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RELEVANT ASPECTS OF EU LEGISLATION AND CJEU JURISPRUDENCE ON TRADING COMPANIES

CRINA MIHAELA VERGA
George Bacovia University of Bacău
Bacău, Romania
Alexandru Ioan Cuza University of Iași
Iași, Romania
crina_verga2000@yahoo.com

Abstract
The first part of the paper refers to the legal framework at the level of the European Union regarding commercial companies. The analyzed area is regulated largely by the member states of the Union, which, however, are obliged, by virtue of their statute, to permanently adapt their internal legal order on the matter to that of the Union, by appropriating the primary legislation, the regulations and by transposing the corresponding directives. This imperative is determined by the priority of EU law over national legislation. In this sense, we will comment on the main legal provisions of the Union, which aim at: companies' formation, their capital, the obligation to communicate information; the legal situation of the companies that carry out activities in several countries. The second part of the paper highlights some important cases from the jurisprudence of the CJEU, which determine relevant directions in the field.
The work is of great interest for specialists, but especially for the member states, which must comply with the Union framework legislation in the field. Equally, this information is important for the commercial companies, which are obliged to respect and apply exactly the commented regulations.
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1. PRELIMINARY CONSIDERATIONS ON TRADING COMPANIES

A company represents a legal person, with all its characteristics recognized by the law, made up of two or more people (with the exception of the limited liability company, which can have only one partner), who participate with sums of money, goods or specific knowledge in carrying out commercial activities, in order to obtain benefits and share them, depending on the contribution of each one.

In the legal literature it has been stated that, after the adoption of the Treaty establishing the European Economic Community, "EU company law harmonization was largely a top-down, technocratic project that was considered imperative to realize the common market [...] it was promoted mainly by the

European Commission and experts advising it without any particular business or investment interest group pushing for harmonization" (Gelter, 2019, p. 2).

As will be noted from the presentation of the legal framework at Union level regarding the setting up of a company, the capital and the disclosure requirements, in 1968, the Council adopted a directive (First Council Directive 68/151/EEC) on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

The directive was repealed by another directive from 2009 (Directive 2009/101/EC), so that the latter was also repealed by Directive (EU) 2017/1132, which itself underwent several amendments.

Therefore, at the European Union level, especially since 2017, there has been a constant concern regarding the determination of appropriate regulations regarding companies, to create a beneficial business environment.

The legal regulation of companies was carried out within the broader framework of the internal market and freedom of establishment, expressly provided for by the Treaty on the European Economic Community of 1957 (EEC Treaty), which, with the appropriate amendments, is still in force today, being known under the new name of the Treaty on the Functioning of the European Union, an integral part of the Treaty of Lisbon.

In this paper, some of the most important legal acts adopted at Union level in the field of companies will be presented and commented on, which refer to companies' formation, their capital, the obligation to communicate information; the legal situation of the companies that carry out activities in several countries.

To provide a broader picture of how companies effectively function in practice and the problems that arise, some of the most relevant cases in the field, ruled by the Court of Justice in Luxembourg, are subject to our analysis.

2. THE LEGAL FRAMEWORK OF THE EUROPEAN UNION ON TRADING COMPANIES

A basic legislative framework which is the one established by the European Union offers a much more effective and equal protection to all investors in the member states of the Union and removes the competition regarding legislative regulation between them in the field of company law.

The purpose of European Union rules on companies is to give entrepreneurs the opportunity to create and carry out activities on the territory of the European Union member states; to ensure protection for all interested parties, in particular employees and creditors.

Company law concerns areas of social relations, in which the Union has a competence shared with the Member States. Therefore, according to art. 2 of the Treaty on the Functioning of the European Union (TFEU), "the Union and the

Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

The aforementioned provision must be corroborated with art. 4 paragraph 1, which lists the internal market among the areas in which shared competence intervenes. The latter "comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" (art. 26 TFEU).

We will present and comment on the main legal provisions of the Union in this area. In this sense, the primary legislation is of particular importance, which has an immediate, direct application and which has priority over the national legal provisions in the field. Thus, the article 49 paragraph 1 TFEU prohibits restrictions on the freedom of establishment for both natural and legal persons: "[…] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State". Then, art. 49 paragraph 2 defines the content of freedom of establishment: "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 or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital".

The legal regulation of the freedom of establishment for the pursuit of a specific activity (art. 49-55 TFEU) is achieved through the adoption of directives, according to art. 50 para. 1 TFEU: "in order to attain freedom of establishment as regards a particular activity, *the European Parliament and the Council*, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, *shall act by means of directives*". In this regard, according to art. 50 paragraph 2, the European Parliament, the Council and the Commission exercise several functions, of which the following are of particular importance for the subject under consideration: giving priority to activities which contribute to the development of production and trade; ensuring close cooperation between the competent national authorities, in order to know the special aspects of the various activities within the Union; eliminating those administrative procedures and practices, which arise either from national law or from agreements previously concluded between the Member States, the maintenance of which would constitute an obstacle to freedom of establishment; the progressive abolition of restrictions on

freedom of establishment in each branch of activity in question, as regards, on the one hand, the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and, on the other hand, the conditions for access of personnel employed at the head office to management or supervisory posts in such agencies, branches or subsidiaries; the coordination, to the extent necessary and with a view to making them equivalent, of the safeguards required by Member States of companies, in order to protect both the interests of members and of third parties.

Article 54 paragraph 2 of TFEU defines companies as follows: 'companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.

In addition to the articles commented above, we also mention Article 16 of the Charter of Fundamental Rights of the European Union (the freedom to conduct a business): the freedom to conduct a business in accordance with Union law and national laws and practices is recognized. This legal regulation has several limitations imposed by Article 17 of the Charter (right to property). At the EU level exists a secondary legislation that establish the criteria for founding a company, its capital, the obligation to communicate information.

Important legal regulations in the field were first included in the *Council Directive (68/151/EEC) of 1968* on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community. In this sense, it was expressly provided that the coordination measures prescribed by this Directive apply to the laws, regulations and administrative provisions of the Member States relating to the types of company, which exist in the six founding member states of the Treaty establishing the European Economic Community concluded in 1957 in Rome. The first section of the directive under analysis contained regulations on mandatory publicity regarding companies. The second section referred to the validity of the obligations assumed by a commercial company. The next section considered the nullity of companies, which occurred under precisely determined conditions.

The above-mentioned directive has been replaced by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent. This 2009 directive was, in turn, repealed by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, the content of which was consolidated in 2022, and which is in force. This normative act is divided into

three titles. The first of these contains general provisions and the establishment and functioning of limited liability companies. The second title refers to conversions, mergers and divisions of limited liability companies, and the last title contains final provisions. This directive contains provisions on disclosure of company information in business registers in Member States to enhance legal certainty in the internal market, and on a system of interconnection of registers

The Directive 2012/17/EU as regards the interconnection of central, commercial and companies' registers was also repealed by the Directive (EU) 2017/1132.

Directive (EU) 2017/1132 has been amended and supplemented by four other separate legal acts: Directive (EU) 2019/1023, Directive 2019/1151, the Directive (EU) 2019/2121 and Directive (EU) 2025/25. These last ones are presented below.

1. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

The purpose of this Directive is to ensure the proper functioning of the internal market and to remove obstacles to the exercise of the free movement of capital and freedom of establishment. These obstacles arise from the different laws of the Member States and from national procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications. The mentioned Directive contains provisions relating to preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor; procedures leading to a discharge of debt incurred by insolvent entrepreneurs; measures to increase the procedures concerning restructuring, insolvency and discharge of debt.

2. Directive (EU) 2019/1151 includes the rules on online formation of companies, on online registration of branches and on online filing of documents and information by companies and branches, disclosure and registers. On the one hand, the directive aimed to make the use of digital tools and processes more efficient in setting up a company, opening a branch of that company in another Member State and providing complete and accessible information about companies. On the other hand, it aimed to create a single legal framework at Union level for the application of digital procedures in the field of companies. The usefulness of this legal normative act can also be deduced from other considerations, such as: to reduce the time and costs of setting up a company or creating a branch; to provide adequate guarantees to avoid abuse and fraud; to stimulate economic growth; to ensure equal and limited access to information on a company for all Member States. In this regard, the directive in question was

adopted so that the coordination measures contained therein apply to the laws, regulations and administrative provisions of the Member States relating to the types of companies mentioned in the regulation text. Therefore, this directive, which amended Directive (EU) 2017/1132, includes, as a new element, rules for the fully online formation of limited liability companies, fully online registration of cross-border branches and fully online filing of documents and information with business registers). The directive in question aims to increase trust and transparency in the business environment and to facilitate the operations and activities of companies in the internal market. In this respect, it is very important that companies, authorities and other interested parties have access to reliable information about other companies with which they cooperate located in the Member States of the Union. This information may be needed for business purposes or in administrative procedures or judicial proceedings. Thus, Directive (EU) 2019/1151 introduced standards for controls of the identity and legal capacity of persons that form a company, register a branch or file documents or information online.

3. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 contains detailed rules on cross-border conversions, cross-border mergers and cross-border divisions of limited liability companies. The deadline for transposing this directive into the national legislation of the Member States was 31 January 2023. Also, according to this directive, by 1 February 2027, the European Commission will have to draw up an evaluation of the application of the directive, as well as a report on the conclusions of this evaluation, which will be presented to the European Parliament, the Council and the European Economic and Social Committee.

4. Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties

This regulation comprises rules and procedures relating to the recovery and resolution of central counterparties (CCPs) authorized in accordance with Regulation (EU) No 648/2012). This normative act also contains rules relating to arrangements with third countries in the field of recovery and resolution of CCPs.

According to Regulation (EU) No. 648/2012, central counterparties (CCP) is a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer.

To contribute to the better functioning of the single market in financial services, it is necessary to have procedures in place where a financial institution or a financial market infrastructure active in that market faces financial difficulties. In this regard, Central counterparties (CCPs) are key components of

global financial markets. CCPs centralize the handling of transactions and positions of counterparties, honor the obligations created by the transactions, and require adequate collateral from their members as margin and as contributions to default funds.

Regulation (EU) No 648/2012 of the European Parliament and of the Council requires CCPs authorized in the Union to observe high prudential, organizational and conduct of business standards. Regulation (EU) No 648/2012 also requires standardized OTC derivatives („OTC derivative contract") to be centrally cleared by a CCP. CCPs set out measures to recover from financial distress.

The lack of harmonized provisions for the recovery and resolution of CCPs across the Union is an obstacle to the proper functioning of the internal market. Therefore, it was necessary to develop such a regulatory act, which is directly and immediately applicable in the legislation of the Member States.

The first title of the regulation establishes its subject matter and defines the financial terms used in its content. The second title contains legal regulations relating to resolution authorities, resolution colleges and involvement of European Supervisory Authorities, decision-making and procedures. The third title concerns recovery and resolution planning, assessment of resolvability, addressing or removing impediments to resolvability, specific coordination procedure to address or remove impediments to resolvability. The following title contains provisions on early intervention (early intervention measures, removal of senior management and board, provision of recompense to non-defaulting clearing members). Title V refers to resolution (objectives, conditions and general principles), valuation **(**objectives, requirements, provisional valuation), resolution tools, resolution powers conferred on the resolution authority necessary to apply the resolution tools effectively. Title VI governs the relations with third countries (agreements with third countries, recognition and enforcement of third-country resolution proceedings, right to refuse recognition or enforcement of third-country resolution proceedings, cooperation with third-country authorities, exchange of confidential information. The following title details administrative measures and penalties. Tile VIII contains amendments to Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 AND (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and Regulation (EU) 2017/1132. The last title includes final provisions concerning review and entry in force.

In another train of thoughts, Directive (EU) 2017/1132 and Commission Implementing Regulation (EU) 2021/1042 establish rules on the system of interconnection of business registers ('BRIS'), applicable since 8 June 2017. 'BRIS' allows EU-wide electronic access to company information and documents stored in the business registers of the Member States via the European e-Justice Portal. BRIS also allows business registers to exchange

information with each other on cross-border operations and on companies and their cross-border branches.

Of particular importance is also Directive 2009/102, which was amended in 2013. It regulates the basic rules around company law on single-member private limited liability companies. The coordination measures prescribed by this directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of company listed in its content.

It is necessary to mention, in the analyzed context, also Directive (EU) 2025/25, which amended both Directives 2009/102 and Directive (EU) 2017/1132 and which refers to further expanding and upgrading the use of digital tools and processes in company law.

Directive 2025/25 aimed to increase the amount and improve the reliability of company documents and information available in business registers or through the system of interconnection of registers, and to enable direct use of company data available in business registers when setting up cross-border branches and subsidiaries and in other cross-border activities and situations). The digital EU power of attorney established under this Directive is without prejudice to national rules on legal and statutory representation or any other types of powers of attorney.

Consequently, by the legal act commented, the system of interconnection of registers (BRIS) existing at Union level is connected with the Beneficial Ownership Registers Interconnection System (BORIS), established by Directive (EU) 2015/849 of the European Parliament and of the Council, as amended by Directive (EU) 2018/843 of the European Parliament and of the Council, which links national central registers containing information on the beneficial owners of companies and other legal entities, trusts and other types of legal arrangements, and with the Insolvency Registers Interconnection system (IRI) established in accordance with Regulation (EU) 2015/848 of the European Parliament and of the Council.

The coordination measures prescribed by this Section shall apply to the laws, regulations and administrative provisions of the Member States relating to the types of companies.

Below, we mention other important amendments made to Directive (EU) 2017/1132 by Directive 2025/25. Thus, new definitions are provided regarding terms used in the field of commercial law, other ways of establishing companies and submitting documents and information are established. Also, Member States shall provide for preventive administrative, judicial or notarial control, or any combination thereof, of the instrument of constitution and statutes of companies listed in the law. There are also changes regarding: online and other procedures (formation, registration and filing), disclosure and registers, documents and information to be disclosed by partnerships, up-to-date registers, EU Company Certificate, digital EU power of attorney, exemption from regulation and any

similar formality, safeguards in cases of reasonable doubt as to origin or authenticity, Safeguards in cases of reasonable doubt as to abuse or fraud, exemption of translation, availability of electronic copies of documents and information, Information on groups of companies, penalties.

Directive 2025/25 underlines the need for this regulatory legal act to be assessed by the European Commission, based on the five criteria (efficiency, effectiveness, relevance, coherence and value added) and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. The evaluation should cover the practical experience with the EU Company Certificate, the digital EU power of attorney, the reduced formalities in cross-border situations for companies, the effectiveness of preventive controls and legality checks and of making the information available free of charge through the system of interconnection of registers, and the application of disclosure requirements for partnerships. Member States shall provide the Commission with the information necessary for the preparation of the report and are obliged to transpose, through appropriate national legal acts, this Directive by 31 July 2027.

3. THE RELEVANT JURISPRUDENCE OF THE CJEU ON TRADING COMPANIES

In this section we will present some of the most relevant cases decided by the Luxembourg Court of Justice in the field under our analysis.

In the Court of Justice's view, the definition of *"establishment"* within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration. The conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (Judgment of 25 July 1991, Factortame and Others, C-221/89, paragraphs 20-23, Judgment of the Court of 11 December 2007, C-438/05, paragraph 70-71).

According to the Court, freedom of establishment constitutes one of the fundamental principles of the Community and the provisions of the Treaty guaranteeing that freedom have direct effect from the end of the transitional period. Those provisions ensure the right to establish oneself in another Member State not only for Community nationals but also for companies and firms as defined in Article 48 EC (Judgment of 27 September 1988, Daily Mail and General Trust, 81/87, paragraph 15 and Judgment of the Court of 11 December 2007, C-438/05, paragraph 68).

The Court also decided that the freedom of establishment, conferred by Article 43 EC 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, according to the actual wording of Article 48 EC, "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 shall, for the purposes of [the provisions of the Treaty concerning the right of establishment], be treated in the same way as natural persons who are nationals of Member States" (Judgment of the Court of 5 November 2002. Case C-208/00, paragraph 56). It is not necessary for the Member States to adopt a convention on the mutual recognition of companies in order for companies meeting the conditions set out in Article 48 EC to exercise the freedom of establishment conferred on them by Articles 43 EC and 48 EC, which have been directly applicable since the transitional period came to an end (Case C-208/00, paragraph 60).

The refusal by a host Member State (`B') to recognize 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 center 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. (Case C-208/00, paragraph 82). Therefore, the Court ruled that where a company formed in accordance with the law of a Member State (`A') in which it has its registered office is deemed, under the law of another Member State (`B'), to have moved its actual center of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

According to the Court, a restriction on the freedom of establishment cannot be admitted unless it pursues a legitimate objective compatible with the Treaty and if it is justified by imperative reasons of general interest. Furthermore, it must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective (Judgment of the Court of 30 November 1995. Case C-55/94, paragraph 37, Judgment of the Court of 15 December 1995. Case C-415/93 paragraph 104, C-438/05, paragraph 75).

In the same sense, in the Case 55-94, the Luxembourg court ruled that national measures likely to make it more difficult or less attractive to exercise the fundamental freedoms guaranteed by the treaty must meet four conditions: to be applied in a non-discriminatory manner, to be justified by imperative reasons of general interest, to be likely to ensure the achievement of the objective pursued and not to exceed what is necessary to achieve it (paragraph 30).

Likewise, the freedom of establishment prohibits any national measure that is "liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty" (Judgment of the Court of 31 March 1993. Dieter Kraus v Land Baden-Württemberg. Case C-19/92; Case C-55/94). The Court also ruled that inequality in application of freedom of establishment is to be avoided (C-438/05).

In the same vein, the prohibition of the use of a trade name as the specific designation of an undertaking is a restriction on the freedom of establishment, but such a restriction is justified by overriding requirements of public interest pertaining to the protection of industrial and commercial property if the primary aim of the restriction is to safeguard trade names against the risk of confusion (Judgment of the Court of 11 May 1999. Case C-255/97).

Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonization while improvement is being maintained, proper social protection and dialogue between management and labor (C-438/05, paragraph 79).

The article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article. The article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions (C-438/05).

Also, the article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, if it is

established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective (C-438/05, paragraph 90).

The Court has decided that, even though the provisions of the Treaty concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving to establish themselves in another Member State (Judgment of the Court of 27 September 1988. Case 81/87, paragraph 16; C-438/05, paragraph 69).

Prohibitions on setting-up secondary establishments and the requirement to reapply for a license have been held to be prohibited restrictions (Judgment of the Court of 27 January 2011.C-168/09)

In the Court's opinion, freedom of establishment confers "no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State" (Case 81/87, paragraph 25).

The freedom of secondary establishment of a company may not be exercised under certain conditions imposed by national legislation such as minimum capital and the liability of directors (Judgment of the Court of 30 September 2003. Case C-167/01).

In the Case 81/87, the Court stated that companies could exercise their right of establishment by setting up agencies, branches and subsidiaries, or by transferring all their shares to a new company in another Member State.

In the Case C-212/97, the Court took exception to a Danish authority's refusal to register a branch of a company validly incorporated in the United Kingdom.

The ECJ had to decide on a case involving the restrictions applied by the (former) state of incorporation (moving out, Wegzugstaat, company leaving the jurisdiction) (Judgment of the Court of 16 December 2008. Case C-210/06).

The European Court has held that companies are creatures of national law and exist only by virtue of the national legislation which determines their formation and functioning. A Member State may subject the right of a company to retain its legal personality under the law of that Member State to restrictions on the transfer to a foreign country of the effective center of management of the company and has the power to define the connecting factor in international company law in respect of its own companies. This power includes the possibility for each Member State not to allow a company governed by its law to

retain that status where the company intends to reorganize itself in another Member State by transferring its registered office to the territory of the latter (Case C-210/06 – Cartesio, paragraphs 99 et seq.).

Therefore, according to the Court, *freedom of establishment* does not apply where a company de facto transfers its central management and control to another Member State but retains the company law status of its country of origin. However, the ECJ has emphasized that it constitutes an obstacle to freedom of establishment if the Member State of incorporation requires the company to be reorganized or wound up, preventing that company from becoming a company governed by the law of the other Member State, in so far as that law permits (Case C-210/06, paragraphs 111 et seq.).

4. CONCLUSIONS

As can be deduced from the above, there is no codified company law at European Union level. This area was regulated within the broader framework of the internal market and, more specifically, of the freedom of establishment, being enshrined in the former Treaty on the European Economic Community, the current TFEU (art. 49-55). Primary legislation in this area was supplemented by article 16 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business.

The general framework provided by the aforementioned treaty was detailed through a series of directives and regulations, which were subsequently adopted and commented on in detail.

As regards companies formation, their capital, the obligation to communicate information, the legal situation of the companies that carry out activities in several countries, in 1968 a directive was adopted (Directive 68/151/EEC), which referred to the coordination, with a view to equivalence, of the safeguards imposed on companies in the Member States, within the meaning of the second paragraph of Article 58 of the Treaty (EEC Treaty), for the protection of the interests of members or third parties. It was not until 2009 that this directive was replaced by another directive (Directive 2009/101/EC), which was also repealed by Directive (EU) 2017/1132. To develop a positive, efficient and competitive business environment, the 2017 directive was subject to several amendments, determined by existing needs.

The ever-increasing use of digital services and the ever-faster evolution of information technology led to the adoption of Directive 2024/25 on further expanding and upgrading the use of digital tools and processes in company law.

Finally, central counterparties (CCPs), key components of global financial markets, were regulated by Regulation (EU) 2021/23 on a framework for the recovery and resolution of central counterparties.

The freedom of establishment concerning companies has been the subject of an extensive case law. The latter has established the content of the concept of

establishment and determined a series of restrictions on the freedom of establishment for companies. In this sense, a restriction on the freedom of establishment must aim at compliance with several conditions: such a restriction must pursue a legitimate objective compatible with the Treaty; the restriction in question must be justified by overriding reasons in the general interest; the restriction is likely to ensure the achievement of the objective pursued and must not go beyond what is necessary to achieve that objective.

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