] M. V. BENEDETTELLI, *Le fusioni transfrontaliere*, op. cit, p. 388.

[252] F. CAPELLI, *La direttiva CE n. 2005/56 sulle fusioni societarie transfrontaliere e gli effetti giuridici che essa è in grado di produrre*, op. cit., p. 626, according to which the Directive has been drafted in a "terrifying way", being "really hard to read".

[253] A. UGLIANO, *The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement*, in *(2007) 18 European Business Law Review,* Issue 3, 2007, p. 599; S. CRESPI, *Le fusioni transfrontaliere davanti alla Corte di giustizia: Il caso Sevic*, in *Riv. dir. int. priv. e proc.*, 2007, p. 362.

may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger». Therefore, it means that, for example, domestic rules that entitle a dissenting shareholder to withdraw from company taking part in cross-border merger shall be considered valid and effective, also where such right to withdraw is not provided for domestic mergers[254].

Then, it is clear how protection of the interests of minority shareholders – or, rather, using the same words of second paragraph of section 4 of the Directive, the minority members who "have opposed" the cross-border merger – is deemed as one considerable example of minimum approach pursued by the Directive – and, conversely, of discretionary opportunity for Member States in the transposition of the same.

As seen above, the Tenth Directive minority protection provisions are evidently framework provisions, as the substantive decision-making is delegated to the Member States[255]. However, whereas some Member States have introduced protection provisions in their national laws according to the indication of the Directive, other ones provide for no such special remedies[256].

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[254] M. VENTORUZZO, *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law,* op. cit., p. 67.

[255] H. ALAVI – T. KHAMICHONAK, *European Provisions for the Protection of Dissenting Shareholders within the Framework of Cross-Border Mergers*, in *Romanian Journal of European Affairs*, Vol. 16, no. 3, 2016. According to the authors, «*the Directive, however, indicates some important minimum requirements that the national laws cannot overstep as well as reminds about the compliance of national protection provisions with the freedom of establishment and the free movement of capital*».

[256] For example, no special rights are afforded to minority shareholders in Franc, Belgium, Lithuania and Bulgaria; see D. VAN GERVEN, *Cross-Border mergers in Europe. Volume 2*, Cambridge University Press 2011, pp. 23 and 81.

Indeed, it is likely that the Directive did not intend, through this statement, to confer, in the technical sense, the right to object on minority member but, rather, it makes reference only to those who have opposed the cross-border merger[257].

The Italian legislature transposing the Directive acted in this way. According to section 5 of Legislative Decree no. 108/2008, in case that the company resulting from the cross-border merger is subject to the law of another Member State, the non-consenting shareholder is entitled to withdraw from the Italian company taking part in cross-border merger. The operating mode of the withdrawal and the determination of value of shares or units shall be in accordance with the requirements of the Italian Civil Code provisions – and in particular set out in sections 2437 ff. for *società per azioni* (joint stock companies)[258] and 2473 ff. for *società a responsabilità*

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[257] A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1203.

[258] In the *società per azioni* (joint stock companies), shareholders who did not approve the following resolutions of the general meeting because they were absent, dissented or abstained from voting have the right to withdraw from the company by operation of law (section 2437, Italian Civil Code):

a) significant change of the corporate purpose;
b) reorganisation of the company;
c) transfer of the company's registered office abroad;
d) revocation of the winding-up;
e) suppression of one or more causes of withdrawal set out in the by-law;
f) suppression of the right to withdraw following the approval by the general meeting of the resolution which:
   extends the terms of duration of the company;
   introduces or removes restrictions to the circulation of the shares;
g) modification of the criteria of determination of the value of the shares in the case of withdrawal;
h) modification of voting and patrimonial rights;
i) extension of the duration of the company;
j) introduction or removal of restrictions to the circulation of the shares.

By-laws can suppress the right of withdrawal in the cases of: (i) extension of the duration of the company; and (ii) introduction or removal of restrictions to the circulation of the shares.

The right of withdrawal in the other cases cannot be excluded by the by-laws.

limitata (limited liability companies) – and without prejudice to other grounds for withdrawal provided for by law or by the bylaws.

The solution can be fully supported, since it is exactly based on the above-mentioned provisions of codified laws, applicable to withdrawal in case of cross-border transfer of the registered office; furthermore, in the case of *società a responsabilità limitata* (limited liability companies), the Italian Civil Code always recognizes the right

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The law provides for other cases in which the shareholders can withdraw from the company, such as when the duration of the company is unlimited, an arbitration clause is introduced in the by-laws or suppressed, and so on.

The value of the shares is determined taking into account the company's assets and its prospective profits, as well as (if available) the shares' market value (section 2437-*ter*, Italian Civil Code). Shares listed on stock exchanges are valued on the basis of the average closing prices in the previous six months (however, the by-laws can provide that the share are valued according to the above criterions). The by-laws can provide for different evaluation methods, which, however, must be fair to the withdrawing shareholder in those cases when the cause of withdrawal cannot be suppressed by the by-laws.

Article 2437-*quarter* of the Italian Civil Code governs the manner in which the shares are liquidated in the case of withdrawal. The repurchase of the shares by the company is one of the methods which can be used only if the shares are not purchased by the other shareholders or acquired by third parties.

In the *società a responsabilità limitata* (limited liability companies), the right of withdrawal can be exercised, amongst others, by those quotaholders who dissent from a resolution concerning (section 2473, Italian Civil Code):

a) the change of the corporate purpose and type of the company;
b) a merger or de-merger project;
c) the revocation of liquidation proceedings;
d) the transfer of the registered office abroad;
e) the exclusion of one or more cases of withdrawal set out in the by-laws;
f) transactions which give rise to a substantial amendment of special rights granted to the quotaholders in respect to the management of the company and profit distribution.

Quotaholders also have the right to withdraw from companies which have an unlimited duration, as well as in other cases set out by applicable laws.

The value of the quota is determined in proportion to the company's assets, to be appraised based on their market value. Where there is disagreement, the quota is valued by an expert appointed by the court.

The shareholders can be excluded from the company if they are in default of the payment of their contribution to the corporate capital (Articles 2344 and 2466, Italian Civil Code). Other cases of exclusion from the company can apply to the quotaholders if provided for in the by-laws of the company (Article 2473-bis, Italian Civil Code).

of the members who have opposed to withdraw in cross-border merger transactions.

Furthermore, where the company resulting from the cross-border merger is subject to the law of another Member State, for all practical purpose and beyond any qualification, there will be a transfer of registered office abroad. It may be assumed that in the case at hand, section 2437 of the Italian Civil Code would have been applied, in case of joint stock companies, on the basis of the above mentioned principles[259]; however, the explicit statement section 5 of Legislative Decree no. 108/2008 ensures the exercise of the right of withdrawal even if the company resulting from the merger falls under the law of another Member State of European Union but keep its headquarters in Italy; in that case, there would only be a change of the law applicable to the company and would not occur such transfer of registered office abroad which is, instead, an event legitimating the withdrawal of the shareholder as per section 2437 of the Italian Civil Code[260]. Furthermore it must be noted that, according to third paragraph of section 2 of Legislative Decree no. 108/2008, the protection rules shall apply also in case of non-EU cross-border mergers.

In addition to the above, the Tenth Directive seems to not consider the issues arising in relation to the determination of the exchange ratio, due to the fact that many domestic rules are applicable in the absence of standardised rules[261]. In this way, according to Section 10, paragraph 3, of the Directive, if the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the exchange ratio applicable to the securities or

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[259] See footnote above.

[260] F. MAGLIULO, *La fusione delle società*, op. cit., p. 21.

[261] M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, op. cit., p. 514.

shares in case of withdrawal from the company by minority members, without preventing the registration of the cross-border merger, such procedure shall only apply if the other merging companies incorporated under the laws of a Member States which do not provide for such procedure explicitly accept. In such cases, the authority competent to scrutinise the legality of the cross-border merger may issue the so-called pre-merger certificate, even if such procedure has commenced. The certificate must, however, indicate that the procedure is pending. The decision relevant to the procedure shall be binding for the company resulting from the cross-border merger and all its members.

In addition, the wording of the above mentioned provision seems to raise three kinds of issues: firstly, the Tenth Directive does not clarify who shall be considered as "minority shareholders", nor to which company they shall refer in order to exercise their right, nor what kind of protection they are entitled to.

With regard to their identity, it is likely that the Directive addressed to who voted against merger. Dissenting shareholders are subject to different treatment by Member States when implementing the Directive; it is quite controversial that some of the Member States have excluded them from the protection they are entitled to, according to the Directive's provisions[262].

Furthermore, it is not clear from Section 10, paragraph 3, of the Directive against which company "minority" shareholders shall assert their rights. The two possible options that seems to be available are

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[262] As remembered by M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, op. cit., p. 516, Austria, Netherlands and Germany laws make reference only to the "dissenting shareholders". With regard to Italy, as briefly described above, the implementing law bring the same interpretative issue, as it makes reference to "non-consenting shareholders", definition that could include also "absent shareholders" and "abstained shareholders".

strictly connected to the results of the approval procedure of the merger by the shareholders of the other companies participating to the merger, so that the company resulting from the cross-border merger is bound to the result of the procedure to compensate minority shareholders, and are: (i) the company resulting from the cross-border merger, if the merging companies have approved the common draft terms of cross-border merger; or (ii) the company participating in the merger carried out in the State which ensure the right of off-set, if the merging companies have not approved the common draft terms of cross-border merger and such responsibility in ensuring the right is transferred to the company resulting from the merger.

As far as what kind of protection shareholders are entitled to is concerned, dissenting shareholders cannot oppose to the merger (claiming for its voidness) once the same merger has became effective; therefore, dissenting shareholders could also claim for indemnification. However, the Tenth Directive does not provide any parameter to determine the value of the shares of the withdrawing shareholder or the relevant compensation if the manifest unfairness of the exchange ratio has been ascertained, nor provides guidelines for a declaration of invalidity of the shareholders' meeting resolution that approved the merger plan. Then, the national legislator shall fill the legislative gap, but the lack of standardised rules in the Tenth Directive has generated a fragmented legal framework[263].

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[263] Austria and Germany, for example, adopted provisions for activating procedures of control of the exchange ratio and control to permit a cash payment in to ensure appropriate protection to minority shareholders, while other Member State – except for the withdrawal, as provided for by Section 4, paragraph 2 of the Directive – did not provided such rights. Germany has made available to dissenting members three different protection tools (see A. WUESTHOFF, *Germany*, in D. VAN GERVEN (ed.), *Cross-Border Mergers in Europe*, I, Cambridge, 2010, pp. 204-205):

(a) in "outbound" mergers (as well as in domestic ones) the shareholders of a German company which has been recorded in the minutes of the shareholders' meeting voting against the merger, have the right to activate a procedure to

In addition to the above, the lack of standardised rules on creditors' protection should be considered as another limit of the Directive, leaving the intra-EU merger subject to the most hard law regime, with respect to one provided by the laws of the countries under which the companies involved in the merger are incorporated. The reason could be found in what is meant by cross-border merger in the Tenth Directive: the European legal system, in the light of the effects caused by the great number of laws applicable (even though they are "distributed" according to the companies involved), accepts that the cross-border merger procedure may be longer and more complex than the domestic one, since they are characterized by additional requirements compared to ordinary domestic mergers[264]. This, however, may no be considered as the legal basis required by the European coordination rules which, also in this case, tells a lot about how European provisions are only partially suitable for facilitating the carrying-out of cross-border mergers.

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scrutinise and amend the exchange ratio pursuant to Section 122h (1) of Umwandlungsgesetz (UmwG), only if the owners of shares of the companies involved in the cross-border merger expressly consent;

(b) secondly, according to Section 122i (1) UmwG, where the acquiring or newly formed company is not governed by German law, the company being acquired shall offer - in the draft terms of merger, or their initial outline - to each owner of shares recording an objection against the merger resolution adopted by the company, to acquire that owner's shares in return for appropriate cash compensation. The above mentioned Section provides for a procedure to assess the cash amount to compensate minority shareholders and compensation may be paid only if the owners of shares in the companies involved in the cross-border merger expressly consent, in the merger resolution, to the application of said provisions (UmwG 122i (2));

(c) finally, if the owners of shares of the other companies involved in the cross-border merger oppose to the activation of one of the two procedures mentioned above, the dissenting shareholders may apply for a declaration of invalidity of the shareholders meeting's resolution that approved the merger plan. In such case, the merger is suspended until the competent court rules on the specific point.

[264] M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, op. cit., p. 518.

Finally – as it will be better described below - the Tenth Directive omits to regulate cross-border mergers between a company incorporated under the laws of a Member State and a non-EU company. In this way, the Directive – while invoking its aim to facilitate cross-border mergers and, through its third Recital, the free movement of capital – does not offer a common position of Member States on a strategic issue, which shall be aimed at European industry growth and opening of the European corporate control market at international level; being then the Tenth Directive rather a first, minimal step in the long process started in 1967 at "Community level", aimed at introducing rules on intra-community cross-border mergers[265].

There are, obviously, "political" reasons behind, which clarify why the European Commission felt like to have achieved the best achievable result through such approach. The Directive clarified certain aspects which, notwithstanding the clear decisions of the Court of Justice on the matter at hand[266], did not ensure legal certainty for intra-EU mergers. The Tenth Directive, indeed, extended its scope to merger between any type of limited company, covering not only joint stock company (in Italy: *società per azioni*), which constitutes the reference framework of the Third Directive and of the Statute for a European Company. Also, it introduced specific provisions on corporate governance of the company resulting from the merger, able to ensure the application of the most favourable rules on employee participation among those applied by the companies involved in the merger.

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[265] D. LIAKOPOULOS – G. MANCINI, *La direttiva n. 2005/56/CE e la nuova disciplina comunitaria delle fusioni transfrontaliere di società di capitali*, in *Rass. avv. Stato*, 2008, p. 7 et seq.

[266] See chapter III.

4. Scope of the Tenth Directive

4.1 Objective scope

The Directive is rich of references to national legislation, as it draws a legislative perimeter aimed at, first of all, allowing mergers between companies of member States and providing them legal certainty, thus avoiding that companies perform complicated transactions often in violation of mandatory rules provided by one or more jurisdictions in question[267].

Section 1 of the Directive delimits its scope, *i. e.* mergers of limited liability companies – whether by absorption or by creation of a new company – provided that, obviously, at least two of them are governed by the laws of different member State.

What unites different kinds of mergers provided for by the Tenth Directive is the effect of extinction, through dissolution without liquidation, of the absorbed or merged companies, together with the transfer of all its assets in favour of the absorbing one or of the company resulting from the merger. In other words, whatever the means by which the transaction is realized, the absorbing company or the new company succeed to the universality of the assets of the extinguished company[268].

The Directive provides for three types of cross-border merger. First, the cross-border merger by absorption; this is the case where an existing absorbing company absorbs one or more companies which, due to the transfer of their assets and liabilities to the absorbing

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[267] D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, op. cit., p. 744.
[268] E. LA MARCA, *La fusione e la scissione delle società*, in M. CASSOTTANA, – A. NUZZO (eds.), *Lezioni di diritto commerciale comunitario*, Torino, 2006, p. 143.

company, are dissolved without having to liquidate their assets, and shares representing the corporate capital of the absorbing company are assigned to the shareholders of the absorbed company on the basis of a predetermined exchange ratio and, if applicable, a cash payment not exceeding 10 % of the nominal value. In the absence of a nominal value reference shall be made to the accounting par value of those shares (article 2.2, letter (a)). According to article 3.1 of the Directive, where the law of at least one of the member States concerned allows the cash payment to exceed 10 % of the nominal value, or, in the absence of a nominal value, of the accounting par value of the shares representing the corporate capital of the company resulting from the cross-border merger, this latter could be however realized under the Directive[269].

Typical effects of the abovementioned transaction are therefore: (i) the transfer of all the assets and liabilities of the absorbed company(ies) to the absorbing company; (ii) the shareholders of the company(ies) absorbed become shareholders of the absorbing company; (iii) the dissolution of the absorbed company(ies).

Secondly, a particular type of merger by absorption is then provided for in article 2.2, letter (c), of the Directive, which concerns the situation where the absorbing company already holds all the securities or shares representing the share capital of the absorbed company. Even in this case, the dissolution without liquidation of the absorbed company and transfer of its assets and liabilities to the absorbing company. However, in this case it is not necessary to calculate the exchange ratio, as the surviving entity is the sole shareholder of the entity ceasing to exist and, therefore, the only effect is the cancellation of the participation of the absorbing company to the

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[269] In Italy, according to section 2501-*ter* of the Civil Code, domestic mergers cannot be realized should the cash payment exceed the limit of 10 %.

share capital of the absorbed one as a consequence of the transfer of all the assets and liabilities of the absorbed company[270].

Finally, the Directive provides merger by formation of a new company. In this case, all the companies participating to the merger transfer their assets and liabilities to newly incorporated company, and upon such transfer they are dissolved without having to liquidate their assets. Also in this case, the shares representing the corporate capital of the absorbing company are assigned to the shareholders of the all companies involved in the mergers, on the basis of a predetermined exchange ratio (article 2.2, letter (b), of the Directive) and, if applicable, a cash payment not exceeding 10 % of the nominal value or to the accounting par value of those shares.

Typical effects of the abovementioned merger are therefore: (i) the transfer of all the assets and liabilities of all the companies involved to the newly incorporated company; (ii) the shareholders of the companies involved become shareholders of the newly incorporated company; (iii) the dissolution of the absorbed companies[271].

In order to further define its scope, the Directive (section 1) also identifies three conditions that must exist so that it can be said that a merger, carried out in accordance with one of the above mentioned types listed under section 2.2, has cross-border nature.

First, the merger shall occur between limited liability companies formed in accordance with the law of a member State.

However this requirement, despite its territorial nature, does not take into account the company's place of incorporation, making reference only to the law under which the merging companies have

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270 N. AL NAJJARI - S. PERON, *Le fusioni transfrontaliere di società di capitali: uno sguardo di insieme,* op. cit, p. 726.
271 C. SANTAGATA, *Le Fusioni,* op. cit., p. 19.

been incorporated. This basically means that the rules provided by the Directive apply even when one or more corporations involved in the transaction have been formed in a non-EU State, but in accordance with the law of a EU Member State, which allows domestic corporations to be incorporated abroad.

According to a restrictive interpretation, the scope of the Directive does not include the different case of mergers involving companies subject to the law of a EU Member State, but originally formed under the law of a non-EU country[272].

However, it should be considered that the case of a corporation formed in a non-EU State according to the law of a EU Member State, is essentially similar to the frequent case of a company originally formed under the law of a non-EU State and, then, subjected to the law of a EU Member State (as a consequence of the transfer of its registered office in such Member State, to be carried out in accordance with both the law of both countries concerned). In fact, although in this case the company cannot be properly considered as formed in accordance with the law of a EU Member State, it has been correctly observed that such case is equivalent to the one provided by the Directive, regardless of literal interpretation of section 1[273]. This interpretation appears more convincing, since it reflects the liberal

[272] P. KINDLER, *Le fusioni nel diritto tedesco: la sentenza Sevic della Corte di Giustizia e l'attuazione della direttiva 2005/56/CE in Germania*, op. cit., p. 486, which underlines that this is the approach followed by the German Federal Ministry of Justice in its proposal of 13 February 2006 for a draft bill concerning changes of the German Reorganisation Act due to the implementation of the Directive.

[273] G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 50, according to which the Directive shall not apply in the opposite case of a corporation originally incorporated under the law of a Member State and later "emigrated" to a non-EU country (and subject to its law). In such a case, said company has severed all ties with the law of the Member State of origin, and that even in the case where it maintains its registered office, central administration or principal place of business in a Member State.

spirit of the Directive and it is also closer to the prevailing position of the European Court of Justice on freedom of establishment, with particular reference to the principles affirmed in the SEVIC case.

Furthermore, section 1 of the Directive expressly provides that companies involved in the transaction shall have alternatively their registered office, central administration or principal place of business within the Community, which can be located even in a Member State other than the State of incorporation.

Finally, it is necessary that at least two of the companies taking part of the transaction are governed by the laws of different Member States. In fact, it is clear that, in absence of such requirement, the merger would not be a cross-border merger.

To sum up, section 1 of the Directive, in outlining the scope of the Directive itself, provides the following definition for "cross-border merger": a merger involving two or more limited liability companies formed in accordance with the law of at least two different Member States and having their registered office, central administration or principal place of business within the Community.

4.2 Personal scope

After outlining the objective scope of the Directive, section 2 provides a definition for "limited company", also outlining, in this way, the personal scope of the same Directive.

The definition of "limited company" is given by a combination of section 2.1, letter a) - which makes reference to the First Company Law Directive[274] - and section 2.1, letter b).

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[274] 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

Differently from the Third Company Law Directive, the Tenth Directive does not make a list of companies' types governed by the same. Indeed, it provides a specific definition, with the purpose of avoiding further amendment of the Directive in case of introduction of new types of companies[275].

Section 2.1 letter a) makes reference to section 1 of the First Directive, which contains a list of the different types of limited companies provided by each EU Member State (with regard to Italy, such types are the following: "*società per azioni*", "*società in accomandita per azioni*" and "*società a responsabilità limitata*").

The final rule set out by the Tenth Directive under section 2.1 letter b) aims at including, in addition to the companies expressly recalled, also any other company with share capital and legal personality. Such rule also provides that companies shall be endowed with separate assets to pay their debts[276] and shall be subject to the rules of the First Company Law Directive concerning shareholders' and third parties' protection – *i.e.* relevant to publication and enforceability of corporate deeds and the invalidity of the company. Therefore, the purpose of the Tenth Directive is to extend the

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equivalent throughout the Community (Official Journal of the Europaean Union, 14 March 1968, no. L65), subsequently amended by Directive 2003/58/EC and most recently repealed by Directive 2009/101/EC, as amended by Directive 2012/17/EU (which have, *inter alia*, integrated the list of company types due to the access of new Member States to the European Union).

[275] G. DI MARCO, *La proposta di direttiva sulla fusione transfrontaliera: un nuovo strumento di integrazione tra le imprese comunitarie*, in *Le Società*, 8, 2004, p. 1048.

[276] It has been argued the existence of a certain "irrational asymmetry" between the provisions of letter a) and letter b) of section 2.1; with regard to share partnerships listed under letter a) (e.g. the Italian *società in accomandita per azioni* and the French *société en commandite par actions*), their liability is not limited only to their assets, and therefore they have not the limited liability requirement under letter b). In this regard see G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, in *RDS*, 2007, I, p. 48.

application of its rules to any kind of limited company recognized by the EU Member States[277].

Furthermore, the Directive excludes some type of companies that, although meeting the requirements provided by section 2.1, cannot be subject to its rules. In particular, companies whose object is the collective investment of capital provided by the public are excluded from the scope of the Directive, if they operate «*on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company*». Therefore, the Directive is not applicable to mergers involving financial intermediaries neither collective investment undertakings[278].

Accordingly, the Italian directive implementation rules expressly exclude cross-border mergers involving a SICAV (*società di investimento a capitale variabile* - investment company with variable capital) (section 2.4 of Legislative Decree no. 108/2008).

With regard to cooperative companies, they are not automatically excluded from the scope of the Directive. However, each Member State is allowed to exclude such companies, through national provisions implementing the Directive, even where said

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[277] The scope of the Directive is considerably wider than the scope of the Third Directive with reference to domestic mergers, which makes reference only to joint-stock company; see G. DI MARCO, *La proposta di direttiva sulla fusione transfrontaliera: un nuovo strumento di integrazione tra le imprese comunitarie*, op. cit., p. 1048.

[278] According to G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 49, the reason of such exclusion is to avoid discrimination within Europe, because not in all Member States such entities have legal personality, so that no all of them fall within the definition of limited liability companies provided by the Directive. See also N. BERGER, *La directive sur les fusions transfrontaliéres: vers une flexibilité renforcée pour les entreprises européennes*, in *Revue du Marché commun et de l'Union Européenne*, 2005, p. 598, who makes also reference to consumer protection reasons.

entities have the requirement to be regarded as "limited companies" according to section 2.1, letter b).

The Italian choice was to include cooperatives in the field of application of the cross-border merger rules, but with the exclusion (according to section 3, paragraph 2, of Legislative Decree 108/2008) of prevalently mutual cooperatives (*cooperative a mutualità prevalente*) under section 2512 of the Italian Civil Code.

Therefore, from the limited application of the EU rules on cross-border merger to joint stock companies (for Italy the "*società per azioni*") provided by the Third Directive, the Tenth Directive extends the reference area for cross-border mergers between limited companies (*società di capitali*)[279], inclusive of the respective domestic corporate form types (corresponding to the Italian "*società per azioni*", "*società in accomandita semplice*" and "*società a responsabilità limitata*"), as well as the European company (*Societas Europaea*) and the cooperatives companies[280].

4.3 EU and non-EU cross-border mergers

What if one of the companies involved in the cross-border merger does not belong to a EU Member State?

[279] For the double criteria for identifying the limited companies category provided by the Tenth Directive and the issues relevant to the identification of domestic corporate forms see G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 47.

[280] G. A. RESCIO, *La fusione e la scissione*, in AA. VV, *La trasformazione. La fusione e la scissione. Lo scioglimento e la liquidazione*, in C. IBBA – G. MARASÀ, *Trattato delle società a responsabilità limitata*, Padova, 2015, p. 137. With reference to these ones - in which shall be included the European Cooperative Society (SCE – *Societaes Cooperativa Europaea*) - as specified above the Tenth Directive entitles each Member State to exclude or limit such companies from the scope of the cross-border mergers provisions.

The above question requires different answers depending on the way each EU Member State decided to implement the Directive 2005/56/EC on cross-border mergers of limited liability companies.

With specific regard to Italy, an intense debate concerns the scope of the Legislative Decree no. 108/2008. In particular, it has been widely discussed whether the set of provisions contained therein may apply also to mergers between an Italian corporation and a non-EU corporation.

First of all, it is necessary to clarify that the non-EU corporation eventually involved in the transaction should belong to a country whose laws recognize and regulate cross-border mergers.

That being said, the Legislative Decree no. 108/2008 seems to be more widely applicable comparing to section 1 of the Directive 2005/56/EC[281]. In fact, according to section 2, paragraph 2 of the above-mentioned Legislative Decree, the rules thereby contained also apply to cross-border mergers involving corporations other than limited corporations and to corporations having legal and real seats in non-EU countries, provided that the other EU Member States eventually taking part of the transaction have adopted national rules for the implementation of Directive applying to such cross-border mergers.

In other words, by adopting the Legislative Decree no. 108/2008 and, in particular, its section 2, paragraph 2, the Italian legislator has extended the application of European rules on cross-border mergers to:

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[281] Section 1 of the Directive 2005/56/EC: «*This Directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States*».

(i) mergers between EU and non-EU companies[282];

(ii) mergers involving companies other than limited companies (*i.e.* partnerships);

As already said, the only condition for such application is that the law of the EU Member State – *i.e.* Italy in the case at hand – shall provide that its national rules implementing the Directive 2005/56/EC also apply to the cases referred to in points (i) and (ii) above. However, it is necessary to specify that if the cross-border merger involves limited corporations that does not have their registered office, neither their real seat within the territory of the European Union, section 19 of Legislative Decree no. 108/2008 on workers participation, will not be applicable to the merger concerned (see section 2 paragraph 2 of Legislative Decree no. 108/2008)[283].

Indeed, in absence of the above condition, section 2 paragraph 3 of Legislative Decree no. 108/2008 provides that section 3 paragraphs 1 (cross-border mergers shall only be possible between types of companies which may merge under the applicable law) and 2 (exclusion of prevalently mutual cooperatives) and sections 4

[282] This in order to avoid fragmentation of regimes, with the consequent risk of unreasonably differentiated treatment of equivalent cases, according to the report accompanying the project scheme of legislative decree implementing the Tenth Directive.

[283] See the report accompanying the project scheme of legislative decree implementing the Tenth Directive, prepared – along with the same project – by G. A. Rescio and M. V. Benedettelli, appointed by the *Consiglio Nazionale del Notariato* (National Notarial Council), on the basis of which the Italian legislator has approved the implementation provision of the Tenth Directive (Legislative Decree no. 108/2008). The report is published in *Riv. dir. soc.*, 2009, p. 946 et seq, along with the project scheme of legislative decree (p. 932 et seq.) in double column comparing the same with Legislative Decree no. 108/2008; according to said report, it has been deemed not appropriate to extend the rules on participation of employees outside of the Community level, in which their adoption is imposed and justified. See also the comment by the same authors M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere (alla luce dello Schema di legge di recepimento della X Direttiva elaborato per conto del Consiglio Nazionale del Notariato e delle massime del Consiglio notarile di Milano)*, in *Riv. dir. soc.*, 2009, p. 742 et seq.

(applicable rules), 5 (withdrawal by non-consenting shareholders), 6 (draft terms of cross-border mergers), 7 (publication in the Official Gazette of the Italian Republic), 8 (report of the management body), 9 (independent expert report) and 18 (simplified formalities) of the same Legislative Decree apply to the cross-border transaction[284].

In such legal framework, in light of both section 25, paragraph 3, of Law no. 218/1995 and Legislative Decree no. 108/2008, the following rules apply to cross-border mergers involving also non-EU corporations[285].

a) *Mergers between two companies – one incorporated under the law of Italy and the other one incorporated under the law of a non-EU country also admitting cross-border mergers*

Said transactions are governed in the first instance by Legislative Decree no. 108/2008 – since Italian law recognizes cross-border mergers – and then, if necessary, by the rules of the Italian Civil Code concerning domestic mergers, which are suitable also for cross-border transactions. It remains understood that, according to section 25 paragraph 3 of Law no. 218/1995, joint activities or activities which require a necessary interaction among the companies involved in the transaction, shall be regulated by both the Italian and the foreign law; in case conflict, the law of the State of incorporation of the company resulting from the merger will prevail (see section 2, paragraph 3 of Legislative Decree no. 108/2008, which recall section 4 paragraph 2 of the same Legislative Decree).

[284] See G. A. RESCIO, *Fusione transfrontaliera: una prima risposta ad alcuni problemi di interpretazione del D. Lgs. n. 108/2008*, in *Orientamenti notarili in materia societaria: quattro esperienze a confronto*, Milano, 2009, p. 75.

[285] For the reconstruction referred to in letters a), b) and c) see A. BUSANI, *La Fusione transfrontaliera e internazionale*, in *Le Società*, 6, 2012. In this regard see also F. MAGLIULO, *La fusione delle società*, op. cit., p. 16.

b) Mergers among three corporations – incorporated respectively under the law of Italy, of a different EU Member State and of a non-EU State

Should be governed (upon condition that internal rules implementing the Directive 2005/56/EC, provided by the EU Member State other than Italy, also apply to this kind of merger) as follows:

(i) activities to be implemented individually by the Italian and the other Member State company shall be subject to the rules respectively provided for the implementation of the Directive (thus, with specific regard to Italy, Legislative Decree no. 108/2008 applies to such activities, excluding its section 19 on workers participation);

(ii) activities to be implemented individually by the non-EU company shall be subject to its own national rules governing mergers;

(iii) activities to be implemented jointly or by interaction among the companies involved shall be subject to the laws both of the EU Member States and of the non-EU State (without prejudice to the rule of prevalence, in case of conflict, of the law of the State of incorporation of the company resulting from the merger).

c) Mergers among three corporations – incorporated respectively under the law of Italy, of a different EU Member State and of a non-EU State, where the law of the EU Member State does not allow application of the rules of implementation of the Directive 2005/56/EC to mergers involving non-EU corporations.

Activities to be implemented individually by each of the companies involved shall be subject to the relevant national law (with specific regard to Italy, they are subject firstly to the rules set out by Legislative Decree no. 108/2008 and then, if necessary by rules provided by the Italian Civil Code for domestic mergers. Indeed, the activities to be implemented jointly or by interaction among the companies involved shall be subject to the laws of all the States taking part of the transaction (again without prejudice to the rule of prevalence, in case of conflict, of the law of the State of incorporation of the company resulting from the merger).

Finally, it should be noted that cross-border merger between companies from which a *Societas Europaea* results[286], or between cooperatives companies from which a *Societaes Cooperativa Europaea* results, are regulated firstly by the EU rules (as well as the possible domestic coordination rules) provided by, respectively, the Council Regulation (EC) no. 2157/2001 of 8 October 2001 and the Council Regulation (EC) no. 1435/2003 of 22 July 2003 as well as, for anything not provided therein, by the Tenth Directive and the relevant domestic implementation rules[287].

4.4 Cross-border merger having "transformative" effects

In domestic mergers, it is possible that a partnership, incorporating a fully owned limited liability partnership, decides to transform in a limited liability company, due to its new size. In such case, this is an autonomous company transformation procedure in parallel with the merger procedure, justified and conditioned by the success of the main transaction, but not required by the same[288].

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[286] For the incorporation of a Societas Europaea through merger see B. DE DONNO, *sub* artt. 17 et seq., in D. CORAPI – F. PERNAZZA (eds.), *La Società Europea. Fonti comunitarie e modelli nazionali*, Torino, 2011, p. 93 et seq.

[287] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 141.

[288] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 148.

In cross-border mergers[289], instead, the sole (merger) transaction automatically produces similar effects to the ones that occur in case of transformation: (i) some shareholders could become shareholders of a company having a different legal form; (ii) third parties which have entered into (on-going) legal relationships with a company governed by certain financial autonomy and liability rules, could now continue their relationships with a company with different rules. This also where the legal form of company resulting from the cross-border merger has features similar to the companies participating to the transaction (e.g. both limited liability or joint stock companies according to the rules of the country of origin), due to the fact that the resulting company could be governed by the laws of another (different) country[290]. In order to protect the interests of the shareholders affected by the cross-border merger (which has "transformative" effects as described above) section 5 of Legislative Decree no. 108/2008 provides for – as it will be better described in the following pages – the right of the non-consenting shareholder to withdraw from the Italian company taking part in cross-border merger, in case that the company resulting from said transaction is subject to the law of another Member State[291].

As far as the creditors of the companies participating in a cross-border merger (which has "transformative" effects as described above) are concerned, it has been observed that their right to oppose provided for by Section 2503 of the Italian Civil Code for domestic merger – applicable also to cross-border merger as provided by the

[289] As well as in domestic mergers where the companies participating and resulting from the merger have the same corporate form.

[290] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 149.

[291] According to G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 150, said withdrawal right should be applicable also in case of demerger having the same result.

Legislative Decree no. 108/2008[292] – does not absorb the safeguards established for all creditors unlimited liability partnerships provided by Section 2500-quinquies[293] of the Italian Civil Code, which therefore shall be applicable also in case of mergers with "transformative" effects[294].

5. General provisions and conflict rules

From the exam of the general provisions of the Tenth Directive - and regardless the Community legislature's willingness to regulate the effects of dissolution without liquidation - the principles set out by the Community rules appear clear and basic: first, a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject (section 4.1, letter (b), of the Directive). This principle has also been expressly confirmed by section 4, first paragraph, of Legislative Decree no. 108/2008, which states that – except as otherwise provided in the same Decree – the Italian companies participating to the merger are

[292] As it will be better described *infra*.

[293] According to which a transformation do not release shareholders who have unlimited liability from liability for company obligations arising prior to the fulfilment of the public disclosure requirements provided by Section 2500, paragraph 3, of the Italian Civil Code, if it is not the case that company creditors have given their consent to the conversion.

[294] G. A. RESCIO, *La fusione e la scissione*, op. cit., pp. 150-151, according to which, (i) on the one hand, it would be unfair and contrary to the system to disregard the creditors' consent in order to release shareholders who have unlimited liability from liability for previous company obligations; and (ii) on the other hand, it would be excessive to grant creditors with the right to prevent merger because of the risk of loss of power to act against each shareholder.

On the contrary, according to the same author, those remedies established for creditors in case of heterogeneous transformation provided by Section 2500-novies of the Italian Civil Code (which provides for the creditors' right to oppose within 60 days from the last public disclosure requirement provided by Section 2500, paragraph 3, of the Italian Civil Code) are absorbed by the right to oppose to the merger pursuant to Section 2503 of the Italian Civil Code.

subject to the provisions of "Book V - Title V, Chapter X, Section II of the Italian Civil Code".

In addition, unlike what is provided for domestic merger and the coordination measures provided by the Directive 2011/35/CE, Section 3, paragraph 1 of the Tenth Directive shall also apply, which allows the cash payment exceeding 10% of the nominal value where it is allowed by the law applicable to at least one of the merging companies or by the law applicable to the company resulting from the cross-border merger (Section 6, paragraph 2, of Legislative Decree no. 108/2008[295]. Moreover, the Legislative Decree provisions which implemented Section 4, paragraph 2 of the Directive on safeguard clause shall also apply regarding cross-border mergers, «*designed to ensure appropriate protection for minority members who have opposed the cross-border merger*». This concerns in particular the dissenting shareholder withdrawal right set out by Section 5 of Legislative Decree no. 108/2008, in case the company resulting from the cross-border merger is subject to the law of another Member State. Such provision is consistent with the pre-existing right of withdrawal set out in the Italian Civil Code in case of cross-border transfer of the registered office[296], but it is considered to be inadequate in the European context, where the aim is to facilitate cross-border transactions, since it provides an important different treatment between domestic merger and cross-border mergers, with the result that cross-border mergers are more complex than the domestic ones. It

[295] Most Member States laws provide for a similar provision in the implementing legislation. However, with reference to the Netherlands, according to Section 2:325(2) of the Dutch Civil Code cash payment exceeding 10% of the nominal value of the shares is forbidden. However, as observed by P. VAN DER BIJL - F. OLDENBURG, *The Netherlands*, in D. VAN GERVEN (ed.), *Cross-Border Mergers in Europe*, I, Cambridge, 2010, p. 230, this not means that said limit could be exceeded in case of "outbound" merger pursuant to which the Dutch company will cease to exist.

[296] Section 2437 of the Italian Civil Code.

is true that, considering the difference between company laws of the Member States, a change of the applicable law may affect the shareholders[297]. However, it is doubtful whether such difference may generate a situation in which is necessary to ensure appropriate protection for minority shareholders and whether the Member State shall ensure said "appropriate protection" or, instead, if it leads to a stronger harmonisation of domestic company laws which satisfies requirements of protection in a harmonised way[298].

In addition, it is provided that the merged company is subject to the *lex societatis* of the country where it will be located after the merge operation has been completed (section 4, paragraph 2, of Legislative Decree no. 108/2008).

In fact, the provision at hand becomes the prevailing parameter, since the Italian legislature, in providing a general criterion for the resolution of conflict of laws which may occur between national rules and those of the legal systems of the other companies involved in the merger process, has determined that, in such cases, reference shall be made to the law applicable to the company resulting from the merger (without prejudice, however, to the provisions of section 11 of Legislative Decree no. 108/2008, concerning the obligation of issuance of the pre-merger certificates of each company involved in the merger).

To this extent, the Italian transposition of the Directive is in line with the minimum approach pursued by the Directive and made explicit also in its third recital, according to which «*in order to*

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[297] As observed by P. VAN DER BIJL - F. OLDENBURG, *The Netherlands*, op. cit., p. 245, according to the report accompanying the Dutch implementation law, the shareholders' right to be compensate is justified by the risk that the different applicable law once the merger is completed does not provides for the right to which the shareholder is entitled according to the Dutch laws.

[298] M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, op. cit., p. 526.

facilitate cross-border merger operations, it should be laid down that, unless this Directive provides otherwise, each company taking part in a cross-border merger, and each third party concerned, remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger».

Given the above, it can be concluded that no restrictions on cross-border mergers shall be introduced, provided that, as mentioned below, the law applicable to each company taking part in a cross-border merger would enable such company to carry out domestic merger with companies of the same type of the other companies participating in the operation of cross-border merger.

In addition, also the further conflict of laws rules introduced by the Italian implementation rules shall be considered in line with the general principles and purpose of the Directive (provided by section 4, paragraph 3 ff. of the same Legislative Decree no. 108/2008). Among others, those providing the application the following overriding mandatory provisions:

- section 2112 of the Italian Civil Code and section 47 of Law of 29 December 1990, n. 428, concerning employee protection;
- the provisions of (i) the Legislative Decree no. 385/1993 "*T.U.B.*" (the Consolidated Law on Banking), (ii) the Legislative Decree 58/1998 "*T.U.F.*" (the Consolidated Law on Finance); (iii) relevant to the regulation of Insurance Undertakings referred to in Legislative Decree 7 September 2005, no. 209, (iv) concerning the protection of competition and the market referred to in Law of 10 October 1990, no. 287; and, moreover (v) concerning procedures for the sale of shareholdings held by the State and public bodies in joint stock companies referred to in Legislative Decree 31 May 1994, no.

332, converted, with amendments, by Law of 30 July 1994, no. 474

But also those rules, on the other hand, precluding the application of other provisions: it is the case of the measures for protection of shareholders and third parties rights, laid out by section 2501-*bis* of the Italian Civil Code, in case of merger leveraged buy-out, which can only be implemented in the event that the company participating in the merge, with respect to the acquisition of control is subject to Italian law. It follows, therefore, that where the target company belongs to another Member State, only measures of protection provided for therein shall apply; therefore, the risk of insolvency in this kind of transactions affects the target companies[299].

However, it must be noted that Section 4, paragraph 1, of the Legislative Decree no. 108/2008 does not apply with regard to certain issues concerning cross-border mergers, which are subject to substantive rules provided by the Directive and by the same Legislative Decree. In particular, those issues deals with rules on formalities, so as to ensure fulfilment of obligations which must necessarily be the same for each of the merging companies (such as for the merger plan) or which, anyway, should be so (such as for independent expert report)[300]. The same Section neither address issues concerning conflicts arising between different rules of Member States, which may not be resolved through cumulative or distributive parameter of application. In such case, Section 4, paragraph 2 of the Legislative Decree no. 108/2008, provides that the law applicable to the company resulting from the merger shall prevail.

[299] D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, op. cit., p. 747; F. MAGLIULO, *La fusione delle società*, op. cit., p. 21.

[300] M. LAMANDINI – C. DESOGUS, *Le fusioni transfrontaliere alla luce della direttiva 2005/56/CE*, op. cit., p. 526.

The harmonised system of rules is related to private international law (and, in particular, to Section 25, Law no. 218/1995 by means of Section 3 of the Legislative Decree no. 108/2008, which specify that a cross-border merger carried out in compliance with the present Legislative Decree meets the requirements referred to in Section 25, paragraph 3 of the Law no. 218 of 31 May 1995.

6. The cross-border merger procedure

After having clarified the scope of the rules governing cross-border merger introduced by the Tenth Directive, the following chapters will briefly address the merger procedure through its single steps, having regard to solutions brought by the Italian implementing rules.

It has been observed that, even though it is common view that the merger procedure begins with the drafting of the common draft terms, this document – to be drafted by each of the companies participating to the merger – involves a preliminary phase aimed at checking under several points of view the opportunity to conclude the transaction[301] and to reach the necessary agreements on the individual aspects of the transaction[302]. According to the same author, in intra-group transactions said preliminary phase starts from instructions by the holding company exercising direction and coordination activities, which develops in discussions with the management of the subsidiaries involved, in order to draw up common draft terms that meets the needs of the holding company[303].

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[301] On the negotiation and procedural aspects see, among others, G. COLTRARO, *Gli accordi di fusione. Profili negoziali e procedimentali*, Milano, 2013, p. 45 et seq.

[302] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 159.

[303] Which is a possible field of application of Section 2497 of the Italian Civil Code about the responsibility of the company carrying out direction and coordination

On the contrary, in transaction which involves companies not pertaining to the same group, the common draft terms are prepared on the basis of previous agreements between the corporate bodies of the companies involved [304] and/or between the relevant controlling shareholders[305]. In countries other than Italy, agreements between the management bodies can lead also to a typical contract type[306] to be approved – instead of the common draft terms – by the shareholders' meeting of the companies involved[307].

All the above shall be deemed as being outside from the merger procedure in the strict sense of the term, differently from a typical procedural step which can be anticipated with respect to the drafting of the common draft terms, i.e. the publication on the *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette of the Italian Republic) of the cross-border merger notice provided by section 7 of Legislative Decree no. 108/2008. Said notice – as it will be better described in the following paragraph – shall be published at least thirty days prior to the shareholder's meeting resolving upon the common draft terms; due to the kind of information that should be provided with the notice at issue (e.g. the identification data of each merging company; how to find more detailed information about the

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activities of companies. See also A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 269 et seq.

[304] On the preliminary negotiations of the common draft terms and the duties of the directors towards the shareholders and the companies see A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 57 et seq. and p. 87 et seq., and G. COLTRARO, *Gli accordi di fusione. Profili negoziali e procedimentali*, op. cit., p. 18 et seq. and p. 127 et seq.

[305] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 160.

[306] As remembered by G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 160, footnote 4, in the U.S. system the merger procedure always begins with the negotiation and approval of a merger agreement by the management bodies of the companies involved, and with a subsequent contract to be approved by the shareholders' meeting of the companies involved. See also J. D. COX – T. L. HAZEN, *Corporations*, 2nd ed. New York: Aspen Publishers, 2003.

[307] For difficulties of applicability of a contractual commitment in Italy see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 160 et seq.

companies involved; the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge)[308], it has been observed that (i) on the one hand, the thirty days period cannot be derogated without the consent of all recipients of said information, i.e. shareholders and creditors[309]; and (ii) on the other hand, the notice can be published also before the drafting and publication of the common draft terms[310]. This because, according to the same author, the aim of the notice is to provide first information about the companies involved and the applicable laws, at the same time ensuring that the interested parties that have all necessary means to acquire additional and more detailed information[311]

6.1 The common draft terms of cross-border merger

According to section 5 of the Directive, the management or administrative organ[312] of each of the merging companies shall draw

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[308] For more detailed description of the contents of the notice see Paragraph 6.1 above.

[309] But according to F. MAGLIULO, *La fusione delle società*, op. cit., p. 30 et seq., the thirty days period can be derogated only without the consent of all shareholders, without taking into account the creditors.

[310] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 163. In the same sense see also M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere*, op. cit., p. 749; to F. MAGLIULO, *La fusione delle società*, op. cit., p. 29. However, on the contrary, see A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1204, which observed that the Directive (Section 6) does not expressly state the date by which the latter form of publication have to be carried out, although it could appears plausible that the same may might only be carry out simultaneously, or, otherwise, immediately after, the filing with the company register.

[311] In the same sense see note no. 109 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Pubblicazione dell'avviso di fusione transfrontaliera sulla G.U. (art. 7 d. lgs. 108/2008)*, 27 January 2009.

[312] In case of an Italian *società per azioni* (joint stock company) with a "two-tier" management system, the common draft terms shall be drafted by the management board (*consiglio di gestione*), but without prejudice to the possibility to provide in the by-laws of the company for the power of the supervisory board (*consiglio di*

up the common draft terms of cross-border merger. Each management body shall draft the terms for its company, and the competent control authority (i.e. the Notary, for Italian domestic mergers; the competent authority for the final scrutiny, for cross-border mergers) shall verify that the common draft terms prepared and approved by each company have the same contents[313]. However, even if the draft terms is considered as "common" (Section 5 of the Tenth Directive) or "single"[314], it is not required by any provision that the same shall be executed in a document to be signed by all directors and legal representatives of the companies involved[315].

The imposition of a minimum content in the common draft terms of cross-border merger - which shall include, among the mandatory contents, the registered office of the merging companies[316], according to section 5 of the Directive – should be considered as guarantee instruments for minority shareholders (in addition to the withdrawal right, as it will be better described in the following), as well as for creditors and bondholders.

To this extent, the items listed in the Community rules will sum and overlap, as a result of the reference made by section 6 of Legislative Decree no. 108/2008, to mandatory items that must be provided in compliance with section 2501-*ter*, first paragraph, of the

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sorveglianza) to authorize/approve the merger transaction (to be resolved by the shareholders' meeting), as it can be qualified as a strategic transaction pursuant to Section 2409-*terdecies*, paragraph 1, letter *f)-bis*, of the Italian Civil Code; see C. GARILLI, *Il consiglio di sorveglianza delle società per azioni. Funzioni e competenze*, Torino, 2012, p. 344 and V. CARIELLO, *Il sistema dualistico*, Torino, 2012, p. 180 et seq.

[313] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 165, footnote 17.

[314] C. SANTAGATA, *Le Fusioni,* op. cit., p. 141 et seq..

[315] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 165, footnote 17 and the authors cited therein.
As pointed out by the same author *ibidem*, footnote 16, in case of a company subject to liquidation procedure, the common draft terms is prepared by the liquidator, as management body of the company during the liquidation procedure.

[316] A. BUSANI, *La Fusione transfrontaliera e internazionale*, op. cit., p. 666 et seq.

Italian Civil Code[317] (provided for domestic mergers). The governing bodies of the companies involved in the merger shall draw up the common draft terms of cross-border merger that shall, also, indicate:

a) the form, name and registered office of the merging companies, as well as details of the company resulting from the cross-border merger;
b) conditions relating to the right to participate to profits;
c) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the supervisory or controlling organs of the merging companies;
d) information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger, pursuant to section 19, paragraph 1, of the Legislative Decree no. 108/2008;
e) the likely repercussions of the cross-border merger on employment;
f) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

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[317] Section 2501-*ter*, first paragraph, of the Italian Civil Code:

«*The governing body of the companies involved in the merger draw up a merger plan that shall, in all cases, indicate:*

1) *The type, name or company name and registered office of every company taking part in the merger;*
2) *The Articles of Association of the new company resulting from the merger or the surviving entity, including any amendments arising from the merger;*
3) *The share or unit exchange ratio and the amount of any cash payment;*
4) *The terms relating to the assignment of shares in the company created through the merger or the surviving entity;*
5) *The date on which such shares qualify for their share of profits;*
6) *The date after which transactions by the companies involved in the merger are written to the accounts of the company created through the merger or of the surviving entity;*
7) *Conditions pertaining to any particular classes of shareholders and holders of securities other than shares;*
8) *Any special benefits offered to parties responsible for managing the companies in the merger*».

g) dates of the merging companies' accounts used to establish the conditions of the cross-border merger;
h) where appropriate, the additional information whose inclusion in the common draft terms is required by the law applicable to companies engaging in cross-border merger;
i) the date from which the cross-border merger is effective or the criteria for its determination.

The abovementioned particulars, given that the same will sum and overlap the ones provided by section 2501-*ter*, first paragraph, of the Italian Civil Code – which will be summarized and described below – can be grouped in information relating to: (i) assets valuation; (ii) relationships with employees; (iii) interaction between applicable laws[318].

With reference to the assets valuation, Section 6, paragraph 1, letter *f)*, of Legislative Decree no. 108/2008 requires the indication in the merger draft terms of information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger (reproducing with any changes what provided by Section 5, letter *k)*, of the Tenth Directive). This means that it should be provided a description of the assets of the incorporated company or the merging companies, along with the indication of their actual value and, where applicable, a concise indication of the criteria used for their evaluation[319]. In addition, the draft terms shall also provide the dates of the merging companies' accounts used to establish the

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[318] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 186.

[319] *Ibidem,* pp. 186-187. The author wonders why said information should not be given also with reference to the assets of the absorbing company. The reason, as observed by the same author, is to set out assets with their real value, whose transfer to the resulting company is proposed as the goal of the merger, such that the alteration of those elements or a significant deviation of the value attributed to the project must induce the management body to put on hold the merger transaction and to consult (again) the shareholders.

conditions of the cross-border merger (Section 6, paragraph 1, letter *h)*, of Legislative Decree no. 108/2008); with this regard, it should be remembered that each merger financial statements shall be governed by the laws governing the company that drafts the same.

As it will be better described in the following of this dissertation, in EU cross border mergers employees protection plays an important role, protection that is completely absent in (Italian) domestic mergers. As far as the merger plan is concerned, two kinds of information are required; first, a general information, which applies to all cross-border mergers pursuant to Section 2, paragraphs 2 and 3, of Legislative Decree no. 108/2008, is required to provide the likely repercussions of the cross-border merger on employment[320]. The other one, on the contrary, is applicable to cross-border mergers (i) between limited companies governed by the laws of EU member States and having the registered office or principal place of business within the European Union; (ii) where at least one of the merging companies has an average number of employees that exceeds 500 during the six-month period preceding the publication of the merger plan and is operating under an employee participation system. In this case, the merger plan shall provide information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger: pursuant to section 19 of the Legislative Decree no. 108/2008, if the resulting company is governed by the Italian laws[321],

[320] Section 6, paragraph 1, letter *e)*, of Legislative Decree no. 108/2008. These information can include any confirmations, reductions, increases of employment relationships as well as any material changes about the current working modalities (e.g. working place change); but, in any case, it is not required to provide such information with reference to any single employment relationship; see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 187.

[321] As it will be better described in the following of this dissertation, it has been provided that the rights to participate in the company resulting from the cross-border

otherwise in accordance with the domestic laws that govern the foreign resulting company[322].

Finally, it should be noted that in cross-border mergers there is an obvious interest of shareholders and third parties to know the rules applicable to the merger transaction[323]. Therefore, the Italian legislator has integrated the particulars provided by Section 5 of the Tenth Directive, requiring the indication in the merger draft terms of the laws applicable to the companies involved in, and resulting from, the merger[324], as well as the date from which the cross-border merger is effective (or the criteria for their determination)[325].

As warned *supra*, with reference to Italian companies participating to the merger, the above mentioned information shall be indicated in addition to the to mandatory items that must be provided in compliance with section 2501-*ter*, first paragraph, of the Italian Civil Code, which could be summarized as follows:

A) Identification data of the companies taking part in the merger (type, name and registered office)[326]. It should be noted that in cross-border mergers, differently from (Italian) domestic ones, said information are required also with reference to the company resulting

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merger shall be decided on the basis of national collective bargaining agreement applicable to the company or, in the absence of such agreements, references shall automatically be made to the relevant provisions of the *Societas Europaea* (i.e. Annex 1, third part, paragraph 1, letter b., to the Legislative Decree 19 August 2005, no. 188, which implemented Directive 2001/86/CE. See F. GUARRIELLO, *Commentario alla direttiva 2001/86/CE*, in D. CORAPI – F. PERNAZZA (eds.), *La Società Europea. Fonti comunitarie e modelli nazionali*, Torino, 2011, p. 330 et seq.

[322] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 188.

[323] *Ibidem*, according to which shareholders and third parties are interested in knowing both "*ad hoc*" rules and domestic laws governing the merger procedure, and laws governing the their relationships with the company resulting from the merger.

[324] Section 6, paragraph 1, letter *a)* of Legislative Decree no. 108/2008.

[325] Section 6, paragraph 1, letter *i)* of Legislative Decree no. 108/2008.

[326] Section 2501-*ter*, first paragraph, no. 1, of the Italian Civil Code.

from the transaction, in addition to the indication of the governing law of the entities involved[327].

B) The articles of association of the new company resulting from the merger or the surviving entity, including any amendments arising from the merger[328]. It has been noted that the expression "articles of association", which has been chosen in order to include all the different corporate form types, in this case makes reference – with regard to both the absorbing company and the resulting company resulting – to the bylaws in any substantial way[329]. Therefore[330], also with reference to the (new) company resulting from the merger, it would be not necessary to indicate in the draft terms the identity of the shareholders and the percentage of their shareholding, the identity of the directors and statutory auditors[331], the incorporation costs.

In case of merger by absorption, the merger plan shall indicate any amendments to the by-laws of the absorbing company arising from the merger, which for example could extend the corporate purpose in order to include the activities carried out by the absorbed

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[327] As highlighted by G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 171, footnote 37, said indication is not expressly required by the Tenth Directive, even if it is implicitly authorized (Section 5 of the Directive «*the common draft terms of cross-border merger shall include at least*») and it's an important particular in order to allow shareholders and third parties to evaluate the correctness of the procedure and the actual change of their relationships pursuant to the new legal system that will govern the same once the cross-border merger has been completed.

[328] Section 2501-*ter*, first paragraph, no. 2, of the Italian Civil Code.

[329] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 171.

[330] A. SERRA - M.S. SPOLIDORO (eds.), *Fusioni e scissioni di società (Commento al d.lg. 16 gennaio 1991 n. 22)*, Torino, 1994, p. 28; P. MARCHETTI, *Appunti sulla nuova disciplina delle fusioni*, in *Riv. Not.*, 1991, p. 45; G. B. PORTALE, *La scissione nel diritto societario italiano: casi e questioni*, in *Riv. soc.*, 2000, p. 502; C. SANTAGATA, *Le Fusioni,* op. cit., p. 151, footnote 95; F. MAGLIULO, *La fusione delle società*, op. cit., p. 184 et seq.

[331] As their indication can be postponed to the moment of approval of the merger plan by the shareholders' meeting (or to the date of the merger deed, in case the management body has been delegated by the shareholders), according the note no. L.A.27 of the *Comitato Notarile Triveneto* (Notarial Commitee of Triveneto), *Momento della nomina dei componenti gli organi sociali delle società di nuova costituzione nelle fusioni o scissioni*, September 2007.

company, change the place in which the registered office is located, increase the corporate capital in order to satisfy the exchange ratio[332]

C) The share or unit exchange ratio, meaning the amount of shares or quotas of the resulting company that any shareholder is entitled to receive[333]. Where necessary, it shall be also indicated the amount of any cash payment necessary in order to rebalance the exchange ratio[334].

The exchange ratio is determined by the directors - with a certain margin of discretion[335] - on the basis of the assets of the companies, the profitability of the companies involved, as well as other elements[336].

In such a context, however, it should be also remembered that the share or unit exchange ratio and the amount of any cash payment - referred to in section 2501-*ter*, first paragraph, no. 3, of the Italian Civil Code - shall not exceed 10 % of the nominal value of the shares or units or, in the absence of a nominal value, reference shall be made to the accounting par value of those shares. However, this limit shall not apply in cross-border mergers, where the law applicable to at least

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[332] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 172. About limits on the increase or reduction of the corporate capital of the absorbing company see L. STUCCHI, *I limiti alla determinazione del capitale sociale post fusione*, in VV. AA., *La struttura finanziaria e i bilanci delle società di capitali. Studi in onore di Giovanni E. Colombo*, Torino, 2011, p. 355 et seq.

[333] For a complete summary see C. SANTAGATA, *Le Fusioni,* op. cit., p. 323 et seq.; S. CACCHI PESSANI, *sub art. 2501-quinquies*, in *Trasformazione - Fusione - Scissione*, in P. MARCHETTI - L. A. BIANCHI – F. GHEZZI – M. NOTARI (eds.), *Commentario alla riforma delle società*, Milano, 2006, p. 580 et seq.).

[334] Section 2501-*ter*, first paragraph, no. 3 and 4, of the Italian Civil Code.

[335] About the discretion of the management see M. PERRINO, *sub art. 2501 et seq.*, in G. NICCOLINI - A. STAGNO D'ALCONTRES (eds.), *Società di capitali. Commentario*, Napoli, III, 2004, p. 1953 et seq.; M. S. SPOLIDORO, *Modifiche e variazioni del rapporto di cambio nei casi in cui tra la redazione del progetto di fusione e la decisione di fusione decorra un rilevante lasso di tempo*, in AA VV., *La struttura finanziaria e i bilanci delle società di capitali. Studi in onore di Giovanni E. Colombo*, Torino, 2011, p. 341 et seq.

[336] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 173.

one of the companies participating in the cross-border merger or the law applicable to the company resulting from the cross-border merger allows an exchange ratio based on more than 10% of the nominal value (section 6.2 of Legislative Decree no. 108/2008)[337].

D) The merger plan shall also make reference to the date for certain effects of the merger. In particular, (i) that on which the shares of the resulting company assigned to the shareholders qualify for their share of profits (of the same resulting company), and (ii) the one after which transactions by the companies involved in the merger are written to the accounts of the company resulting from the merger[338]. It has been observed that, even if Section 2501-*ter* of the Italian Civil Code does not make any reference, in merger by absorption the merger plan can depart from the provisions of Section 2504-*bis*, paragraph 2, of the Italian Civil Code[339], providing for example a fixed effectiveness date following the last filing with the Companies' Register, or certain criteria for determining the same in the merger deed etc.[340]. In addition, according to Section 2504-*bis*, paragraph 3, of the Italian Civil Code, earlier dates, with respect to the last filing with the Companies' Register, may be chosen with reference to the date on which the shares of the resulting company assigned to the shareholders qualify for their share of profits, as well as the date after which transactions by the companies involved in the merger are written to the accounts of the company resulting from the merger. Are

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337 According to G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 46 et seq., this provision should be considered as and index of the European Union favour for cross-border mergers.

338 Section 2501-*ter*, first paragraph, no. 5 and 6, of the Italian Civil Code.

339 According to which - as it will be described in the following of this dissertation - the effectiveness of the merger begins once the cross-border merger deed has been filed with the Companies Register (principle that has been also confirmed by Section 17 of the Tenth Directive).

340 G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 180-181.

indeed frequent in practice clauses according to which accounting and effect are retroactive as from the first day of the financial year during which the merger is effective[341].

E) In case of existence of any particular classes of shareholders and holders of securities other than shares, the merger plan shall indicate any particular conditions pertaining to the same[342].

The expression "particular classes of shareholders" includes the shareholder holding category of shares carrying different rights pursuant to Section 2348 of the Italian Civil Code, the promoters or funding shareholders to which the articles of association attribute any benefits (referred to in Section 2328, paragraph 1, no. 8, of the Italian Civil Code), the quota holders of *società a responsabilità limitata* (limited liability companies) granted with certain special rights pursuant to Section 2468, paragraph 3, of the Italian Civil Code. Whilst "holders of securities other than shares" makes reference to participating and non-participating financial instruments (Section 2346 of the Italian Civil Code), convertible and non-convertible bonds, warrants, financial instruments referred to in Section 2411, paragraph 3, of the Italian Civil Code (that make the term and the entity of the repayment of capital dependent on the economic performance of the issuer), as well as debt instruments referred to in Section 2483 of the Italian Civil Code. As observed, the reference to "any" particular conditions pertaining to the same parties described above is due to the fact that the merger transaction could not affect in no way the rights of the same[343].

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341 *Ibidem*, p. 181 and p. 320 et seq.

342 Section 2501-*ter*, first paragraph, no. 7, of the Italian Civil Code.

343 For a more detailed description of "particular classes of shareholders" and "holders of securities other than shares", as well as a more detailed dissertation on the particular conditions of the same that an by affected by the merger see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 181-183.

F) The merger plan shall also indicate any special benefits offered to parties responsible for managing the companies involved in the merger[344]. Special benefits could be *ad hoc* remunerations for the directors or other rights with respect to the company resulting from the merger[345]. The possibility to grant also to the experts who examine the draft terms of the cross-border merger or to members of the supervisory or controlling organs of the merging companies offer special benefits or advantages, is expressly provided in cross-border mergers by Section 6, paragraph 1, letter *c)*, of Legislative Decree 108/2008 (in application of Section 5, letter *h)*, of the Tenth Directive)[346].

It has been observed that Section 2501-*ter* does not require, with reference to (Italian) domestic mergers, the indication in the merger plan of any condition relevant to the right of the holders of the shares in the resulting company to participate in profits[347]. However, with reference to cross-border mergers, these information has been provided by Section 6, letter *b)*, of Legislative Decree no. 180/2008

[344] This because the early termination of the office of the directors of the absorbed companies or the involved in the merger, that are not appointed with reference to the resulting company, or because of a possible special remuneration that could be offered to the same for their efforts in closing the merger transaction and the results achieved; see G. F. CAMPOBASSO, *Diritto commerciale - Vol. II: Diritto delle società*, IX ed., Torino, 2015, p. 615; A. SERRA - M.S. SPOLIDORO (eds.), *Fusioni e scissioni di società (Commento al d.lg. 16 gennaio 1991 n. 22)*, op. cit, p. 31; F. MAGLIULO, *La fusione delle società*, op. cit., p. 211 et seq.

[345] As subscription rights according to particularly advantageous conditions in case of share capital increase of the resulting company; G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 184.

[346] According to which the draft terms of the cross-border merger shall provide for any measure proposed concerning them. For the compliance with the European Union principles of said provisions see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 185; of the same author see also *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 55 and p. 52 (about the predominance of the more liberal legal system).

[347] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 185, according to which there is no particular reason for this exclusion.

(in compliance with Section 5, letter *e)*, of the Tenth Directive). Therefore – and also with reference to domestic mergers, as directly applicable rule the require no implementing provisions[348] – the merger draft term shall provide for any clause, condition, term of circumstance affecting the entitlement of the holders of the shares in the resulting company to participate in profits[349].

Finally, given that each domestic law of each Member State may require additional information in the merger plan that are not required by a different domestic law[350], the common draft terms shall provide any other particular required by the laws applicable to the non-Italian companies involved in the cross-border merger[351].

6.2 The publicity of the common draft terms

The regulation of the contents of the common draft terms falls, more generally, in the prominence that the European legislation tends to give to the aspect of publication of the cross-border merger in question; this, again, in order to allow all stakeholders involved to make their choices and exercise their rights in consciousness.

On this point, section 6 of the Directive provides that the common draft terms of the cross-border merger shall be published in the manner prescribed by the laws of each Member State for each of the merging companies at least one month before the date of the general shareholders' meeting which is to decide thereon. This requirement, not mentioned in the first draft of the Directive, has been

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[348] *Ibidem*, p. 185, footnote 93.

[349] G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 55.

[350] And provided that this does not conflict with any needs of the European Union law; see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 189.

[351] Thus construing the common draft terms in accordance with the laws of all the companies involved; G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 189.

introduced in the occasion of its approval, in order to strengthen the protection of shareholders (in particular, of minority shareholders), creditors and employee[352]. In addition, also second paragraph of section 6 of the Directive stipulates the obligation to publish particulars for each of the merging companies in the relevant national Gazette a) the type, name and registered office of every merging company; b) the register in which the documents referred to in section 3.2 of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register; c) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

In particular, the letter b) of the section at hand provides for a sort of "publication of publication", since the Gazette will indicate the registers in which the documents referred to in section 3.2 of Directive 68/151/EEC are filed, among which the accounting records of the merging companies assume greater importance.

As far as the Italian implementation provisions are concerned, it is not surprising that the Italian legislature has provided – as anticipated above – with section 7 of Legislative Decree no. 108/2008 that, "except as provided for by Article 2501-*ter*, third and fourth paragraphs, of the Italian Civil Code, at least thirty days prior to the shareholder's meeting resolving upon the merger, the following information shall be published on the *Gazzetta Ufficiale della*

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[352] G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 54; see also G. ARNÒ – G. FISCHETTI, *Le fusioni transfrontaliere*, op. cit., p. 68; A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1203.

Repubblica Italiana (Official Gazette of the Italian Republic) for each company participating in the cross-border merger: a) the type, name, registered office and laws of incorporation of each merging company; b) the number of enrolment and the companies register in which the merging companies are enrolled with; c) in connection with the operation of cross-border merger, an indication, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

The reason of such publication is that for Italian citizens it would be more difficult to find the information relevant to foreign companies with respect to domestic mergers[353].

6.3 Report of the management and of the independent expert

The transposition of the rules concerning the report drafted by the management body of the companies involved, as well as the report prepared by independent expert (provided by sections 7 and 8 of the Tenth Directive), went through sections 8 and 9 of Legislative Decree no. 108/2008.

With regard to the first report, the transposition legislative decree had to integrate the content of the document required for domestic mergers by section 2501-*quinquies* of the Italian Civil Code[354].

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[353] See F. MAGLIULO, *La fusione delle società*, op. cit., p. 29.

[354] Section 2501-*quinquies* of the Italian Civil Code:

«[1] *The governing body of each of the merging companies shall draw up a written report illustrating and providing reasons for the merger on legal and economic grounds, specifying the share or quota exchange ratio.*

[2] *This report must also state the criteria used to establish the exchange ratio. Any difficulties encountered in undertaking valuations must be reported.*

First of all, the report of the management body shall describe and justify the merger plan on the economic standpoint, providing the economic reasons, ultimate aims and profitability of the transaction for the single company and, where applicable, for the group to which the same belongs. Then, the same report shall explain and justify the merger plan in light of the applicable laws, taking into account those aspects (even critical) that affect the transaction and justify the operational choices made[355].

The analysis provided by the report shall extend to all terms of the merger plan, focusing in particular to the exchange ratio (in order to evaluate its fairness), as well as to the methods adopted for determining the same, in order to appreciate its suitability, highlighting the possible assessment difficulties encountered[356].

In addition the report shall include, among the mandatory contents, the consequences of the cross-border merger with regard to shareholders, creditors and employees deriving from, indeed, the cross-border nature of the transaction and the different set of rules that could became applicable to the legal relationships involving said parties[357] (Section 8 of Legislative Decree no. 180/2008). Then the report, enriched in compliance with the requirements set forth by the Community rules, shall illustrate further aspects, by giving full

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[3] *The governing body reports to the shareholders at the meeting, and to the governing body of the other merging companies, the main changes relevant to assets and liabilities occurred between the date on which the merger plan has been deposited at the registered office of the company or published on the Internet site of this latter and the date of the merger resolution.*

[4] *The report referred to in paragraph one is not required if all shareholders or holders of other securities conferring the right to vote have so agreed*».

355 G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 212.

356 See M. S. SPOLIDORO, *Modifiche e variazioni del rapporto di cambio nei casi in cui tra la redazione del progetto di fusione e la decisione di fusione decorra un rilevante lasso di tempo*, op. cit., p. 342.

357 G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 212.

cognizance of the economical and juridical reasons underlying the merger plan[358].

Furthermore, it is interesting to note that while the Tenth Directive requires that such report shall be made available to the shareholders and to the representatives of the employees not less than one month before the date of the general shareholder meeting called to approve such merger plan, the Italian transposition of the Directive requires, more precisely, that the report shall be sent to the representatives of the employees; where there are no representatives, it shall be made available to the employees themselves (section 8.2 of Legislative Decree no. 108/2008).

However, employees (or their representatives) may provide an opinion in relation to the report, which shall be appended to the report "if received in good time"[359].

It has been noted that the report of the management cannot be unanimously waived in cross-border mergers. As highlighted, in case fully controlled company and the resulting simplification, Section 18 of Legislative Decree no. 108/2008, while referring to Section 2505,

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[358] Moreover, there are those who noticed the dubious systematic coherence of such content with respect to the provisions of our written laws, based on the fact that the report in question for the domestic merge shall contain – and provide insights into – the share/quota exchange ratio, as evidenced by the fact that the report can be legitimately omitted where the exchange ratio is, by definition, missing: *i. e.* merger by absorption of fully controlled companies; see F. MAGLIULO, *La fusione delle società*, op. cit., p. 31. It is understood that the content prescribed, without regard to the exchange ratio, has the effect of changing the function of the document itself which, as a result, will no longer be addressed to members only, but will be also aimed at the protection of creditors and employees; as a consequence, in the event that the ratio under section 2501-*quinquies* of the Italian Civil Code may be omitted – *i. e.* in merger by absorption of fully controlled companies – "the consequences of the cross-border merger with regard to shareholders, creditors and employees" shall be anyway illustrated, in the case of intra-Community cross-border mergers.

[359] As observed by A. PRETO – C. DESOGUS, *La direttiva comunitaria sulle fusioni transfrontaliere di società di capitali*, op. cit., p. 253, the relevant provision of the Tenth Directive (section 7.3) is similar to the rules provided by the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (section 9.5)

paragraph 1, of the Italian Civil Code, might suggest that the management body could not prepare the report; but this would be in conflict with Section 15, paragraph 1, of the Tenth Directive, which provides only the exemption from the independent experts' report in compliance with Section 7 of the same Directive (about the report of the management or administrative organ), whose content corresponds to Section 8 of Legislative Decree no. 108/2008[360]. Indeed, due to (i) the express reference to the creditors' interest, and (ii) the fact that the same report shall be made available to the representatives of the employees or, where there are no such representatives, to the employees themselves, it should be excluded that the same circumstances for the exemption of the independent experts' report justify also the exemption of the report of the management (as well as the waiver of the 30-day period for the general meeting that shall approve the common draft terms of the cross-border merger, without the prior consent of all parties for the benefit of which the report is made available, i. e. shareholders and employees)[361].

With regard to the preparation of report of independent[362] experts for each company, the EU rules, apart from the time limit for filing – again, as provided by section 8 of the Tenth Directive, not less

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[360] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 239.

[361] G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 56 et seq. The 30-day period made available for employees, as observed by the same author in *La fusione e la scissione*, op. cit., p. 240, is provided in order to allow them to prepare an opinion that, if received in good time, shall be appended to the report (Section 8, paragraph 3, of Legislative Decree no. 108/2008): therefore, it is not possible to shorten the terms without the consent of the parties granted with such right; see note no. 113 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera: relazione dell'organo gestorio (art. 8 d. lgs. 108/2008, art. 2501-quinquies c.c.)*, 27 January 2009 and M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere*, op. cit., p. 749 et seq.

[362] As properly pointed out by G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 213, the experts are qualified as "independent" by the EU rules.

than one month before the general meeting which shall decide on the approval of the common draft terms of cross-border merger – indicate the minimum content to be laid down in the report, also highlighting elements regarding the fairness of the exchange ratio and methods adopted for determining this ratio[363].

Section 9 of Legislative Decree no. 108/2008 reproduces verbatim the same requirements provided by section 2501-*sexies* of the Italian Civil Code for the appointment of experts - as well as with reference to further aspects - applicable in case of domestic mergers[364].

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[363] On this point see A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1206.

[364] Section 2501-*sexies* of the Italian Civil Code:

«[1] *For each company, one or more experts draft a report on the consistency of the share or unit exchange ratio, indicating the following.*

a) The method or methods adopted to calculate the proposed exchange ratio, and the values resulting from application of each one;

b) Any difficulties encountered in undertaking valuations.

[2] *This report must, additionally, present an opinion on the adequacy of the method or methods adopted to calculate the exchange ratio and the relative importance attributed to each method in calculating the value adopted.*

[3] *The expert or experts shall be chosen from parties referred to in first paragraph of section 2409-bis; if the surviving entity or the company generated by the merger is a joint stock company (società per azioni) or share partnership company (società in accomandita per azioni), the experts shall be appointed by the court at the location where the company is registered. If the company is listed on regulated markets, experts must be chosen from auditing firms subject to CONSOB oversight.*

[4] *In any event, the merging companies must jointly apply to the court in the location where the company generated by the merger or the surviving entity is located to appoint one or more common experts.*

[5] *Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary enquiries.*

[6] *The experts are liable for any damages caused to the merging companies, their shareholders and third parties. The provisions of section 64 of the Italian Civil Procedure Code apply.*

[7] *In the case of mergers of partnerships with joint stock companies, the parties referred to in paragraphs 3 and 4 above are also required to draft a report estimating worth of the partnership pursuant to section 2343 (of the Italian Civil Code).*

[8] *The report referred in paragraph one is not required if all shareholders and holders of other securities of each merging company unanimously so decide*».

The report of the independent experts is provided in order to offer to the shareholder a professional and external opinion, free from conflicts of interest[365], about the fairness of the exchange ratio and to the suitability of the methods adopted for determining the same, also verifying the correct use of the same and specifying the possible assessment difficulties[366]. To this end, each expert shall have the right to obtain from each company involved all useful and necessary information and documents and to carry out the necessary verifications, making reference to any the possible difficulties incurred, making reservations about the conclusions, if necessary[367].

The opinion of the expert, applying the Italian law, is not binding: however, the disagreement on the exchange ratio may constitute a starting point for challenging the shareholders' meeting resolutions and/or liability actions after judicial assessment of the unfairness of the exchange ratio[368].

But certain issues could arise if the merging companies appoint one or more independent experts for the drafting of a single report. Therefore, the Italian implementation rules provide (by transposing section 8.2 of the Tenth Directive[369]) that a single written report may be drawn up for each of the merging companies by expert appointed for that purpose at the joint request of the companies by a judicial or administrative authority in the Member State of one of the merging

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[365] For a brief analysis of the issues relevant to the experts' liability see S. CACCHI PESSANI, *sub art. 2501-sexies*, op. cit., p. 612 et seq.

[366] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 213.

[367] See G. M. GAREGNANI, *Profili di valutazione nelle operazioni di fusione: concambio e Mlbo*, Milano, 2006, p. 67 et seq.; A. SERRA - M.S. SPOLIDORO (eds.), *Fusioni e scissioni di società (Commento al d.lg. 16 gennaio 1991 n. 22)*, op. cit., p. 72; C. SANTAGATA, *Le Fusioni*, op. cit., p. 369.

[368] For more details see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 214 and footnotes 179 and 180, as well as the authors cited therein.

[369] This provision, according to A. PRETO – C. DESOGUS, *La direttiva comunitaria sulle fusioni transfrontaliere di società di capitali*, op. cit., p. 253, has been introduced with a view of reducing expertise costs.

companies or of the company resulting from the cross-border merger or approved by such authority (section 9, third paragraph, of Legislative Decree no. 108/2008).

The same provision continues by stating that the expert shall be appointed by the Court of the place in which the Italian company participating in or resulting the cross-border merger has its registered office; however, since the following paragraph refers to the second paragraph which requires judicial appointment only if the merged company is a joint stock company or a partnership limited by shares, or an equivalent company of another Member State, it may be concluded that out of such cases, the expert will be selected among the audit firms referred to in section 2409-*bis* of Italian Civil Code[370].

Anyway, any single report shall include all the information that the law applicable to the merging companies may require.

Finally, paragraph 4 of section 9 of the implementing rules provided the right to waive the preparation of the report. If all shareholders of the merging companies have so agreed, the preparation of the expert report is not required[371]. However, such provision have been repealed by Legislative Decree 22 June 2012, no.

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[370] *I.e.* the audit firms enrolled in the dedicated register. See also F. MAGLIULO, *La fusione delle società*, op. cit., p. 33 and G. ARNÒ – G. FISCHETTI, *Le fusioni transfrontaliere*, op. cit., p. 71.

[371] The relevant provision of the Directive (section 8.4) provides that «*neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed*». The difference between waiver to the examination of the common draft terms and waiver to the preparation of the expert report is that, in the first case, the experts should not be appointed and, in the other case, they should be appointed for the sole purpose of examining the draft terms, without drafting any report. However, it is not clear how said experts should bring to the attention of the shareholders their comments about the common draft terms. As suggested by G. A. RESCIO, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla direttiva 2005/56/CE in materia di fusione transfrontaliera*, op. cit., p. 56, the experts should intervene in the shareholders meeting called for the approval of the common draft terms of the merger, in order to express their opinions and to answer to questions thereby asked by the members.

123[372], which has also modified the third paragraph of Section 2501-*sexies* of the Italian Civil Code[373], according to which – on the basis of the current wording – the experts' report is not required if all shareholders and holders of other securities of each merging company unanimously so decide (and, therefore, such a waiver is now covered also for cross-border mergers by said Section 2501-*sexies*. As observed[374], it is a natural consequence of his being aimed at verifying the exchange ratio, to which obviously only the shareholders are interested[375].

6.4 Cross-border merger leveraged buy out

Merger leveraged buy out procedure is characterized by complication of the procedure, in order to increase the availability of information for the interested parties[376]. In a cross-border perspective,

[372] Which has implemented Directive 2009/109/CE, about reporting and documentation requirements in the case of mergers and divisions.

[373] Paragraph introduced by means of Legislative Decree 13 October 2009, no. 147, which has implemented the Directive 2007/63/EC, about requirement of an independent expert's report on the occasion of merger or division of public limited liability companies, by means of which Directives 78/855/EEC and 82/891/EEC, relevant to mergers and divisions, have been amended

[374] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 240.

[375] For case law in this regard see the decree of the Court of Appeal of Milan on 8 January 2001, commented by V. SALAFIA, *Funzione della relazione dell'esperto indicata dall'art. 2501 quinquies c.c.*, in *Le Società*, 2001, p. 434, and commented also by G. BATTISTI, *Note critiche sulla derogabilità della relazione degli esperti ex art. 2501 quinquies c.c.*, in *Giur. Comm.*, 2001, II, p. 424. In the same sense see also note no. III of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Rinuncia alla relazione degli esperti sulla congruità del rapporto di cambio in caso di fusione e scissione (art. 2501-quinquies c.c.)*, 6 February 2001. For scholars see L. A. BIANCHI, *La congruità del rapporto di cambio nella fusione*, Milano, 2002, p. 383; A. SACCHI, *Note sulle relazioni di congruità delle società di revisione ai sensi degli artt. 2501-quinques c.c. e 158, comma primo, T.U.I.F.*, in *Governo dell'impresa e mercato delle regole. Scritti giuridici per Guido Rossi*, I, Milano, 2002; G. FERRI, *Modificabilità e modificazioni del progetto di fusione*, Milano, 1998, p. 115.

[376] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 241.

the interests deserving protection in cross-border merger leveraged buy out refer to the target company, regardless of whether it is absorbed (direct merger) or absorbing (reverse merger), and therefore to its shareholders, creditors and third parties involved. Therefore, where the companies involved in the merger are governed by different laws, it is up to the law to which the target company is subject, to provide the conditions and the modalities of protecting the interests connected to the same[377].

The above is the reason why according Section 4, paragraph 3, of Legislative Decree no. 108/2008, Section 2501-*bis* of the Italian Civil Code is applicable to cross-border merger leveraged buy out only if the (target) company, whose control has been acquired through debts, is governed by Italian laws. It's therefore clear how the above provision of the Italian implementation rules takes into account the interests protected by the Italian Civil Code, which are mainly referable to protection of shareholders and creditors that may be prejudiced by the transaction[378]. Given the above, in case of breach, by the Italian company, of the provisions of Section 2501-*bis* of the Italian Civil Code[379] (that will be briefly analysed in the following), it

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377 M.V. BENEDETTELLI, *Le fusioni transfrontaliere*, op. cit., p. 377; M. V. BENEDETTELLI – G. A. RESCIO, *Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere*, op. cit., p. 751 et seq.; G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 250.

378 M. TOLA, *La fusione transfrontaliera*, op. cit., pp. 616 and 617; F. MAGLIULO, *La fusione delle società*, op. cit., p. 21.

379 Section 2501-*bis* of the Italian Civil Code - Merger leveraged buy out:

«[1] *In the case of mergers between companies in which one of the companies has contracted debts in order to acquire control of the other company, and where, as a result of the merger, the equity of the latter company is used as general collateral or as a source of repayment for the above stated debts, the provision of this section apply.*

[2] *The merger plan referred to in Section 2501-ter must state the financial resources envisaged to be used to satisfy the obligations of the company resulting from the merger.*

has been admitted that shareholders and creditors can allege the nullity of the merger and, should the same have been already filed, to claim for indemnification[380].

As it has been observed, the wording of Section 4, paragraph 3, of Legislative Decree no. 108/2008 is clear in the sense that the (Italian) domestic rules on merger leveraged buy out are not applicable in case of cross-border mergers where the target company is governed by a foreign law[381]. Said domestic rules shall be, therefore, applicable only to the companies subject to the Italian *lex societatis*; in such case, it shall be verified that the procedure, followed by the Italian bidder company, complies with the laws that govern the target company concerning cross-merger leveraged buy out, which are binding for all the companies involved in the transaction and the relevant bodies[382].

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[3] *The report referred to in Section 2501-quinquies must state reasons that justify the transaction, include an earnings on financial plan that states the source of financial resources, and a description of the goals the merger is intended to achieve.*

[4] *The experts' report referred to in Section 2501-sexies certifies that the information contained in the merger plan is reasonable pursuant to subsection 2 above.*

[5] *The plan must, in annex, include a report from the person in charge of the statutory accounting audit of the target or acquiring company.*

[6] *The provisions in Section 2505 and 2505-bis do not apply to the mergers referred to in subsection 1.*»

380 D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, op. cit., p. 759.

381 G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 250; M. TOLA, *La fusione transfrontaliera*, op. cit., p. 617; F. MAGLIULO, *La fusione delle società*, op. cit., p. 21.

382 See note no. 111 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera con indebitamento (artt. 4, comma 3, d. lgs. 108/1998, 2501-bis c.c.)*, 27 January 2009, according to which the provision, as it clarifies the only way to protect the Italian target, implicitly refers to the protection of the foreign target to the choices of the law to which it is subject.

Going now to briefly analyse the provisions of Section 2501-*bis* of the Italian Civil Code, it should be remembered that Italy[383], as well as other country like Spain[384], has provided for specific rules for merger leveraged buy out transactions[385].

More in detail, merger leveraged buy out are allowed, subject to certain procedural conditions aimed at ensuring full information of shareholders and third parties, as well as the indebtedness sustainability assumed in the context of a justifiable transaction in economic terms[386]. In particular, the Italian domestic rules require to (i) indicate in the merger plan the financial resources envisaged to be used to satisfy the obligations of the company resulting from the post-merger indebtedness; (ii) include, in the report of the management, a description of the reasons that justify the transaction, as well as a financial plan that states the source of financial resources the goals the merger is intended to achieve; (iii) certify, in the experts' report, the reasonableness of the statements of the management above; and (iv) draft and enclose to the merger plan a report from the person in charge of the statutory accounting audit of the target or acquiring company. With reference to the latter report, as the Italian Civil Code does not provide for an indication of the contents required, it is believed that the same shall check the reliability of the accounting data on which the entire transaction is based and, in particular, of the financial and

[383] Section 2501-*bis* of the Italian Civil Code has been introduced with the 2003 company law reform, subsequently amended in 2004 and 2010 by means of Legislative Decree 27 January 2010, no. 39.

[384] For a compared analysis of Italian and Spanish rules on merger leveraged buy out transactions see G. A. RESCIO, *La fusione e la scissione*, op. cit., pp. 242-250, as well as the other authors cited therein.

[385] See, among all, L. ARDIZZONE, *sub art. 2501-bis*, in *Trasformazione - Fusione - Scissione*, in P. MARCHETTI - L. A. BIANCHI – F. GHEZZI – M. NOTARI (eds.), *Commentario alla riforma delle società*, Milano, 2006, p. 487 et seq.

[386] G. A. RESCIO, *La fusione e la scissione*, op. cit., pp. 243.

economic plan explained in the management report[387]. As far as the "author" of the report is concerned, it has been observed that the same shall be the person - whether "internal" (statutory auditor) or "external" (independent auditor/auditing firm) to the company – which has been engaged for the statutory audit pursuant to law or resolution of shareholders' meeting (e.g. for *società a responsabilità limitata* (limited liability companies))[388].

In addition, given the interests deserving protection mentioned above – reason which justify the additional information package above[389] – the report of the management and the experts' report cannot be omitted in case of simplified mergers pursuant to Section 2505 (absorption of wholly-owned companies) and 2505-*bis* (absorption of 90%-owned companies) of the Italian Civil Code[390], or pursuant to unanimous consent of all shareholders.

6.5 Approval by the general meeting and simplified formalities

In cross-border mergers, as well as in domestic mergers, the shareholders' meeting is an essential step of the transaction. In fact, as explained above, the administrative body and experts' reports are prepared and made available for the purpose of the resolution of the shareholders. Section 9 of the Tenth Directive provides that «*after taking note of the reports referred to in Articles 7 and 8, the general*

[387] See, among others, M. S. SPOLIDORO, *Fusioni pericolose (merger leveraged buy out)*, in *Riv. soc.*, 2004, p. 97; L. ARDIZZONE, *sub art. 2501-bis*, op. cit., p. 510; F. MAGLIULO, *La fusione delle società*, op. cit., p. 168.

[388] G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 245, which also highlights that the report at hand is missing in leveraged buy out mergers in which *società per azioni* (joint stock companies), or *società a responsabilità limitata* (limited liability companies) that have not engaged statutory audit, are not involved.

[389] *Ibidem.*

[390] For simplified mergers see N. ATLANTE, *La fusione semplificata*, in *Riv. Not.*, 2007 and F. MAGLIULO, *La fusione delle società*, op. cit., p. 174 et seq.

meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger».

However, the decision-making process is not devoid of complexity, due to the difficulties arising from both the rules in force concerning the mechanism of employee participation, and potential differences between national rules applicable to companies involved in the transaction.

The implementing provision of section 10 of Legislative Decree no. 108/2008 (named "Decision on the cross-border merger") provides that the implementation of the cross-border merger could be made conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger. In addition, paragraph 2 of the same section continues by providing that if the law of a Member State to which a merging company is subject provides for a procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or a procedure to compensate minority shareholders, without preventing the registration of the cross-border merger, the meeting, when approving the draft terms of the cross-border merger, shall decide on the possibility for the members of that merging company to have recourse to such procedure. In other words, the application of a foreign provision on the procedure to scrutinise and amend the ratio applicable to the exchange of securities or shares, or the procedure to compensate minority shareholders, depends on the specific approval by the shareholders of the merging Italian company in the event that foreign shareholders decides to make use of such option[391].

[391] F. MAGLIULO, *La fusione delle società*, op. cit., p. 25.

It has been observed that the Directive does not expressly provide the possibility or not for the shareholders' meeting to approve amendments to the merger plan[392]. However, as far as the Italian implementation rules are concerned, Section 10, paragraph 3, of Legislative Decree no. 108/2008 makes express reference to the applicability of Section 2502, paragraph 2, of the Italian Civil Code, according to which the merger resolution may only affect amendments to the merger plan provided that they do not impact the rights of shareholders or third parties[393]. All the provided that – as specified by the above-mentioned implementation rule – all companies participating in the cross-border merger have resolved the same amendments (Section 10, paragraph 3, of Legislative Decree no. 108/2008).

Finally, in this context it should be noted that if the company resulting from a cross-border merger, to which a *società per azioni* (joint stock company) with share capital divided into different categories of shares, is foreign, the resolution of the general meeting decision to approve the common draft terms must be approved by the special shareholders' meeting of the relevant category or categories of shares, where the same are prejudiced by the merger[394].

Although the issue should be addressed in another context, with regard to the procedures, it is worth mentioning that the transposing Italian decree initially implemented the so-called simplified

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[392] N. AL NAJJARI - S. PERON, *Le fusioni transfrontaliere di società di capitali: uno sguardo di insieme,* op. cit., p. 732.

[393] For a complete and detailed analysis of Section 2502 of the Italian Civil Code and the amendments to the merger plan admitted see G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 272 et seq.

[394] Prejudice that, however, must be different from the mere subjection to a different law of the category rights recognized by the company resulting from the merger; see no. 110 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera in presenza di azioni di speciali categorie (artt. 2376 c.c., 6 d. lgs. 108/1998)*, 27 January 2009.

formalities rules established by the Directive and already provided by the Italian Civil Code[395], and, later, slightly amended such rules pursuant to the more recent European law 2013*bis*. Indeed, the forms of so-called simplified merger (or by simplified procedure) are multiple, including both domestic and cross-border mergers[396]; in particular, the first and ordinary form is where a cross-border merger by acquisition is carried out by at least two companies and one of them holds all the shares of the other company, pursuant to and in accordance with section 2505, first paragraph, of the Italian Civil Code[397].

The focus of the legislature on this form is expressed in the reference to section 2505 of the Italian Civil Code, implemented by section 18 of Legislative Decree no. 108/2008[398], which provides, in case of merger by absorption of fully controlled companies, the exemption from the resolution upon the merger (Section 18, paragraph 2), except as provided for the Italian merging company by the second and third paragraphs of section 2505 of the Italian Civil Code.

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[395] G. ARNÒ – G. FISCHETTI, *Le fusioni transfrontaliere*, op. cit., p. 76.

[396] For other hypothesis included by the scholars see, among all, A. BUSANI, *Lieve maquillage per la procedura di fusione transfrontaliera "semplificata"*, in *Le Società*, 4, 2015, p. 404.

[397] Section 2505 of the Italian Civil Code:

«[1] *The absorption of a company by another company that owns all of its shares or units in exempt from the provisions of Article 2501-ter, paragraph one, number 3, 4 and 5, and from Articles 2501-quinquies and 2501-sexies.*

[2] *The Articles of Association or Bylaws may provide that the absorption of a company into another company that owns all of its shares or units may be decided through a resolution sanctioned by a public deed taken by their respective governing bodies, provided that each of the companies taking part in the merger complies with the provisions of Article 2501-ter, paragraphs 3 and 4, and, as regards the surviving entity, Article 2501-septies.*

[3] *Shareholders in the surviving entity representing at least 5% of share capital may, in any event, within eight days of the filing or publication referred to under paragraph 3, Article 2501-ter, file a request with the company seeking that the surviving entity's decision to approve the merger be adopted pursuant to paragraph one of Article 2502*».

[398] Section 18 of Legislative Decree no. 108/2008 is applicable also to non-EU merger, as provided by section 2, paragraph 3, of the same legislative decree.

However, it has been observed that the Italian legislator does not intend to exclude any approval of the merger plan, but simply does not intend to refer the approval to the shareholders' meeting[399]. Therefore, the merger plan shall be approved by the management body[400] pursuant to Section 2050, paragraph 2, of the Italian Civil Code, that shall be deemed as applicable also to cross-border mergers, in the absence of any contrary provision[401].

In addition, in such case the first paragraph of section 18, however, provides a further simplification: the common draft terms of cross-border merger may not indicate the content under section 6.1, letter (b) of the Decree, *i.e.* «*conditions relating to the right to participate to profits*», without prejudice, this time, for what provided by the first paragraph of section 2505 of the Italian Civil Code. On the other hand, the exemption from the resolution upon the merger by the general meeting of absorbed company fully controlled by the absorbing one, and, more generally, the simplifications mentioned appear increasingly reasonable where such transactions – which indeed represent the most frequent cases of merger – concretely turn into in mere corporate reorganization, which may be directly implemented by the management bodies[402].

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399 M. TOLA, *La fusione transfrontaliera*, in A. SERRA – I. DEMURO (eds.), *Trasformazione, fusione, scissione*, Bologna, 2014, p. 616.

400 I.e. the same body that prepare the merger plan, as properly highlighted by G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 265.

401 See note no. 114 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera semplificata e organo deliberante (artt. 18, comma 2, d. lgs. 108/2008, 2505, commi 2, 3, c.c. e 2505-bis, commi 2, 3, c.c.)*, 27 January 2009.

402 See also section 15 (Simplified formalities) of the Tenth Directive:

«1. *Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired:*

- *Articles 5, points (b), (c) and (e), 8 and 14(1), point (b) shall not apply;*
- *Article 9(1) shall not apply to the company or companies being acquired.*

Given the above, the derogation scheme of simplified merger provides the exemption from (i) the preparation of the merging plan referred to in section 2501-*ter*, first paragraph, letters 3, 4 and 5 of the Italian Civil Code, since the exchange ratio is, by definition, missing in this case; (ii) the directors' report referred to in section 2501-*quinquies* of the Italian Civil Code (iii) the experts' report on the fairness of the exchange ratio referred to in section 2501-*sexies* of the Italian Civil Code.

As anticipated above, the Italian implementation rules have been recently slightly amended by the so-called European law 2013bis. The text in force until 24 November 2014, in fact, provided that where a cross-border merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of the Italian company being acquired, the reports referred to in section 2501-*sexies* of the Italian Civil Code shall not be required if the members of the absorbed company are granted with the right to sell their shares, quotas or other securities pursuant to section 2505-*bis*, first paragraph of the Italian Civil Code (third paragraph of section 18, Legislative Decree no. 108/2008).

According to the recent legislative intervention, it has been provided the non-applicability of:

(i) section 2501-*quater* of the Italian Civil Code[403] in relation to the preparation of the statement of assets and liabilities,

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2. *Where a cross-border merger by acquisition is carried out by a company which holds 90 % or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, reports by an independent expert or experts and the documents necessary for scrutiny shall be required only to the extent that the national law governing either the acquiring company or the company being acquired so requires*».

[403] Section 2501-*quater* of the Italian Civil Code:

which was formerly subject to the sole condition that the members of the absorbed company were granted the right to sell their shares to the merging company for the corresponding fee to the right of withdrawal;

(ii) section 2501-*quinquies* of the Italian Civil Code in relation to the report of the management[404];

(iii) section 2501-*sexies* of the Italian Civil Code in relation to the experts' report on the fairness of the exchange ratio; and

(iv) section 2051-*septies* of the Italian Civil Code[405] in relation to filing or publication of merger documents.

«[1] *The governing body of the companies taking part in the merger draft, in compliance with statutory financial requirements, balance sheets for the companies as at a date no earlier than 120 days prior to the day when the merger plan is filed at company headquarters or published in the website of the same*.

[2] *The balance sheet may be replaced by financial statements from the most recent financial year if the accounts were closed no more than six months prior to the filing or publication date referred to in first paragraph or, in case of company listed on regulated markets, by the six-monthly balance sheet provided by special laws, provided that it is not earlier than six-month from the filing or publication date referred to in first paragraph.*

[3] *The balance sheets referred in paragraph one is not required if all shareholders and holders of other securities of each merging company unanimously so decide* »

[404] But see paragraph 6.3 of this chapter about the information goals and the recipients of this report, according to which the same cannot be waived; see also G. A. RESCIO, *La fusione e la scissione*, op. cit., p. 240, and note no. 113 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera: relazione dell'organo gestorio (art. 8 d. lgs. 108/2008, art. 2501-quinquies c.c.)*, 27 January 2009.

[405] Section 2501-*septies* of the Italian Civil Code:

«[1] *Unless shareholders unanimously waive this term, during the thirty days leading up to the merger decision, and until the merger has ben decided, copies of the following documents must be held at the headquarters of the merging companies, or published on their websites:*

1) *The merger plan inclusive of the reports, if prepared, specified in Articles 2501-quinquies and 2501-sexies;*
2) *Financial statements from the merging companies for the last three financial years, including a report from the parties responsible for the management and statutory auditing;*
3) *The balance sheets of the merging companies if drafted pursuant to first paragraph of Article 2501-quater or, in the case provided by paragraph 2 of Article 2501-quater, the six-monthly balance sheet.*

Such exemptions are justified, however, only if provided by the national law to which the acquiring or acquired company are subject.

6.6 Preventive and subsequent scrutiny of the legality of the cross-border merger

A) Pre-merger certificate

With regard to the procedures to scrutinize the aspect of the legality of EU cross-border mergers[406], the shareholders' approval is followed by the scrutiny of the legality of the transaction pursuant to Section 10 of the Tenth Directive[407].

The European rules thus provide that the first scrutiny of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies[408]. After the

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[2] *Shareholders are entitled to view these documents and obtain a copy free of charge. Copies are transmitted electronically upon shareholder request. The company is not required to provide with copies of the documents if the same are published in the website of the company and it is possible to have a copy or to print them».*

[406] Except of the cases of the so-called simplified merger – as said, the legislator intervened by changing the third paragraph of section 18 of Legislative Decree no. 108/2008 by means of section 27 of Law 161/2014; on this point see A. BUSANI, *Lieve maquillage per la procedura di fusione transfrontaliera "semplificata"*, op. cit., p. 403 et seq.

[407] Which, in broad terms, together with the subsequent scrutiny provided by section 11 of the Tenth Directive, the recalls the scrutiny provided by Articles 25 and 26 of the Council Regulation no. 2157/2001/EC, with reference the formation of an European Company (*Societas Europaea*) by means of a merger.

[408] According to the seventh recital of the Tenth Directive «*In order to facilitate cross-border merger operations, it should be provided that monitoring of the completion and legality of the decision-making process in each merging company should be carried out by the national authority having jurisdiction over each of those companies, whereas monitoring of the completion and legality of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger. The national authority in question may be a court, a notary or any other competent authority appointed by the Member State concerned. The national law determining the date on which the cross-border merger takes effect, this being the law to which the company resulting from the cross-border merger is subject, should also be specified*».

scrutiny, according to the Directive, the competent authority shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

As expected, the Italian transposition rules (section 11 of Legislative Decree no. 108/2008) entrusts for this activity the Civil Law Notary that, upon the request of the domestic company, issues the corresponding pre-merger certificate "attesting to the proper completion of the pre-merger acts and formalities". About foreign companies, the certificate shall be issued by the competent authority according to the applicable law[409].

With particular regard to the transposition in Italy of the scrutiny at hand[410], the second paragraph of section 11 of Legislative Decree no. 108/2008 states that the certificate shall indicate in particular:

a) the correct registration with the Register of Companies of the resolution concerning the cross-border merger;
b) the expiration of the term granted to creditors to oppose the merger as referred to in section 2503 of the Italian Civil Code[411] or the assumptions that, under the same article, allow the implementation of the merger before the expiry of that term, or, in case of opposition by creditors, that the Court has

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[409] According to section 10, paragraph one, of the Tenth Directive, «*Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law*».
[410] That shall be considered only with regard to EU cross-border mergers, as it does not seem reasonable to apply to non-EU cross-border mergers, see A. BUSANI, *La Fusione transfrontaliera e internazionale*, op. cit., p. 671.
[411] *I.e.* sixty days from the filing of the merger resolution with the companies' register.

acted in accordance with section 2445, fourth paragraph, of the Italian Civil Code[412];

c) if the general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger, pursuant to section 10, paragraph one, of Legislative Decree no. 108/2008;
d) where appropriate, that the meeting resolved in accordance with Article 10, paragraph 2, of Legislative Decree no. 108/2008; and
e) the non-occurrence of prohibitive conditions to the resolution of the cross-border merger relating to the applicant company.

However, with regard to the term, even the Italian text does not go beyond the generic expression "without delay" referred to in the European rules (but, as it will be better described in the following subparagraph, each merging company shall submit the pre-merger certificate to the competent authority within six months of its issue).

The certificate has an important function for the distribution of responsibility among the authorities competent to scrutinise the legality; moreover, it makes it easier to designate the subject entrusted with the task of scrutinizing in virtue of the domestic law applicable[413].

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412 Paragraph 4 of section 2445 of the Italian Civil Code: «*The court, in case it evaluates that the danger of prejudice of creditors is not grounded or the company has granted an adequate guarantee, orders that the reduction can take place notwithstanding the opposition* [of creditors]»

413 F. MAGLIULO, *La fusione delle società*, op. cit., p. 38.

B) The scrutiny of the legality of the cross-border merger. The final certificate

Section 13 of Legislative Decree no. 108/2008, implementing section 11 of the Tenth Directive, introduces in the cross-border merger context another activity that were unknown in domestic merger procedure[414].

Both Italian domestic and European provisions provides that the merging company shall submit, to the authority competent to scrutinise the legality of the cross-border merger, the pre-merger certificate within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting.

The competent authority for this second scrutiny, in accordance with European regulations, is designed by each Member State «*as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law*» (section 11, paragraph one, of the Tenth Directive). Therefore, the competent authority shall be designed by the Member State to whose law the company is subject where the company resulting from the cross-border merger has its head office.

Also in this case, with reference to Italian legal system (section 13 of Legislative Decree no. 108/2008), the authority chosen is the Civil Law Notary who, within 30 days of receipt of the pre-merger certificates and of the resolution of the common draft, shall verify the

[414] Also in this case, the scrutiny at hand should be considered as not applicable in case of non-UE cross-border mergers, see A. BUSANI, *La Fusione transfrontaliera e internazionale*, op. cit., p. 673.

proper completion of the merger procedures – issuing the relevant declaration[415] - after having checked that:

a) companies participating in the cross-border merger have approved the same common draft terms or the cross-border merger;
b) pre-merger certificates of each company involved in the merger procedure have been collected, if the conditions are satisfied;
c) the arrangements of participation of the employees concerned have been observed.

Finally, with reference to the pre-merger and the final certificates, it deserves to be remembered the opinion of the Notarial Council of Milan (*Consiglio Notarile di Milano*) in the context of cross-border merger between an Italian company and a company subject to the laws of another State that has not implemented the Tenth Directive, being the same a EU Member State late in implementing it[416] or, more likely, a non-EU Member State. According to the Notarial Council of Milan, failure to identify the competent authority to issue the pre-merger and the final certificates for the non-Italian companies participating in a cross-border merger, does not prevent the completion and the effectiveness of the cross-border merger in accordance with applicable domestic and EU legislation. In such a case, the scrutiny of the legality of the cross-border merger shall be performed by the Italian Notary upon execution of the merger deed: more precisely when the merger deed is

[415] However, if the cross-border merger deed provides a condition precedent for its effectiveness, the issuance of the declaration shall take place upon the occurrence of the relevant event; see note no. 108 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione transfrontaliera: rapporti tra certificati e atto di fusione*, 27 January 2009.

[416] Unlikely hypothesis at the present time, as the deadline for transposition expired on 15 December 2007.

executed in Italy before the Notary or at the time when the merger deed, executed abroad, is subsequently filed with the Italian Notary, in accordance with Section 12 of Legislative Decree no. 108/2008[417].

6.7 The cross-border merger deed

The cross-border merger deed is the culmination of the procedural requirements mentioned above. With reference to the Italian legal system, the cross-border merger shall be performed through the public deed – as for the provisions of national law in respect of similar transaction – as referred to in section 2504 of the Italian Civil Code drafted for domestic mergers[418], to be drawn up by a Civil Law Notary where the company resulting from the merger is subject to Italian law. In the same way, if the law of the Member State where the company resulting from the cross-border merger has its registered office requires that the cross-border is not sanctioned by public deed, the Italian Notary has to intervene in substitution. Anyway, where the foreign law applicable to the company resulting from the cross-border merger provides the issuance of the public deed – entrusting it to the competent authorities – the document must be filed with the Italian Notary for the purposes of fulfilling the

[417] Note no. 112 of the *Consiglio Notarile di Milano* (Notarial Council of Milan), *Fusione di società italiane con società straniere soggette ad ordinamento che non ha attuato la decima direttiva (direttiva 2005/56/CE, artt. 2, 3 d. lgs. 108/2008, art. 25 legge 218/1995)*, 27 January 2009.

[418] Section 2504 of the Italian Civil Code:

«[1] *The merger must be sanctioned by public deed.*

[2] *The notary or individuals responsible for the management of the company resulting from the merger or the surviving entity must submit the merger deed for registration within 30 days at the companies' register in the locations where the registered office of the merging companies, the resulting company or the surviving entity is located.*

[3] *The filing for the company resulting from the merger or the surviving entity may not precede filings by the other companies taking part in the merger*».

publication requirements established by section14, second paragraph of Legislative Decree no. 108/2008.

Finally, it has been observed[419] that the Directive does not expressly refer to a merger agreement as a form of implementation of the merger decisions. To be honest, the Tenth Directive lacks an explicit reference to a merger deed; however this is compensated by the often cited reference to the provisions and procedures laid down by national rules for the participating companies in its section 4.

6.8 Publicity of the merger; effects and effectiveness of the transaction

The publication system provided for the cross-border merger deed - which is, of course, intertwined with the effectiveness of the transaction - is obviously more burdensome than the domestic one.

First of all, the EU rules require a form of publication to be implemented in the Member States to which the merging companies belong (*i.e.*, according to section 6 of the Tenth Directive, «*in the manner prescribed by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC*»). To this extent, the Italian implementation rules under section 14 of Legislative Decree no. 108/2008, distinguish two different cases:

(i) the company resulting from the cross-border merger is an Italian company: within thirty days, the cross-border merger deed, together with the final certificate and the pre-merger certificates, must be filed with the Companies Registers of the place where the merging Italian companies, and the company

[419] A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1208; as remembered, on the opposite the Third Directive entrusts Member States, by means of its section 16, where appropriate, to draw up and certify the merger contract subsequent to general meetings in due legal form.

resulting from the cross-border merger, have its registered office[420]. With regard to the determination of the date upon which the transaction will be effective, the Italian transposition replicated the provisions of Article 2504-*bis,* second paragraph of the Italian Civil Code[421], to the extent that even the effectiveness of the EU cross-border merger begins once the merger deed has been filed with the Companies' Register of the place where the registers office of the entity is located[422];

(ii) the company resulting from the cross-border merger belongs to another Member State: within thirty days from the final scrutiny of the legality of the cross-border merger, the merger deed, together with the final certificate and the pre-merger certificates, shall be filed with the Companies' Register of the place where the Italian company participating to the cross-border merger has its registered office. With regard to the determination of the date upon which the transaction will be effective, the applicable national law determines the date on which the cross-border merger takes effect (section 15, paragraph 3, of Legislative Decree no. 108/2008).

In addition, the provisions of the EU cross-border merger contemplate a strengthening of the mechanisms of publication, particular mechanisms of coordination between companies' registers of companies of the various countries. According to section 13 of the

[420] It being understood that the filing relevant to the company resulting from the merger cannot be performed before the other companies involved in the merger (section 14, first paragraph, of the Legislative Decree no. 108/2008).

[421] Section 2504-*bis*, paragraph 2, of the Italian Civil Code: «*The merger takes effect when the last of the registrations required under Article 2504 has been undertaken. The date may, however, be established subsequently in the case of mergers trough absorption*».

[422] But except as provided for in section 15, first paragraph of Legislative Decree no. 108/2008, according to which in merger by absorption, the term may be fixed at a later date.

Directive[423], in fact, the registry for the registration of the company resulting from the cross-border merger shall notify, "without delay", the registry (or the registries) in which each of the companies was required to file documents that the cross-border merger has taken effect. Since the date upon which the transaction will be effective shall be determined by law of the Member State to which the company resulting from the cross-border merger is subject, the obligation of notification "without delay" shall apply from such date[424].

According to section 13, second paragraph of the Directive, the deletion of the old registration, if applicable, shall be effected on - but not before - receipt of that notification.

After becoming effective under above-mentioned provisions, the cross-border merger may not be declared null and void (section 17 of the Directive) – without prejudice to any rights to compensation for damages to which shareholders and third parties damaged by the transaction are entitled (section 17, paragraph 2, of Legislative Decree no. 108/2008).

Finally, it should be underlined that the European legislator provides in third paragraph of section 14 of the Directive that the where laws of the Member States require the completion of «*special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties*»

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[423] As also confirmed by the implementation provision under section 15, paragraph 2, of the Legislative Decree no. 108/2008.

[424] Which, by the way, may differ according to the Member State of the company resulting from the cross-border merger; see A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1209.

those formalities shall be carried out by the company resulting from the cross-border merger[425].

7. Protection of dissenting (minority) shareholders

7.1 The interests deserving protection

In order to provide a detailed analysis of the instruments made available by the laws to protect minority shareholders' interests, it is necessary first to identify interests deserving protection in the context of a cross-border transaction. Scholars' opinions are divided into two different approaches: the so-called "traditional" approach and the "business oriented" approach[426]. The traditional approach[427] identifies the conservation of company's assets as the interest of the company,

[425] Within this regard, it has been observed – although in the context of Italian domestic mergers - that publication would not be necessary, since there is no transfer of assets and being the publication of the merger the only to make effective against third parties the ownership title of the absorbing company or of the company resulting from the merger; see C. SANTAGATA, *Le Fusioni*, op. cit., p. 717.

[426] For a complete analysis of the Italian scholars' debate before the adoption of the Tenth Directive see A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 3 et seq.

[427] For the so-called "traditional" approach see C. SANTAGATA, *La fusione tra società*, op. cit., p. 273; B. LIBONATI, *Rapporto di cambio e fusione di società per azioni*, in *Riv. Dir. Comm.*, 1979, II, p. 114 et seq.; A. SERRA, *La trasformazione e la fusione delle società*, op. cit., p. 370; F. GALGANO, C*ircolazione delle partecipazioni azionarie all'interno dei gruppi di società*, in *Contr. Imp.*, 1986, p. 357 et seq.; G. OPPO, *Fusione e scissione delle società secondo il d.lgs. 1991 n. 22: profili generali*, in *Riv. dir. Civ*., 1991, II, p. 501 et seq.; A. CERRAI – A. MAZZONI, *La tutela del socio e delle minoranze*, in P. ABBADESSA – A. ROJO (eds.) *Il diritto delle società per azioni: problemi, esperienze, progetti*, 1993, p. 389; L. STANGHELLINI, *Osservazioni in materia di sindacabilità nel rapporto di cambio nella fusione dopo la riforma del 1991*, in *Giur. Comm.*, 1995, p. 135; L. NAZZICONE, *Il sindacato giudiziale sul rapporto di cambio nella fusione*, in *Foro it.*, 2001, p. 1937; G. LOMBARDI, *Riflessioni a margine di un'operazione di fusione: conflitto di interesse, rapporto di cambio, assemblee speciali e merger leveraged buy-out*, in *Corr. Giur.*, 2003, p. 208.

i.e. shareholders' equity remains unchanged, and the fairness of the exchange ratio as the interest of the individual shareholder[428].

However, the above-mentioned interpretation has been criticized for being too restrictive, as it should be affirmed that also the company interest to achieve the maximum profit could be prejudiced[429]. Such "business" approach, which is characterized by an economic-business point of view, is divided among those who identify profit through the sum of the companies' profits[430] and those who identify profit through the sum of positive cash flows[431].

A middle approach between the two ones described above identifies as company's interest the maximization of shareholders' investment profitability[432]. This solution contemplates both the above-

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[428] See P. LUCARELLI, *Rapporto di cambio incongruo, invalidità della fusione e rimedi: una relazione ancora da esplor*are, in *Riv. dir. Comm.*, 2001, p. 286 et seq., according to which the exchange ratio is fair when it meets the requirement of replacing shareholdings in a neutral way for shareholders.

[429] A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 3 et seq. See also the bibliographic references indicated therein.

[430] See F. GRAMMEGNA, *Note in punto di Leveraged Buy-Out*, in *Riv. dir. Comm.*, 1993, p. 80 et seq.; I. CHIEFFI, *Il leveraged buyout nell'ordinamento italiano*, in *Giur. Comm.*, 1992, I, p. 988 et seq.; R. PARDOLESI, *" Pardolesip. 988 et senovità a tinte forti (o fosche?)*, in *Giur. Comm.*, 1989, p. 404 et seq.

[431] A. DAMODARAN, *The dark side of valuation: valuing young, distressed and complex business*, 2nd edition, Financial Times Management, 2009, according to which the intrinsic value of a cash flow-generation asset is a function of how long you expect it to generate cash flows, as well as how large and predictable these cash flows are. This is the principle that we use in valuing businesses, private as well as public, and in valuing securities issued by these businesses. See also R.A. BREALEY – S.C. MAYERS – F. ALLEN, *Principles of Corporate Finance*, 11/e (Global Ed.), Mc GrawHill, 2014, *passim* and A. BLACK – P. WRIGHT – J.E. BACHMAN, *La ricerca del valore nell'impresa. Analisi e gestione dei fattori di successo della performance*, 1999, p. 58 et seq. For Italian scholars see P. MONTALENTI, *Leveraged buyout: una sentenza chiarificatrice*, in *Giur. it.*, 1999, p. 2105 et seq.; M. S. SPOLIDORO, *Incorporazione della controllante nella controllata e "leveraged buy out"*, in *Le Società*, 2000, p. 81 et seq.

[432] L. MENGONI, *Appunti per una revisione della teoria sul conflitto di interessi nelle deliberazioni di assemblea della società per azioni*, in *Riv. soc.*, 1956, p. 434 et seq.; D. PREITE, *Abuso di maggioranza e conflitto di interessi del socio nelle società per azioni*, in G.E. COLOMBO – G.B. PORTALE (eds.), *Trattato delle società per azioni*, 3, 2, 1993, p. 135; A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 7 et seq.;

mentioned approach on the matter: it presupposes, first, that the shareholders' equity remains unchanged; and, secondly, the improvement of the company's ability to generate profits or cash flows. The pursuit of the company' interest in maximizing profits is related to the determination of a fair exchange ratio[433] and to Maximizing the total value of the shares, in compliance with the constraints provided by the law[434]. The main criterion to assess the profitability of shareholders' investment lies in increasing the total value of shares[435], since the company's ability to generate profits improves with increasing such value[436].

Among the special interests of the shareholders who deserve protection, there are without any doubt the followings: the interest in maintaining the absolute economic value of their position[437], and the interest in maintaining the participation in equal proportion after the merger[438]. Provisions that impose the adoption of an appropriate exchange ratio and to provide adequate information, i.e. Sections 2501-*bis*, 2501-*quater* and 2501-*quinquies* of the Italian Civil Code, directly protect this interest. Shareholders who believe that the exchange ratio has been incorrectly calculated may also take an individual action of liability as laid out in Section 2504-quater,

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V. AFFERNI, *Invalidità della fusione e riforma delle società di capitale*, in *Giur. Comm.*, 2009, I, p. 190 et seq.

433 L. A. BIANCHI, *La congruità del rapporto di cambio nella fusione*, op. cit., p. 46 et seq.

434 A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 15 et seq.

435 A. DAMODARAN, *The dark side of valuation: valuing young, distressed and complex business*, p. 13 et seq.

436 L. ENRIQUES, *Il conflitto di interessi degli amministratori di società per azioni*, Milano, 2000, pp. 176 ss.

437 P. MARCHETTI, *Decreto del Presidente della Repubblica 10 febbraio 1986, n. 30*, in *Le nuove leggi civ. comm.*, 1988, p. 183.

438 G. SCOGNAMIGLIO, *Le scissioni*, in G. E. COLOMBO – G. B. PORTALE (eds.) *Trattato delle società per azioni*, 7, 2, 2004, p. 166; see also G. DOMENICHINI, *Fusioni e scissioni – profili civilistici delle recenti evoluzioni della prassi*, in *Il contr. leg. dei conti*, 2001, p. 128.

paragraph 2, of the Italian Civil Code[439] (i.e. the right to compensation for any damage caused to shareholders or third parties damaged by the merger).

However, this not means that the exchange ratio may not be determined so as to deprive who hold a share below the minimum exchangeable of its status of shareholder[440]. In case a shareholder does not have the sufficient number of shares required by such ratio, indeed, he may lose his shareholder status. This because, on one hand – as already said above – Section 3, paragraph 1 of the Tenth Directive, as well as Section 2501-ter, paragraph 2, of the Italian Civil Code, provide that the cash payment may not exceed 10 % of the nominal value of the shares; on the other hand, Section 2501-sexies, paragraph 3, of the Italian Civil Code, as well as Section 8, paragraph 2 of the Tenth Directive, provide that an independent expert shall be appointed (by the Court or by the competent public entity) for the purpose of preparing single written report on the fairness of the exchange ratio, which therefore cannot be not be arbitrarily determined by the parties. It must therefore be concluded that the so-called cash-out merger is not eligible under European rules[441]. In any case, even in the light of the foregoing considerations, this shall not mean that the shareholder has the right to maintain his influence on decisions, although in proportion to the assets values and liabilities of the companies involved in the merger; on the basis of comparative

[439] V. AFFERNI, *Invalidità della fusione e riforma delle società di capitale*, op. cit., p. 194.

[440] As affirmed, on the contrary, by A. SERRA, *La trasformazione e la fusione di società*, op. cit., p. 360.

[441] However, as affirmed by M. VENTORUZZO, *Freeze-Outs: transcontinental analysis and reform proposal*, in *Virginia Journal of International Law*, Vol. 50, n. 4, 2010, p. 851 «*if the exchange ratio is high enough, only the largest shareholders are entitled to obtain at least one share and therefore maintain their participation in the company; meanwhile, the minority shareholders receive a cash equivalent to the value of the fraction of a share to which they are entitled*».

evaluations, indeed, a different distribution of shares might take into account company interest most deserving of appreciation[442].

7.2 Tenth Directive and protection of dissenting shareholders

As already observed above, the Tenth Directive has not provided harmonization, through common provisions, for protection for minority shareholders who want to oppose the cross-border merger; it leaves the adoption of specific provisions during the transposition of the Directive to the discretion of the Member States. Such a legislative choice is in line with the most recent tradition and with the conflicts among legal system already described in the first Chapter since - considering protection instruments provided by each Member State for domestic mergers, also applicable for cross-border mergers - the protection of minority shareholders is a matter falling under the competence of Member States[443].

Given the above, a first consideration shall be given on the effective opportunity of a Member State to choice to provide for specific protection instruments for minority shareholders in the context of a cross-border merger. In this regard, it has to be remembered that merger is one of the most "democratic" corporate restructuring process[444], since its approval requires a positive vote of the general meetings (thus, this means that all shareholders are entitled to participate in the general meeting) of all of the merging companies involved, to be adopted through an increased number of majority than normally required in ordinary meetings. As already observed, Section

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[442] C. SANTAGATA, *Le Fusioni,* op. cit., p. 476.

443 M. WYCKAERT - K. GEENS, *Cross Border Merger and Minority Protection: an Open-Ended Harmonisation*, in *Utrecht Law Review*, volume 4, issue 1, 2008, p. 42.

[444] M. WYCKAERT - K. GEENS, *Cross Border Merger and Minority Protection: an Open-Ended Harmonisation*, op. cit., p. 46.

9, paragraph 1 of the Directive on cross-border mergers provides that the general meeting of each of the merging companies shall decide on the approval of the common draft terms of cross-border merger. Therefore, shareholders will at least have the right to participate in the decision-making process.

Secondarily, the change *lex societatis* applicable to the absorbed company, as a result of the merger, may also not be considered as a real risk factor for shareholders, as there are no so deep differences between the corporate models proposed by different legal systems at EU level (or, rather, bigger than differences between corporate models within the same legal system), which would justify the need for specific protections[445]. Indeed, it would be difficult to affirm that a Member State provides a significantly lacking of shareholders' protections scheme than another one[446], also taking into account the harmonisation process that has characterized company law at EU level[447].

However, it must be acknowledged that in any case a change of *lex societatis* involves a substantial change of investment conditions; moreover, the fact that European legal systems are essentially equivalent in terms of protection of minorities does not allow to reach

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[445] According to M. WYCKAERT - K. GEENS, *Cross Border Merger and Minority Protection: an Open-Ended Harmonisation*, op. cit., p. 50, «*this vision seems to be based on the presumption that shareholders are – generally speaking – more familiar with the national law of the company in which they are holding their shares than with the law of other Member States, and are better placed to enforce their rights under such national law*» but, as specified by the authors, «*this may, in itself, be an accurate presumption, but only to the extent that shareholders are 'of the same nationality' as the company. And that is, in real life, less and less the case, which also, over the years, will make the presumption less evident*».

[446] M. VENTORUZZO, *Cross-border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights under Italian Law*, op cit., p. 11.

[447] For an analysis of the harmonization process of the corporate law within the EU by means of directives see A. SANTA MARIA, *European Economic Law*, Netherlands, Kluwer, 2009, p. 120 et seq.

definitive conclusion on the issue at hand. The change of *lex societatis* is, in itself, a change of shareholder's rights. Even though the value of shares, before and after the merger, remains formally the same, differences regarding minor administrative rights or company rules may arise[448]. Furthermore, the new *lex societatis* may in the future evolve in a different way from the original law of the incorporated company. In other words, after the merger the shareholder is subject to a new legal framework, different from the original one.

In addition, economic considerations should be taken into account; the effects of a cross-border merger announcement are more positive for a target company (absorbed) when the State of incorporation provides better shareholders' protection than the country of origin[449]. In other words, the increase of protection level ensured to shareholders by the legal system of the company resulting from the cross-border merger could increase economic returns[450]. Finally, the choice of enhancing the level of protection of shareholders by a Member State may also have a positive impact on the overall system level, encouraging other States, in a sort of competition among each other, to gradually remove the differences still existing among Member States' legislations[451]. Also on this basis, several EU Member

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[448] D. FAUNELE – F. M. MUCCIARELLI, *Questioni in tema di fusioni transfrontaliere*, op. cit., p. 755 et seq.

[449] A. BRIS – C. CABOLIS, *The Value of Investor Protection: Firm Evidence from Cross-Border Mergers*, in *The Review of Financial Studies*, vol. 21, issue 2, 2008, p. 605 et seq.

[450] M. MARTYNOVA – L. RENNEBOOG, *Spillover of Corporate Governance Standards in Cross-border Mergers and Acquisitions*, in *Journal of Corporate Finance*, 14, 2008, p. 220, according to which partial takeovers may also lead to a spillover effect (spillover by control).

[451] M. M. SIEMS, *The Case Against Harmonisation of Shareholder Rights*, in *European Business Organization Law Review*, vol. 6, no. 4, p. 547.

States have been encouraged in order to provide specific provisions concerning protection of minority shareholders[452].

7.3 The protection instruments

Generally speaking, the remedies available to minority shareholders – according to Italian law - may be divided in "obligatory" remedies, "*in rem*" remedies and exit remedies.

With regard to *in rem* remedies, the Italian case law has given rise to certain interpretative doubts concerning the type and nature of corporate deeds that shareholders can challenge, for example with reference to the resolution of the Board of Directors approving the merger plan; a non-binding deed, indeed, generally may not cause damage to a company. In the example at issue, the merger plan approved by the Board of Director requires a sort of "ratification" by the shareholders meeting in order to produce its effects. As a consequence, shareholders cannot challenge the Board of Director resolution. On the other hand, with reference to the binding agreements provided in the merger plan (such as exclusivity or confidentiality agreements), it's necessary to identify which damages may be caused by the resolution at issue.

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[452] Spain (Sections 320 and 149 of *Ley de Sociedades Anonima*, provides for a "*separaciòn"* right (a right of withdrawal from the company) granted to shareholders that have not voted to approve a merger transaction where the resulting compay is a *sociedad anònima europea* with its *domicilio* abroad, or the transfer of the registered office abroad (as also provided for Spanish limited liability companies by Section 95, letter "b", of the *Ley 2/1995, de 23 de marzo de Sociedades de Responsabilidad Limitada*). In addtion, Section 62 of the Spanish law no. 3/2009116 (implementing the Tenth Directive) provides that if the shareholders of a Spanish company involved in a cross-border merger disagree with the merger and the resulting company has its registered office in another Member State, the former will have the right to withdrawal from the company as provided for limited liability companies (*Ley the Sociedades de Responsabilidad Limitada* mentioned above).
Also Germany (sections 122h and 122i of *Umwandlungsgesetz*), the Netherlands, Poland and Romania provides rules that grant to dissenting shareholders a sort of withdrawal right similar to the Italian "*recesso*" right.

Moreover, it must be observed that shareholders are not granted with a direct remedy as, according to Section 2388, paragraph 4, of the Italian Civil Code, only resolutions harmful to the rights of shareholders may be challenged[453], i.e. those that directly and immediately affect a shareholder personal right (e.g. the option right or the pre-emption right); the abovementioned rule provides indeed that only the board of statutory auditors or directors (who were not present or dissented) may challenge resolutions which are not adopted in compliance with the law or the articles of association. In the same way, also a resolution of the Board of Directors in breach of conflict of interest rules may not be challenged by an individual shareholder or a qualified minority[454].

As far as the resolution of the shareholder's meeting approving the merger plan in concerned, it may be challenged – as provided under Section 2377, paragraphs 2 and 3, of the Italian Civil Code – where it has been not adopted in conformity with the law or the articles of association; it can be challenged by absent, dissenting or abstaining shareholders when they own a number of shares with voting rights representing, also jointly, one per thousand of the company capital in companies which resort to the capital market and five per cent in other companies. Shareholders who are not entitled to challenge the resolution, are entitled – according to paragraph 4 of the abovementioned Section - to compensation for damages cause to them

[453] See Italian case law: Supreme Court of Cassation 28 March 1996, no. 2850, published in *Foro it.*, 1997, I, p. 235; Court of Rome 19 July 2005, published in *Foro it.*, 2006, I, p. 1622.

[454] L. ENRIQUES, *Il conflitto di interessi degli amministratori di società per azioni*, Milano, op. cit., p. 372; see also G. FRÈ – G. SBISÀ, *Delle società per azioni. Artt. 2325-2409*, I, in F. GALGANO (ed.), *Commentario del codice civile Scialoja-Branca*, Bologna-Roma, 1997, sub. Section 2391 of the Italian Civil Code, p. 382, according to which the resolution, in order to be considered in breach of conflict of interest rules according to Section 2391, paragraph 3, of the Italian Civil Code, must be detrimental to the company's interest and, in the event of damage to the company's interest, may recognized only an indirect damage to the individual's interest.

by the resolution's non-compliance with the law or the articles of association. With regard to the burden of proof, the challenging shareholder shall produce the evidence in order to prove the actual damage to the economic interest protected by the law[455], underlining therefore the complexity of the burden of proof, which remains with the challenging shareholder-plaintiff[456].

Another *in rem* remedy available to shareholders is the possibility to challenge the resolution may also in case of abuse of majority power[457] or of breach of the principle of equal treatment guaranteed to shareholders in accordance to Sections 2348, paragraph 1, of the Italian Civil Code and 92 of the Legislative Decree 24 February 1998, no. 58, providing Consolidated Law on Finance (*Testo Unico della Finanza*)[458].

About the principle of equal treatment, a degree of legal uncertainty seems to surround it, especially in relation to an interpretation according to which the application of the principle of equal treatment shall be based on the parameter of "reasonableness",

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[455] See Italian case law: Supreme Court of Cassation 25 March 2003, no. 4372, published in *Diritto e Pratica delle Società, Il Sole 24 Ore, 19, 2003, p. 58 e et seq.* e in *Impresa*, 2003, p. 1060 et seq., according to which the demonstration of an actual damage to a protected economic interest shall be considered as a prerequisite for the recognition of the interest in bringing proceedings.

[456] A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 267.

[457] D. PREITE, *Abuso di maggioranza e conflitto di interessi del socio nelle società per azioni*, op. cit., p. 224 et seq.; M. CASSOTTANA, *L'abuso di potere a danno della minoranza assembleare*, Milano, 1991, p. 162 et seq.; A. CERRAI – A. MAZZONI, *La tutela del socio e delle minoranze*, op. cit., p. 77 et seq.; M. A. IMBRENDA, *L'abuso di potere da parte della maggioranza vizia la delibera*, in *Le Società*, 1995, II, p. 1548 et seq., which provide comments to the Supreme Court of Cassation ruling on 5 May 1995, no. 4923.

458 See G. OPPO, *Eguaglianza e contratto nella società per azioni*, in *Riv. dir. civ.*, 1974, p. 629 et seq.; C. ANGELICI, *Parità di trattamento degli azionisti*, in *Riv. dir. comm.*, 1987, I, p. 1 et seq.; F. D'ALESSANDRO, *La seconda direttiva e la parità di trattamento dei soci*, in *Riv. soc.*, 1987, p. 1 et seq.

where the assessment of the interests involved shall be carried out on a case-by-case basis[459].

As far as the abuse of majority power is concerned, according to the settled case law, the resolution may be challenge in case of manifest unfairness or arbitrariness of the exchange ratio [460]. However, the evidence of the manifest unfairness of the exchange ratio in itself is not sufficient to satisfy the burden of proof, since it is also necessary to prove that the same constitutes a fraud against the minority on the basis of unambiguous factual elements[461]; and such proof may, in many cases, be restrictive for the injured shareholders and may breach the requirements for their protection.

The last deed of the merger process, which the shareholders could challenge, is the merger deed. Scholars consider that active legitimation may be justified by the fact that the interests protected are basically the same which allows shareholders to challenge the merger resolution[462]. However, according to an opposite point of view,

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[459] D. PREITE, *Abuso di maggioranza e conflitto di interessi del socio nelle società per azioni*, op. cit., p. 228; A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 284.

[460] See Court of Rome, 12 October 2001, commented by G. BRAVO, *Limiti del sindacato giurisdizione sulla determinazione del rapporto di cambio*, in *Le Società*, 7, 2002, p. 886; Court of Genova, 21 December 2000, commented by P. LUCARELLI, *Rapporto di cambio incongruo, invalidità della fusione e rimedi: una relazione ancora da esplor*are, op. cit.; Court of Milan, 13 May 1999, commented by P. MONTALENTI, *Leveraged buyout: una sentenza chiarificatrice*, op. cit.; Court of Milan, 20 January 1998, published in *Foro Padano*, 1998, p. 258 et seq.

[461] This means that the challenging shareholder-plaintiff shall demonstrate that the directors or the mayority shareholder(s) have planned the merger with the purpose of excluding (or significantly reducing the participation of) minority shareholders, F. GALGANO, *La circolazione delle partecipazioni statali*, in *Riv. dir. Comm.*, 1984, I. p. 449 et seq.

For case law see Court of Perugia, 26 April 1993, published in in *Giur. Comm.*, 1995, p. 134 et seq., commented by L. STANGHELLINI, *Osservazioni in materia di sindacabilità nel rapporto di cambio nella fusione dopo la riforma del 1991*, cit., p. 135. See also A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 286.

[462] A. GENOVESE, *L'invalidità dell'atto di fusione*, 1997, p. 61 et seq.; M. DE ACUTIS, *Il nuovo regime dell'invalidità della fusione*, in *Giur. comm.*, 1991, I, p. 729 et seq..

shareholders cannot challenge of the merger deed. According to this view, due to the contractual nature of the merger deed and since the management of the company exclusively belongs to the directors[463], the same merger deed may not be challenged by shareholders[464].

Finally, a last (and residual) *in rem* remedy available to shareholders could be found in the so-called "atypical precautionary measure" provided for by Section 700 of Italian Civil Procedure Code, together with the suspension of the execution of the resolution pursuant to Section 2378, paragraphs 3 and 4, of the Italian Civil Code[465]. However, it should be remembered that according to Section 2504-bis of the Italian Civil Code, and as also confirmed by Section 17 of the Tenth Directive, the effectiveness of the merger begins once the cross-border merger deed has been filed with the Companies Register (or through the different means pursuant to which the merger becomes effective according to the implementing rules of the other Member States), and therefore after that moment the invalidity of the same may not be invoked; in such a case, only "obligatory" remedies will remain for minority shareholders[466].

With regard to the "obligatory" remedies, the most relevant case for the purposes of this work is the shareholder's action for damages to his individual interests under Section 2504-quater,

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[463] See for example Section 2380-bis of the Italian Civil Code.

[464] L. PICONE, *Invalidità della fusione e mezzi di tutela del socio*, in *Le Società*, 1999, p. 462, commenting the ruling of Court of Rome, 23 September 1998; see also A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 288.

[465] The precautionary measure can be filed before the challenge of the merger resolution, since so far the shareholder has no specific protection; see Court of Milan, 20 January 1998, published in *Foro Padano*, 1998, p. 258 et seq.

[466] Among scholars that argued a regression of shareholders' protection see F. D'ALESSANDRO, *Il diritto delle società da i "battelli del Reno" alle "navi vichinghe"*, in *Foro it.*, 1988, V, p. 48; see also C. ANGELICI, *La nullità della fusione*, in *Riv. Dir. Comm.*, 1992, p. 271; F. D'ALESSANDRO, *La tutela delle minoranze tra strumenti ripristinatori e strumenti risarcitori*, in *Riv. Dir. Civ.*, 2003, I, p. 708; A. GENOVESE, *La tutela risarcitoria dell'azionista pregiudicato dalla fusione*, in *Riv. soc.*, 2007, p. 64.

paragraph 2, of the Italian Civil Code. The analysis on this matter will change depending on whether remediation claimed by shareholder for the damage suffered may be considered as indemnity (*natura indennitaria*) or compensation (*natura risarcitoria*)[467]. In the first case, once it is proved that the internal procedures or the merger deed are not in compliance with the applicable law, the damaged shareholder will be entitled to a lump-sum which, however, does not take into account the greater damage suffered. In the second case, on the other hand, the challenging shareholder-plaintiff shall prove all conditions of civil liability. From the point of view of the shareholder, the advantage may lie in the fact that the compensation for damage would include the consequential loss (i.e. the intrinsic value of shares) and the present value of loss profits (i.e. the estimate of the total sum of money lost, which may have been invested in alternative investments) [468]. However, the problems associated with the remedy at hand are evident: for example, the time period to be taken into account for the calculation of the damages; the shareholder could receive compensation lower than the actual value of his shareholdings[469] and, above all, such calculation would not take into account the complexity of stock exchanges. To better explain, between the date of the adoption of the merger resolution (considered as the starting point from which the damage may be assessed) and the date of the decision of the Court relevant to the damage compensation, it is not possible to abstractly reconstruct what would have been the strategic investment

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[467] For this reconstruction see A. GENOVESE, *La tutela risarcitoria dell'azionista pregiudicato dalla fusione*, op. cit., p. 70 et seq.
[468] And, according to A. DE CUPIS, *Il danno. Teoria generale della responsabilità civile*, Milano, 1979, p. 303 and M. FRANZONI, *Il danno risarcibile*, Milano, 2004, p. 195 et seq., also the future loss of profits (i.e. the total sum of money that would have generated the lost profits, which may have been invested in uncertain future investments).
[469] A. VICARI, *Gli azionisti nella fusione di società*, op. cit., p. 325.

choices of the shareholder if he obtained a number of shares, issued by the absorbing company in exchange, calculated according to a fair exchange ratio[470]. In addition, it is also worth considering how to take into account benefits achieved in the meantime by shareholders, even though they have been damaged by the merger, e.g. dividends which may not have been distributed otherwise, increases in the value of the investments related to synergies which have been subsequently developed[471]. Therefore, it is difficult to affirm that the interest of shareholder damaged by the merger can be fully restored by means of the abovementioned judicial remedies, both for the heavy financial burden experienced by shareholder and for the difficulty of meeting the probative standard in specific cases of non-fulfilment[472].

It should also be noted that also the obligatory remedies provided for in the U.S. legal system, the so-called "fiduciary duties", have been strongly criticized due to their ineffectiveness[473].

Finally, along with remedies described above, there are the so-called exit remedies, i.e. the typical right of withdrawal under the Italian law referred to in Sections 2437 and ff. of the Italian Civil Code. The 2003 Italian company law reform seems to consider the withdrawal as a means of "reconsidering the investment" in the light

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[470] C. SANTAGATA, *Operazioni straordinarie e responsabilità*, in *Riv. soc.*, 2004, p. 1529.

[471] These issues are more relevant for listed companies, due to the higher frequency of transactions. For the analysis of certain issue arising in the determination of damages in case of non-fulfilment of obbligations relevant to takeover bids see C. MOSCA, *Acquisti di concerto, partecipazioni incrociate e responsabilità per inadempimento dell'obbligo di OPA (nota a margine del caso Sai-Fondiaria)*, in Riv. soc., 2007, p. 1290 et seq.

[472] C. SANTAGATA, *Operazioni straordinarie e responsabilità*, in *Riv. soc.*, 2004, p. 1537.

[473] C. R. TAYLOR, *The inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, in *Oregon Law Review*, Vol. 85, no. 993, 2007; M. SIEGEL, *Fiduciary Duty Myths In Close Corporate Law*, in *Del. J. Corp. L.*, 2004, Vol. 29, 2004 p. 377.

of changes in the conditions of the investment itself[474]; therefore, as observed[475], the withdrawal would protect the individual interest of the shareholder to dissolve partnership, monetizing his shares, when events which have a particularly significant impact on the organizational structure occur[476].

The extension to the scope of "exit" options for minority shareholder should be also considered as a sort of restriction to the greater freedom of action accorded to statutory autonomy[477], which

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[474] A. TUCCI, *Illegittimità dell'esercizio del recesso e responsabilità della banca*, in *Banca, borsa, tit. cred.*, 2007, p. 20 et seq.; P. SPADA, *Relazione di sintesi*, in C. MONTAGNANI (ed.), *Profili patrimoniali e finanziari della riforma*, Milano, 2004, p. 271 et seq. Therefore, the reform seems to have overcome the idea of the withdrawal as a form of unilateral opposition of the shareholder by dissolution of its partnership.

[475] A. PACIELLO, *sub art. 2437-ter*, in G. NICCOLINI - A. STAGNO D'ALCONTRES (eds.), *Società di capitali. Commentario*, Napoli, 2004, p. 1105.

[476] It seems that the 2003 reform gave priority to the demands of minority shareholders, who cannot directly influence the choices of company and may become a sort of "prisoners" of it. It has been extended the scope of application, since the pre-reform legislation provided for only three cases in which the shareholder – of a non-listed company - had the right to obtain payment of shares: change of the company's corporate purpose, change of the corporate form of the company, cross-border transfer of the registered office (see G. GRIPPO, *Il recesso del socio*, in G. E. COLOMBO - G. B. PORTALE (eds.), *Trattato delle società per azioni*, 6, 1, Torino, 1993, p. 137; G. PRESTI, *Questioni in tema di recesso nelle società di capitali*, in *Giur. comm.*, 1982, I, p. 112 et seq.). In addition, for non-listed companies, the shares of the withdrawing shareholder were liquidated in proportion to the company's assets resulting from the financial statements of the last financial year (i.e. the "book value"), which in most cases was significantly lower than its market value, due to the fact that in Italy historical cost is usually the basis of measurement of elements of financial statements, also in order to protect the legal corporate capital (M. VENTORUZZO, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, in 40 *Tex. Int'l L.J.*, 2004, p. 113). The reform, on the other hand, established a liquidation process aimed at protecting company's asset integrity and letting the company bear the costs of the shareholder's exit on a residual basis only (P. PISCITELLO, *Riflessioni sulla nuova disciplina del recesso nelle società di capitali*, in *Riv. soc.*, 2005, p. 526). The risk is, inndeed, that the right of withdrawal may represent, in particular circumstances, an obstacle to the adoption of certain decisions aimed at achieving the optimal corporate structure, which constitutes a sort of veto power of minority shareholders over corporate action.

[477] According to the new versions of Section 2437 and 2473 of the Italian Civil Code provided by the Legislative Decree 17 January 2003, n. 6, the by-laws could provide for different causes of withdrawal by shareholders.

has been one of the guidelines of the 2003 companies reform[478]. The 2003 reform legislator has then preferred the right of withdrawal to protect minority shareholders in the event of decisions capable of altering the business risk conditions[479].

In the new rules the right of withdrawal has also a wider function, i.e. it is a means of company's internal debate and bargaining to start negotiations between majority and minority shareholders and minority shareholders in case business and corporate choices[480]. In other words, the right of withdrawal serves a double function: on one hand, it has an "exit" function, namely the protection of minority shareholder by means of divestment; on the other hand, a "voice" function, i.e. the renegotiation process for company organization[481].

In light of the foregoing considerations, the withdrawal right may be considered the most effective instrument for the protection of minority shareholders whose interests have been prejudiced (even in terms of modification of investment conditions) as a consequence of

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[478] The withdrawal right before the reform had to ensure of a stable investment climate as its main purpose (V. DI CATALDO, *Il recesso del socio di società per azioni*, in *Il nuovo diritto delle società – Liber amicorum Gian Franco Campobasso*, P. ABBADESSA – G. B. PORTALE (eds.), 3, Torino, 2007, p. 224). In other words, the contribution of the shareholder was seen as inextricably linked to the company and any partial divestment of shares was likely to represented a reduction in absolute terms of the resources of the system in question, as the capital obtained would hardly be reintroduced through a re-investment in other entrepreneurial entities. The evolution of the Italian markets and of the economic system has considerably changed the legislator's approach to the right of withdrawal, as it could be highly probable that assets which have been withdrawn through the exercise of withdrawal right will be reintroduced into the production system and therefore will not be left unproductive.

479 F. CHIAPPETTA, *Nuova disciplina del recesso di società di capitali: profili interpretativi e applicativi*, in *Riv. soc.*, 2005, p. 489.

[480] And this, at least according to the legislator's intentions, shall allow better allocation of financial means, V. DI CATALDO, *Il recesso del socio di società per azioni*, op. cit., p. 224.

[481] For the distinction between the two functions see A. O. HIRSCHMAN, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Harvard University Press, 1970.

the approval of a cross-border merger by the majority shareholder(s)[482]. First, due to the certainty and promptness of the protection; *in rem* remedies, such as the challenge of the resolution, is a protective mechanism not so used both at national and EU level[483]. Because of their limited scope - in particular, because the invalidity of the cross-border merger may not be claimed once the relevant deed has been filed with the Companies Register – it's difficult to imagine a widespread and effective use of such remedies by the minority shareholders in order to protect their interests.

With regard, on the other hand, to obligatory remedies, the shareholders who intend to use them have, however, to deal with excessive length of judicial proceedings in Italy, after which only the damages proved would be awarded (which are never higher than the actual damages incurred); thus, if the expected profit outweighed loss, the threat posed by compensation would not have any deterrent effect on company - and, on the other hand, this also appears to be unsuccessful for the "investor-shareholder".

The exit remedy, on the contrary, meets the requirements of a modern capitalist economy. As a matter of fact, the minority shareholders hardly participate in management activities; their contribution mainly lies in capital contribution (so as to maximize its economic return). In this light, the minority shareholder will not have a particular interest in owning shares of a company rather than another. Instead, it will have an interest in achieving the best balance between earnings prospects and risks profile, according to his portfolio. Section 2497-quater, paragraph 1, letter a), of the Italian

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482 Also, it seems to be the remedy that best suits the complexity of the corporate structure.

483 Due to the greater importance given to effects of company decisions, in accordance with the principle of majority.

Civil Code entitles each shareholder to withdraw from the company when the (directing) company has resolved upon a change on its own corporate purpose, thereby allowing the performance of activities that may directly and significantly affect the economic and financial situation of the company (subject to the direction and coordination activity)[484]. The right to withdraw allows to avoid becoming a "prisoner of the company" and to withdraw in order to make capital investments in other companies, which better satisfy the preferred investment parameters. This feature is further highlighted by the possibility of a partial withdrawal, a choice that is justified by the need for diversification, through divestment and re-use of money in other investment activities. In case, on the other hand, of a shareholder who, even though he is not a majority shareholder, identifies himself in the core business of a certain company (e.g. for historical reasons, market know-how or other reasons) and, therefore, shall be presumed to hold a significant participation, the right of withdrawal will, albeit indirectly, grant a "voice" right to shareholder and therefore his active participation in decision making of company as a result: the more significant the participation is, the more effective will be the threat of exercising the right to withdraw. The advantages brought by an internal negotiation, even though "voluntary" more than spontaneous, as in the example in question, have been underlined by many experts: the right of withdrawal has been considered a useful, even

[484] English translation of Section 2497-quater, paragraph 1, letter a), of the Italian Civil Code:

«*The shareholder of a company subject to the direction and coordination activity may withdraw:*

a) when the company or entity that carries out direction and coordination activity has reslved upon a transformation that implies a modification of the corporate purpose, or a modification of the corporate purpose, or a modification of the corporate activity allowing the carrying out of activities that sensibly and directly alter the economic and financial conditions of the company subject to the direction and coordination activity».

indispensable instrument of negotiation among shareholders because it allows to combine divergent interests (the so-called bargaining chips[485]), such as the requirements for functional and organizational changes for the best allocation of common assets, the requirement to leave the company's ownership unchanged. In other words, although the majority will presumably adopt decisions without involving minorities, the latter may exercise the right of withdrawal to claim participation in the decision-making process concerning corporate strategies, with obvious benefits in terms of legal certainty and effective protection.

In addition, simplifying the hypothesis of dissolution may have the effect of making the market more liquid, thus attracting more investments. As a matter of fact, it is known that investors are obviously oriented towards liquid markets, which are based on spreading share ownership[486]. The withdrawal right may thus carry out what is contractually expected in business practice: the possibility of a divestiture remedy upon the occurrence of certain conditions. As is customary in M&A transactions, minority investors protect themselves by means of shareholders' agreements, aimed at ensuring specific rights in decision-making process within the target company. Such agreements also usually provide that one party might exit at different expiration times, or in case of disagreements with the majority shareholder (the so-called deadlock provisions). In the absence of an express choice by the parties, the right of withdrawal may, therefore, play the positive role of put options, which entitle the

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[485] S. W. STEVENSON, *The Venture Capital Solution to the Problem of Close Corporation Shareholder Fiduciary Duties*, in 51 *Duke Law Journal*, 2001, p. 1139 et seq.

[486] M. BECHT, *European Corporate Governance: Trading Off Liquidity against Control*, in *European Economic Review*, 43, 1999, p. 1071 et seq.

beneficiary of the put option the right to sell its shares under predetermined terms and conditions[487].

[487] The favourable considerations expressed above on the right of withdrawal deserve a rethink in relation to listed companies. As previously said, withdrawal right, in its main sense of exit option, is necessary whenever - in case of substantial changes that may alter prospects of profitability, the nature of the holding and or deeply alter the risk conditions existing upon registration in the shareholder register - the shareholder intends to divest its shareholding, but such operation might not be easy. An example of this is the case of non-listed companies, whose shares are owned by a small number of investors and are not traded publicly. On the contrary, in listed companies and publicly traded companies, a shareholder that wishes to "exit" from a company may do so quickly by transfer its shares at a market price. However, companies with a broad shareholder base are incompatible with the withdrawal: the risk of a joint exercise of the right of withdrawal by minorities (which often represents - in absolute terms - the majority) may force directors to renounce to most of the operations even if carried out in the interest of the company. Even though the liquidation procedure by application of Section 2437-quater of the Italian Civil Code aims at requiring the company to bear divesture costs only on a residual basis, it is easy to imagine that offering shares for sale to the general public may significantly affect the value of the shares as well as company's assets, especially when the cost is borne by the company.

In non-listed companies, however, the risk may be reasonably bearable by the company and more consistent with the "voice" as a function of the withdrawal right. If proportion of minority ownership is low, the company may have the opportunity to negotiate corporate projects with the minority shareholder. In listed companies, on the contrary, the effect of shareholding dispersion may preclude the possibility of such negotiation. Moreover, with reference to liquidation value of the shares, Section 2437-ter, paragraph 3, of the Italian Civil Code provides that value of liquidation of the shares listed on regular markets is determined with exclusive reference to the arithmetic average of the closing prices of the shares in the six months previous to the resolution, which legitimate the exercise of the withdrawal. It follows that, when stock market cycle enters into a period of contraction, shareholders may exercise such right when the average exit price over the last six months is higher – and it is quite probable – than the current stock price, disregarding any economic-industrial valuation. Moreover, the abovementioned circumstances might prevent the adoption of significant strategic choices for the company, which are particularly necessary in the context of an economic crisis. As a consequence, there would be some doubt about providing for the right of withdrawal also in relation to listed companies (this reconstruction is consistent with the applicability of the appraisal right for companies listed in the National Securities Exchange (68 Del. Laws ch. 337, §§ 3-4 (1991) and for companies with more than 2,000 shareholders, unless differently provided by the by-laws (Del. Laws ch. 50, § 262 (1967). For more detailed comments about the appraisal right and the exit opportunitird offered by the development of the stock market see W. T. ALLEN – R. KRAAKMAN – G. SUBRAMANIAN, *Commentaries and Cases on the Law of Business Organization*, 3rd edition, Aspen Publishers, 2009, p. 475 et seq., and E. L. FOLK III, The Delaware General Corporation Law: A Commentary and an Analysis, Boston, 1972, p. 391).

In the light of the foregoing considerations, it seems appreciable the choice of Section 2437-quinquies of the Italian Civil Code, to provide that shareholders who

Finally, in addition to the “exit” and “voice” instruments described above, the right of withdrawal, as well as other rules for the protection of minorities (such as mandatory bid, actions against directors, etc.), may further act as an indirect control instrument on the actions of the directors with even better effects in terms of economic performance, compared to direct involvement of the shareholders in the management of the company, as evidenced by some empirical studies. The principle of “rational apathy”[488] of shareholders is, in fact, a characteristic belonging to companies with a broad shareholder base, typical of modern economies, in which shareholders renounce to participate in the management in exchange for an economic return in terms of growth of equity value or dividends. From the point of view of the company, the withdrawal also allows those who make the decisions to know ex ante the economic context of the transaction, in relation to the overall outlay. This may certainly facilitate the planning of organizational and economic strategies, which may be affected - for example - by the risk of uncertainty relating to a reimbursement or refund.

8. Creditors’ protection

As said, the Legislative Decree no. 108/2008 did not provided for any instrument for protection of creditors within a cross-border

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did not participate in the resolution which determines the exclusion from the listing have the right of exercise their withdrawal. This provision may not be applied in the event of share listed in regulated markets of another Member State (such as, for example, the case of a cross-border merger within the European Uninion between two listed companies). If the protection of the right of withdrawal is recognized in cases of shareholder’s exit, this circumstance does not occur when the shareholder can easily exchange his shares on a regulated market offering the same guarantees as that Italian market.

[488] For an overall description of rational apathy of shareholders see M. M. SIEMS, *Convergence in Shareholder Law*, Cambridge, 2008, p. 89 et seq.

merger. Practically speaking, it just makes reference to the mechanism of creditors' opposition provided by Italian laws for domestic mergers. Therefore, it is necessary to analyse firstly the prerequisite to the right to oppose domestic mergers, in order to check whether it is possible to extend its applicability, and therefore if such right of opposition may be exercised within cross-border mergers, due to the change of *lex societatis* which occur in such a case.

With reference to domestic mergers in Italy, the applicable laws just grant to creditors the right to oppose the merger, without providing any prerequisite for the granting and the possible exercisability of this right.

The Italian company law reform occurred in 2003[489] has identified the diminution of the debtor's security assets (*garanzia patrimoniale*) as the basis of the creditors' opposition. As a matter of

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[489] Before the Italian company law reform occurred in 2003, there were two different positions in this legal vacuum. The settled case-law (in majority part trial courts) and the prevailing in legal doctrine (see R. ORIANI, *L'opposizione dei creditori della società alla fusione nel quadro dei mezzi di conservazione della garanzia patrimoniale*, Milano, 2011, p. 33 et seq.; G. FERRI – G. GUIZZI, *Il progetto di fusione e i document preparatori*, in *Il nuovo diritto delle società – Liber amicorum Gian Franco Campobasso*, P. ABBADESSA – G. B. PORTALE (eds.), 4, Torino, 2007, p. 260; M. PINARDI, *Le opposizioni dei creditori nel nuovo diritto societario*, Milano, 2006, p. 207 et seq.) identified the damage caused to creditors by the merger transaction as the basis of its creditor's opposition. Certain legal doctrine, then, focused on the issue of material prejudice, with the prevailing position used to make reference just to the pecuniary prejudice (i.e. the prejudice for the creditor to lose its chance to recover the credit; see S. CACCHI PESSANI, *sub art. 2503*, in *Trasformazione - Fusione - Scissione*, in P. MARCHETTI - L. A. BIANCHI – F. GHEZZI – M. NOTARI (eds.), *Commentario alla riforma delle società*, Milano, 2006, p. 721). The minority doctrine, on the contrary, identified the prejudice in terms of breach of the so-called business guarantee, which occurs when a debtor company may no longer fulfil its payment obligations when debts become due, that is insolvency.

For a general overview and the main cases-law and legal writing references about this main position see S. CACCHI PESSANI, *sub art. 2503*, op. cit., p. 720.

Opposite to this prevailing view, which identified the prejudice caused to creditors by merger as the basis of its creditor's opposition, there is a minority view, which identified the principle of protection of the legal sphere of the individual as the basis of it. As a result, the creditor could oppose to the merger without justifying its grounds, nor demonstrating what may have been prejudicial to its rights within the merger (see G. CABRAS, *Le opposizioni dei creditori*, Milano, 1978, p. 59).

fact, in order to balance the demands for speeding up the transaction and for protecting company's creditors, the 2003 reform provided for a further case of anticipated merger (sub Section 2503, paragraph 1, of the Italian Civil Code) in the event that a firm of auditors establishes that no further safeguards for the protection of creditors are required (in addition to the assets of companies participating in the merger)[490]; it is clear from the above mentioned case that reference is made to the protection of the security from the assets of the companies involved in the merger[491]. Further evidence supporting such interpretation is represented by the amendment (after the 2003 reform) of Section 2445, last paragraph, of the Italian Civil Code, according to which it is possible to conclude the anticipated merger even in case of pending opposition, where the Court considers as ungrounded the prejudice for the opponent creditor or in case company has provided adequate guarantees in order to prevent creditors' prejudice, which may only be of financial nature[492].

As far as prerequisite of creditor's opposition in cross-border mergers is concerned, it must be noted that such mergers are characterized by a specific risk which involves creditors, that is the change of the legal system of the debtor company which may potentially bring less advantages and protection for creditors[493]. Such

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[490] M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, in *Riv. dir. comm. e dir. gen. obbl.*, III, 2016, p. 507.

[491] See G. A. RESCIO, *La fusione e la scissione*, op. cit., pp. 291-292, according to which the ultimate aim of the opposition is to protect creditors from the risk of non-fulfilment of the of the obligation and/or failure to compulsorily satisfy the credit, or in general from any significant deterioration of of their status with regard to their "capital" or "commercial" security which depends on the legal and economics effects of the transaction.

[492] M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, op. cit., p. 507.

[493] F. M. MUCCIARELLI, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi*, op. cit., p. 192.

specific risk shall distinguish cross-border merger from domestic mergers, in which seems to issue only the case of merger between debtor company and a less capitalized company or indebted company. According to this perspective: (i) the risk of creditors would not consist in company's financial risk and business risk (i.e. different capital strength and different economic and financial perspectives of the two companies), since it depends on the change of *lex societatis*, namely change rules applicable to the company and of limits on private autonomy in the two different legal system; and (ii) the fact that Legislative Decree no. 108/2008 did not provided for any specific instrument for protection of creditors within a cross-border merger does not prevent the possibility to identify the change of *lex societatis* of the debtor company as a further prerequisite to apply the general remedy of the opposition. As a result of such perspective, in the event of a merger of an Italian company into a foreign company, the right to oppose the merger may be based on the transfer of debtor company's registered office abroad (and the consequent change of *lex societatis*), since it is not necessary to give evidence of the prejudice in terms a diminution of the debtor's security assets caused by the merger[494].

However, this approach seems not to be shared, since Section 11, paragraph 1, letter b) of the Legislative Decree no. 108/2008 simply extends to cross-border mergers the application of creditors' right to oppose, as provided for by Section 2503 of the Italian Civil Code for domestic merger, without any specific provision regarding the grounds of the right itself. Nothing would have prevented the Italian legislator, in fact, from qualifying the change of *lex societatis* caused by the merger according to the so-called cross-border

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[494] M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, op. cit., pp. 508-509.

transformation[495], providing, by way of example, creditors of the Italian company merging into a foreign company with the different remedy of opposition to domestic heterogeneous transformation, pursuant to Section 2500-novies of the Italian Civil Code (which is different from Section 2503 of the same Code from the point of view of the basis of the opposition)[496].

In this scenario, the change of the company's corporate form, due to the change of *lex societatis*, may legitimate the creditor's opposition by simply invoking the change of the company's organizational structure (e.g. mechanisms of profit distribution) and the negative impact of these new rules on creditors' stances[497].

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[495] On the issue at hand see the following guidelines of the Interregional Committee of the Notary Councils of the Tre Venezie:

- guideline no. E.B.1. *Legittimità del trasferimento in altro stato dell'unione europea della sede sociale con mutamento della "lex societatis"* (the legitimacy of transfer of the company seat in other EU Member State with change of the lex societatis), according to which it is possible to transfer the registered office of a company incorporated in Italy to another EU Member State and at the same time subjecting the company to the foreign legal system (so-called "lex societatis"), and therefore adopting its own corporate form of the legal system of the Member State in which it is transferred (so-called 'international transformation'); and
- guideline no. E.B.3. *Attuazione della pubblicità del trasferimento della sede all'estero* (implementation of the publication of transfer of the seat abroad), according to which the decision to transfer the registered office to another State of a company incorporated in Italy, without abandoning Italian law, is immediately registered in the Italian Companies Register and does not involve the deletion of the same by that Register, the change of applicable domestic law (so-called "lex societatis"), with acquisition of a corporate form provided by the dinestic law of the Member State of the European Union of destination, is subject to the cancellation of the company from the Italian Companies Register. Such cancellation, which may take place only after that the company, in its new corporate form, has been recognized by the State of destination, is not subject to scrutinity of legality by the Italian notary and can therefore be requested directly by the directors. It is preferable to consider that the cancellation of the company from the Italian Companies Register cannot take place before sixty days have elapsed from the registration of the resolution without opposition from the creditors.

[496] M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, op. cit., p. 509.

[497] See G. CABRAS, *Le opposizioni dei creditori*, op. cit., p. 107; M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, op. cit., pp. 509-510; M. MALTONI – F. TASSINARI, *La*

Therefore, in such legal vacuum, it can be affirmed that the intent of the legislator was to provide the remedy of opposition pursuant to Section 2503 of the Italian Civil Code also for cross-border merger, upon the occurrence of the same prerequisites for domestic mergers[498].

Given the above, it can be concluded that it is not sufficient to invoke the transfer of company's registered office abroad in order to argue that the change of the *lex societatis,* following the cross-border merger, may cause prejudice to company's creditors. In the context of cross-border merger, indeed, the only prejudice to be identified as the basis of its creditor's opposition is referred to the diminution of the debtor's security assets, since creditors are not entitled to exercise the opposition right to the merger resolution based on other reasons; therefore, the opponent creditor shall bear the burden of proving that the cross-border merger may prevent the possibility recover their credits, reducing the value of the debtor company's assets.

Recently, these conclusions have been confirmed by the Court of Milan in its order (*ordinanza*) on 19 August 2015[499]. The court order at hand is the first ruling in Italy regarding the main substantial issues on creditors' opposition to the cross-border merger.

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trasformazione delle società, Milano, 2011, pp. 280-281; G. MARASÀ, *Le trasformazioni eterogenee*, in *Riv. Not.*, 2003, I, p. 590; G. FRANCHI, *sub art. 2500-novies*, in *Trasformazione - Fusione - Scissione*, in P. MARCHETTI - L. A. BIANCHI – F. GHEZZI – M. NOTARI (eds.), *Commentario alla riforma delle società*, Milano, 2006, p. 404.

[498] M. SAGLIOCCA, *La opposizione dei creditori alla fusione transfrontaliera (nota a Tribunale di Milano, ordinanza 19 agosto 2015)*, op. cit., p. 510. But see also R. DESSÌ, *Le fusioni transfrontaliere e il mercato*, in G. FERRI – M. STELLA RICHTER (eds.), *Profili attuali di diritto societario europeo*, Milano, 2010, p. 274, according to which the instrument of the opposition presents certain crictical issues that could bring Italian legal system far from the other EU jurisdictions, representing a probable reason for choosing to be subject to another law in order to escape the constraints imposed by Italian laws.

[499] Case *Sorin S.p.A. v. Presidenza del Consiglio dei Ministri, Ministero dell'Ambiente, della Tutela del Territorio e del Mare, Ministero dell'Economia e delle Finanze.*

The issues examined in the Order of the Court of Milan are particularly topical, in the light of changes occurred within the legal framework of reference after the adoption of the Tenth Directive. Although the latter removed any obstacles or prohibitions imposed by domestic legislation to carry out cross-border mergers, it did not establish minimum European standards on protection of creditor's interests in cases of change of *lex societatis*, leaving Member States free to decide remedies to adopt[500].

In particular, the Court of Milan, definitely affirming the legitimacy of a cross-border transfer of an Italian company's registered office to another U.E. Member State, identified the prejudice to the rights of the creditor in terms a diminution of the debtor's assets as the basis of its creditor's opposition; moreover, the Court considered the transfer of company's registered office abroad as not sufficient evidence of damage to company's creditors.

The order has been issued following the opposition pursuant to Section 2503, paragraph 2, of the Italian Civil Code, filed by the Ministry of the Environment and Protection of Land and Sea, the Ministry of the Economy and Finances and the Presidency of the Council of Ministers, as creditors of the company Sorin S.p.A. in a dispute on environmental matters before the same Court. The opposition was filed in order to obtain, firstly, a declaration of the Court ascertaining the "unlawfulness" of transactions which resulted in the merger by absorption of Sorin S.p.A. into the company Cyberonics Inc., a company governed by the laws of U.S., declaring as invalid and ineffective the resolution of the shareholder's meeting of that approved the merger.

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[500] F. M. MUCCIARELLI, *Società di capitali, trasferimento all'estero della sede sociale e arbitraggi normativi*, in *Quaderni di Giurisprudenza Commerciale*, Milano, 2010 p. 134.

More precisely, through the cross-border merger at issue, Sorin S.p.A. was merged and incorporated into the newco and wholly owned subsidiary Sand HoldCo PLC (later renamed as LivaNova PLC). Thereafter, another merger - not involving Sorin S.p.A. - was carried out (under the laws of the State of Delaware), that is the merger by absorption of Cypher Merger Inc., (a subsidiary of LivaNova PLC), with and into Cyberonics, Inc.

Therefore, through this transaction: (i) Cyberonics, Inc. became a wholly owned subsidiary of LivaNova PLC and (ii) the shares of LivaNova PLC were transferred to Cyberonics, Inc. shareholders. As stated by the order of the Court of Milan, no merger between Sorin S.p.A. and the U.S. company Cyberonics, Inc. (which therefore became part of the companies' group led by the U.K. company LivaNova PLC) might have been possible and, as a consequence, the merger deed to which the opposition was filed may have only been the cross-border merger of Sorin S.p.A. into LivaNova PLC. The Court of Milan accepted Sorin S.p.A.'s application for precautionary measure pursuant to Section 700 of the Italian Civil Procedure Code and authorized the merger by absorption into LivaNova PLC, since the opponent creditors argued just only the prejudice embodied by the transfer of company's registered office in the U.K., and did not suffered any present and real diminution of the debtor's assets.

9. Employee participation

As already said, regarding employee participation the Tenth Directive was strongly influenced by the German debate.

It is known how, within this regard, European national legislations have taken very different positions. Corporate governance systems shift from excluding, as it happens in Italy, employees from the management, to a sort of imposition of the German *Mitbestimmung*, on the other extreme[501].

The decision to apply the corporate law of the Member State where the company resulting from to cross-border merger has its registered office may, in fact, give rise to protection issues, whenever such legislation does not provide any forms employee participation, or

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[501] Without going into details, it is sufficient to recall that German legislation, which provides for three forms of codetermination, based on the power conferred to employees within the supervisory board: the first form of codetermination - introduced by *Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie* of 21 May 1951 (the so-called *Montan-Mitibestimmungsgesetz*) applies to coal and steel enterprises and it is called "parity codetermination" or "qualified codetermination" (*paritätische oder qualifizierte Mitbestimmung*), based on numerical parity of shareholder's representatives and representatives of the employees within the supervisory board.

The second form of codetermination, pursuant to *Gesetz über die Mitbestimmung der Arbeit* of 4 May 1976, is applicable to limited liability companies and cooperatives with a number of employees that exceeds 2000: it provides for "quasi-parity codetermination" (*quasi-paritätische Mitbestimmung*) since, unlike the previously described form, in case of decision-making deadlock within the authority body, the Chairmen is entitled to exercise the double voting rights, which entails a double representation of shareholders.

Finally, the third form of *Mitbestimmun*, the most common one, introduced in 1952 by the *Betriebverfassungsgesetz* and amended by virtue of *Drittelbeteiligungsgesetzes* of 18 May 2004 (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*) applies to corporations, cooperatives and mutual associations with a number of employees between 500 and 2000 and grants employees with the right to elect their representatives in the supervisory board, in the proportion of one-third of the members.

See H. HIRTE - T. BÜCKER, *Grenzüberschreitende Gesellschaften*, 2 ed., München, 2006, p. 141 et seq.; W. STREECK - C. CROUCH, *Political Economy of Modern Capitalism: Mapping Convergence and Diversity*, London, 1997, p. 243; M. J. BONELL, *Partecipazione operaia e diritto dell'impresa*, op. cit., p. 5 et seq.

However, a closer look to the French law reveals that even this country does not ignore forms of codetermination, where it provides that in the event that the employees of the company (or its subsidiaries) hold 3% or more of the share capital, the by-laws might provide that one seat or two (never more than one-third) in the *Conseil de surveillance* may be reserved to shareholders employees. See Y. GUYON, *Droit des affaires. Tome I - Droit commercial général et Sociétés*, Paris, 2001, p. 376.

For first practical steps within this regard for the UK corporate law see B. WEDDERBURN, *The Future of Company Law: Fat Cats, Corporate Governance and Workers*, Liverpool, 2004, p. 49 et seq.

whenever including them, they are less protective than the ones of the country of origin.

However, the Directive provides a number of guarantees in order to protect employees acquired rights, which will be then embedded into domestic law applicable to the company resulting from the cross-border merger[502].

However, the Directive's choice creates more than a problem under the practical-operational profile, in view of the implementation of protection system in the company law to which the company resulting from the cross-border merger is subject. Section 16 of the Directive reaffirms the general principle: the company resulting from the cross-border merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office; but expressly provides a departure if one of the three conditions provided therein occurs[503].

First, where at least one of the merging companies has an average number of employees that exceeds 500[504] and «*is operating under an employee participation system within the meaning of section 2(k) of Directive 2001/86/EC*»[505].

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[502] Moreover, even the thirteenth recital of the Tenth Directive provides that if employees have participation rights in one of the companies involved in the cross-border merger, «*and if the national law of the Member State in which the company resulting from the cross- border merger has its registered office does not provide for the same level of participation as operated in the relevant merging companies, including in committees of the supervisory board that have decision-making powers, or does not provide for the same entitlement to exercise rights for employees of establishments resulting from the cross-border merger, the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights are to be regulated*».

[503] See P. FRANÇOIS - J. HICK, *Employee Participation: Rights and Obligations*, in D. VAN GERVEN (ed.), *Cross-Border Mergers in Europe*, I, Cambridge, 2010, p. 31.

[504] In the six months before the publication of the draft terms of the cross-border merger (section 16, paragraph 20, of the Tenth Directive).

[505] Involvement of employees meaning «*any mechanism, including information, consultation and participation, through which employees' representatives may*

In addition, the rules in force concerning employee participation in the Member State where the company resulting from the cross-border merger has its registered office shall not apply also where the national law applicable to the company resulting from the cross-border merger does not «*(a) provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; or (b) provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office*» (section 16, paragraph 2, of the Tenth Directive).

The EU rule at hand, than, explains what such derogation entails in practice: where one of the conditions mentioned therein occurs, «*the participation of employees in the company resulting from the cross-border merger and their involvement in the definition of such rights shall be regulated by the Member States, mutatis mutandis*» and without prejudice to what provided for under paragraphs 4 to 7 of the same section 16, and also in accordance with the principles and procedures laid down in the Regulation and the Directive on the Statute for a European company (*Societas Europaea*) – which are evoked for the purpose by cumbersome references[506].

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exercise an influence on decisions to be taken within the company» (section 2(h) of Directive 2001/86/EC).

[506] On this matter, A. CARDUCCI ARTENISIO, *Dall'armonizzazione minimale alla denazionalizzazione: la direttiva 2005/56/CE in materia di fusioni*, op. cit., p. 1212 et seq., noted that, in the event that occurrence of a cause that makes national rules

As it may be easily imagined, coordination with the national governance rules is far from easy. For this reason, the European legislator is forced to provide further clarifications and additional requirements[507].

Apart from inaccuracies, clumsy references and coordination issues, the EU rules gives an overview of the protection of employees through two models of participation of employees: the "weak" one, which corresponds in general terms and except as otherwise provided in certain specifications, with the relevant system provided for the *Societas Europaea*; the other, by contrast, that can be called "strong", which is a full right of codetermination, based on the actual degree of participation granted to employees in the companies involved in the merger. Also in this latter model, negotiation plays a fundamental

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(of the acquiring company or of the company resulting from the transaction) of employee involvement ineffective, the following procedure will be applied: after the common draft terms of the cross-border merger has been published, the management or administrative organs of the participating companies provide relevant information to a special negotiating body representative of the employees created for the purpose. Such special negotiating body includes at least one member representing each participating company which has employees in the Member State concerned. These members are elected or appointed according to the law of each Member State. The management or administrative organs start negotiations with the special negotiating body representative of the employees on arrangements for the involvement of employees in the merging company of in the company resulting from the transaction. The special negotiating body may decide by the majority set out below not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the European Company has employees. Where such rules determine to limit the proportion of employee representatives in the special negotiating body, the proportion will be increased. The Directive expressly allows not to open negotiations when the management or administrative organs decide to apply the European Company default rules transposed by the Directive itself. It is worth mentioning that if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative organ than one third.

[507] For an overview of the main issues arising from the provisions of the Directive about employee participation see M. PANNIER, *The EU Cross Border Merger Directive – A New Dimension for Employee Participation and Company Restructuring*, in 16 *European Business Law Review,* 2005, p. 1424 et seq.

role, since the "strong" degree of participation may arise from a specific negotiation, or by choice of the administrative bodies[508].

Since traditionally there are no forms of participation of employees in decision-making models of corporations under the Italian legal system, the innovative EU labour provisions on the EU cross-border merger may have disruptive consequences on the Italian corporate governance rules system.

It is known, in fact, that in Italy – even in the so-called "two-tier" management system, alternative to the traditional one used in Italian - direct participation of employees in the supervisory board is even expressly prohibited by section 2409-*duodecies* of the Italian Civil Code, providing that shall not be members the supervisory board those who are connected to the company or its subsidiaries or companies subject to a joint control by reason of an employment relationship or a consultancy agreement or any paid activity which do compromise their independence.

Although it could be reasonable to expect a series of interventions, aimed at amending the corporate governance system in order to introduce possible forms of codetermination, the transposition Legislative Decree no. 108/2008 – in order to mitigate the risks of the abovementioned disruptive consequences – made just references – except as provided for in derogation clause with regard to collective bargaining therein – to Directive 2001/86/EC, just like the Community legislature did, with the internal act of transposition: Legislative Decree of 19 August 2005, no. 188[509].

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[508] See P. FRANÇOIS - J. HICK, *Employee Participation: Rights and Obligations*, op. cit., p. 39.

[509] For criticism to this solution see G. ARNÒ – G. FISCHETTI, *Le fusioni transfrontaliere*, op. cit., p. 77. However, this lead to a coexistence in the Italian corporate system of both corporations without any form of codetermination, established under the rules of the Civil Code, and corporation which, although subject to the same codified rules, are co-managed with employees, since they result

Therefore, the Italian implementation rules do not provide for general rules of codetermination for all domestic companies, does not establish a legal framework, or even provide a specific regulation suitable to Italian corporate governance concerning cases in which an Italian company resulting from a cross-border merger with the aforementioned characteristics shall establish forms of codetermination.

In accordance with the wording of section 19 of Legislative Decree no. 108/2008, where at least one of the merging companies has, in the six months before the publication of the draft terms of the cross-border merger, an average number of employees that exceeds 500 and is operating under an employee participation system within the meaning of the relevant provisions, the participation of employees in the Italian company resulting from the cross-border merger and their involvement in the allocation of relevant rights shall be established according to procedures, parameters and arrangements laid down in collective bargaining agreements stipulated between the parties and applicable to the company itself. As from twelve months after the official date of entry into force of the Decree, in the absence of the above agreements and whether such matter is not provided under this Article, the following provisions will be applied: Article 12 (2), (3) and (4) of Council Regulation (EC) No. 2157/2001 of 8 October 2001; Legislative Decree no. 188 of 19 August 2005, as follows: i) Article 3, (1), (2), (3), (4, letter a), (5), (6) and (11); ii) Article 4, (1), (2, letter a, g and h), and (3); ii) Article 5; iii) Article 7, (1), (2, letter b), and (3), except as provided in the above-mentioned (2, letter b) concerning the application of percentage provided in

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from cross-border merge with companies in which forms of codetermination were provided under their previous legal systems, as observed by P. MATERA, *Sub art. 2501 c.c.*, in P. CENDON (ed.), *Commentario al Codice Civile: artt. 2484-2510*, Milano, 2010, p. 809 et seq.

Annex I, third section of the same Decree are increased to thirty-three and one third per cent; iv) Articles 8, 10 e 12; v) Annex I, third section, (1, letter b).

Second paragraph of the same transposition provision goes on providing that the board of directors or management of Italian company participating in the cross-border merger and the competent management or administration bodies of other Member State companies participating in the cross-border merger may decide to apply, without prior negotiation, the standard rules referred to in paragraph 1, letter f), as from the effective date of the cross-border merger. Then, specifying in particular in the third paragraph that where, following prior negotiations, standard rules for employee participation referred to in paragraph 1, letter f) are applied, it may be set an upper limit for the proportion of employee representatives in the administrative or supervisory body of the Italian company resulting from the cross-border merger.

Finally, a safeguard clause aimed at establishing a floor that meets the requirement of the Directive on the number of representatives in equal proportion after the merger, states that if in one of the merging companies employee representatives constituted at least one third of the administrative or supervisory board, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third.

In other words, in the light of the principle established by the in the Directive, the Italian transposition rule[510] – whether the dimension requirements of the company are met – merely designate parties stipulating collective bargaining agreements (applied to company

[510] Section 19 of the Tenth Directive.

resulting from the cross-border merger) to provide for the definition of their participation rights[511].

Finally, in order to provide a more complete analysis, it shall also be pointed out how the same section 19, fourth paragraph, of Legislative Decree no. 108/2008 provides that when at least one of the merging companies is managed under an employee participation system and the company resulting from the cross-border merger is to be governed by such a system in accordance with the rules referred to in paragraph one (of the same section 19), that company shall be obliged to take a legal form allowing for the exercise of participation rights; this provisions is followed by the fifth paragraph which states that the companies referred to in the fourth paragraph shall take the necessary measures in order to ensure the protection of the participation rights in the event of subsequent mergers with Italian companies within three years from the effective date of the cross-border merger, in compliance with the provisions of the same section 19, where compatible providing a second safeguard clause, in order to prevent any circumvention.

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511 According to A. DI STASI, *Le rappresentanze dei lavoratori in azienda, in Organizzazione sindacale e contrattazione collettiva*, in M. PERSIANI - F. CARINCI (eds.), *Trattato di diritto del lavoro*, II, Padova, 2014, p. 339 et seq., such designation, however, turns out to support the negotiation settlement between social partners, or between corporate bodies on one side and the signatory union organizations of the national collective bargaining agreement applicable to the company on the other side, since, in the absence of such agreements, references shall automatically be made to the relevant provisions of the *Societas Europaea*.

Concluding remarks

This study has clearly shown how corporate mobility is becoming increasingly essential in the current context of globalization, where the interdependence of countries around the world is progressively growing. In particular, at the EU level, corporate mobility is taking on great importance as a fundamental right guaranteed by the Treaty provisions under the name of "freedom of establishment", becoming a key player in the European company law harmonisation process. As seen in Chapter III, such process has been marked by the decisions rendered by the European Court of Justice, which have had a really positive impact both on harmonisation purposes and on efficient exercise of freedom of establishment, to be understood as the companies' right to themselves into the other Member States avoiding prior winding-up or liquidation.

Here comes the increasing relevance and diffusion of cross-border mergers. In fact, in this general panorama, the above-mentioned transactions play a key rule, as they basically consist in a particular way of exercising freedom of establishment. Thus, in the absence of a directive governing cross-border transfer of company seats - which has been actually drafted but never adopted by the EU lawmakers - cross-border mergers allow companies to convert themselves into companies governed by the law of the Member State to which they wish to relocate, without going into liquidation.

Especially after SEVIC, when cross-border mergers have become protected, thanks to the remarkable interpretation of freedom of establishment given by the European Court of Justice, such mergers are now tools for companies not only to legally transfer their seats into another EU country and to choose, through the new establishment, corporate rules that are deemed suitable for actual needs of the companies themselves.

In a few words, cross-border mergers guarantee the full exercise of companies' right to corporate mobility, also permitting companies to choose the applicable corporate law by transferring their seats into the chosen Member State.

In this perspective, it should be observed how the evolution of the concept of "freedom of establishment", along with all the related implications, has triggered competition among national legal systems within the European Union, in a similar way to the "*market for corporate charters*" developed in the USA[512].

Once it has become possible to choose the applicable law in accordance with companies' economic and strategic interests, law provisions adopted by the States may be considered as products of a specific market, which has been called *"market of rules".* As any other market, even such *"market of rules"* is characterized by the typical intersection by demand and supply. Just to clarify, in this specific case the economic operators' demand of corporate types and rules is commensurate with the supply of corporate types and rules provided by Member States. In other words, the possibility of choice basically concerns the different company forms of organization adopted by Member States and, more in general, the different corporate law systems that Member States are free to define - at the domestic level - in their content and scope, without prejudice to the fundamental rules set out by the European Union.

This mechanism has resulted in a positive form of competition among the States, which started adopting specific measures in order to improve their domestic corporate rules and their own models of

[512] See Chapter I.

corporate governance. In this way, Member States clearly aim at achieving two main concurrent results. First of all, they wish to attract foreign capitals by pushing indirectly foreign corporations to move into their own territories. Secondly, they make effort to avoid that domestic corporations move to other Member States where corporate law is deemed more suitable, as it is less strict or it meets their economic interests for whatever reason.

Notwithstanding an accurate evaluation of the effects of the growing competition among domestic corporate legal systems is still being discussed, it can be observed that such competition has not brought negative consequences. As a matter of fact, each Member State has been encouraged to amend its national corporate rules, with the clear purpose to make them more efficient and competitive.

This is the reason why most of the significant reforms of company law recently made by the EU Member States can be considered as directly or indirectly related to the above-described phenomenon of competition among European corporate law systems[513].

In the Italian perspective, the above considerations should be referred to the famous FIAT S.p.A. – FIAT Chrysler Automobiles N.V. cross-border merger, which created FCA - FIAT Chrysler Automobiles N.V., currently the world's seventh-largest auto maker. As known, FIAT S.p.A. (formerly "*Fabbrica Italiana Automobili Torino*") is the largest family-owned corporation in Italy and the major Italian manufacturer of automobiles, trucks and industrial vehicles and components. In 2014, FIAT S.p.A, after acquiring the whole shares of Chrysler Group LLC, established in the Netherlands a

[513] Among these reforms, it should be mentioned the wide legal innovation relating to the domestic types of "close corporations" of each Member State, which has been inspired by the successful model of the British Private Limited Company (*società a responsabilità limitata, société à responsabilité limitée, Gesellschaft mit beschränkter hafting e Unternehmergesellschaft, Sociedad limitada nueva empresa, Sociedade por quotas, Besloten vennootschap, etc.*)

vehicle company named FIAT Investments N.V. *("naamloze vennootschap",* a joint stock company). Immediately after, FIAT S.p.A merged with and into such vehicle company and successively named FCA - FIAT Chrysler Automobiles N.V. (through the so-called "reverse merger").

The aim of the transaction was to incorporate and organize the new company under the law of the Netherlands, since the shareholders wished to take advantage of the more favourable Dutch rules on multiple voting shares. In particular, according to Dutch law, the corporation resulting from the merger could issue "special voting shares" to the shareholders of the Italian entity. In this way, relevant shareholders could receive one special voting share per any common share held, upon registration in of their shares in a "loyalty register" for an interrupted period of three years.

The FIAT case, besides the relevance of the transaction in terms of capital, also deserves consideration for the following reasons. It makes evident that the attraction of important holding companies – regardless of the places where productive activities are actually implemented – represents a serious concern for the European countries, since it has a strong impact on national economies. Thus, it seems that this concern has flowed into the economic policy agenda of most of the European governments, which start competing with each other by amending their domestic company laws to make it more attractive both for domestic and foreign companies.

As explained above, the main reason for the FIAT S.p.A. – FIAT Chrysler Automobiles N.V. transaction was the convenience for the Italian corporation to move its seat to the Netherlands, by mean of a cross-border merger, in order to be governed by law of the Netherlands that, contrary to the Italian law, allowed corporations to issue multiple voting shares and loyalty shares. Thus, the strategic choice of the Italian company was essentially the result of a comparison between two legal systems, one of which appeared to be more attractive for corporate decision-makers.

Then, it should not be considered a mere coincidence the fact that, only few months after the closing, the Italian legislator adopted the Legislative Decree no. 91/2014 (converted into Law no. 116/2014) introducing multiple voting shares mechanism in the Italian corporate law system.

That being said, the Italian reform may be easily put in relation with the awareness of the Italian government to have lost one of the most important Italian multinational corporations. Therefore, it shows how corporate mobility may have the effect to stimulate the States to improve their corporate law in a perspective of harmonization of corporate law at the EU level.

In consideration of the above, it should be concluded that the market of rules, which put national corporate laws in competition among each other, may be seen as a useful instrument able to gradually remove the differences still existing among Member States' legislations. This would led to a global harmonization, which may be define as "*de facto*" and "from below" harmonization and to a complete implementation of the European Single Market. Thanks to the harmonization process it would be possible to create a positive environment for all economic operators, where corporate rules are more attractive for companies, contractual freedom in corporate law is enhanced and competition and innovation are encouraged.

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