

Cross-border business in the European Union and statutory disclosure requirements: using IT as a catalyst for further market integration

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Abstract. This paper highlights the gap between the opportunities for EU-companies to fully exploit their freedom of establishment on the one hand and the obstacles flowing from the mainly national organisation of information filing requirements through business registers on the other hand. From the point of view of companies, this gap partly neutralises the efforts replayed both in EU regulation and ECJ jurisprudence to guarantee the freedom of establishment. Companies are not only often obliged to file the same information in different countries but, due to the lack of information sharing between the countries in which they are established, investors, creditors and other stakeholders may suffer information asymmetries. We analyse the possible legal approaches towards organising the filing of information in a network model. The design of a technical solution to improve the cross-border sharing of corporate data in order to decrease administrative burdens on the freedom lies at the heart of the BRITE project. BRITE wishes to increase the interoperability of business registers, not only with a view to facilitating the cross-border establishment of companies, but also as a tool for other users (including public authorities) who can benefit from the better dissemination of public company data and the possibility to aggregate data at a European level. We submit that the European lawmakers have not yet fully exploited the possibilities offered by linking national public information systems into networks, although the Transparency Directive does envisage a network approach as regards the dissemination of company and financial information by listed companies.

1. Introduction

One of the main objectives of the European Union is to promote throughout the Community a harmonious, balanced and sustainable development of economic activities (Article 2 EC Treaty). The creation of a single European market, of which the internal market is a fundamental component, is believed to be the most important way to achieve this ambitious goal (Article 3, 1, c) EC Treaty). By the abolition of obstacles to the free movement of goods, persons, services and capital, the European Union wishes to make of the integrated European market world's most competitive and dynamic market (Lisbon European Council 2000).

As a part of this project, the European Community is aiming at the 'transnationalisation' of companies, *i.e.* the process by which companies extend their economic activities to other Member States than those where they are incorporated.¹ In this way competition between companies or firms deploying economic activities in the European Union will increase. This should in turn result in better company performance and thus in lower prices for consumers. It is precisely with this objective that the EC Treaty grants the freedom of establishment to 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 (which we call hereafter 'EU-companies') (Article 43 in combination with 48 EC Treaty). Hence, the freedom of establishment has a clear economic function as it is one of the most significant tools to increase the mobility of factors of production. An overview of the content of the freedom of establishment as currently envisaged by the European Court of Justice will be provided in section 2.

However, the achievement of the freedom of establishment cannot be realised solely by the Treaty. Notwithstanding the direct applicability of the principle of freedom of establishment in the legal order of the EU Member States², the cross-border establishment of companies involves the submission to local rules in the state of establishment designed to protect various stakeholders (creditors, shareholders etc.). In order to eliminate the costs associated with the disparities of regulations across EU Member States, the Treaty has vested the European legislator with powers to adopt harmonization directives (Article 44 EC Treaty). As regards the setting-up and the cross-border establishment of companies, part of this harmonization relates to the disclosure of corporate

information³. Section 3 will look into the filing obligations of private and public limited companies, as well as the access to that information. This analysis will demonstrate that, in the present stage of EU harmonization, the cross-border establishment of companies still involves substantial costs due to the mere national organisation of business registers and the limited access possibilities to these registers.

In section 4, we develop the viewpoint that after taking into account the modification of the First Company Law Directive (Directive 68/151/EEC), the current European regulatory framework regarding the dissemination of corporate information still lags behind the possibilities offered by today's information and communication technologies. In order to eliminate multiple filing of identical information in different countries when taking advantage of the freedom of cross-border establishment, three theoretical models will be presented with their different impact on the accessibility of the information by end-users. However, in the light of the present legal framework, only one model could and should effectively be implemented.

Section 5 will provide some comments on the BRITE project, the aim of which is to create a platform offering advanced features regarding the interconnection and interoperability of business registers across Europe. This research project further explores the possibilities to improve the delivery as well as the retrieval of company and financial data in a significant way. If its technical solution would be in place, the 'several-stop-shop' concept in terms of delivery, as currently envisaged within European company law, could evolve towards a 'one stop shop'-system, and trigger a simplification of the European legal framework while reducing regulatory costs for businesses.

Section 6 will stress the potential advantages of the BRITE platform for many users in other areas of economic life. The prospect of value added services that enhance the transparency of business registers opens up opportunities for adequately using business register data in the fight against money laundering and terrorism financing in particular. The linkage between business registers and officially appointed mechanisms (OAMs) to be set up for the dissemination of information by listed companies could also contribute to better performing securities markets and more investor protection through improved access to relevant information.

We will conclude with the standpoint that the realization of a system of cross-border and cross-domain interoperability of company data is currently feasible. This technical platform, in combination with a simplification of the current legal framework, could do its part in the ongoing efforts for the establishment of a true European single market. However, further research will be needed to assess the consequences of the increased mobility and use of business register data on privacy protection, as the European Data Protection Directive (Directive 95/46/EC) does not seem to be fully adapted to this evolution.

2. Recent developments in the field of freedom of establishment

At first glance, Articles 43 and 48 of the EC Treaty provide the necessary conditions for companies to be able to fully exercise their freedom of establishment. These provisions amount to a clear prohibition for Member States to restrict the setting-up on their territories of agencies, branches or subsidiaries established in their territory (i.e. a secondary establishment) It further clarifies that EU companies have the right to take up and pursue activities and to set up and manage other EU companies under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

However, since the EC Treaty came into force, numerous legal obstacles prevented companies from enjoying the same freedom of movement as natural persons. After a wave of harmonisation which brought down many burdens on the cross-border mobility of companies, the regulatory activity came to a dead end. The lack of further legislation on the mutual recognition of EU-companies, on the retention of legal personality in the event of cross-border seat transfer and on the possibility of mergers between companies or firms governed by the laws of different countries (Article 293 EC Treaty), constituted a restraint on the exercise by EU-companies of the freedom of establishment. (Wymeersch, 2003) The yawning gap between European company law systems that adhere to the so-called 'Incorporation theory' on the one hand and those that follow the 'Real Seat theory' on the other hand symbolised the political interests at stake⁴ (Hirt, 2004). Irrespective of the company law system, Member States took measures to prevent the circumvention of their national legislation, thus creating market fragmentation.

In the last decade the European Court of Justice (ECJ), through a number of landmark judgments⁵, has played a pronounced pro-active role in improving the conditions for cross-border establishment of companies in Europe. As a result of these judgments, there is currently no doubt that Member States should allow companies that have been incorporated in other Member States to freely enter their territory, according to the rules under which they have been formed in their state of origin. (Omar, 2005) This ECJ case law has also triggered other significant regulatory developments in European company law. Member States eventually managed to reach the necessary agreement to adopt a Directive governing the cross-border merger of companies (Directive 2005/56/EC) as well as to introduce a new type of company, namely the '*Societas Europaea*' (SE) (Council Regulation No 2157/2001). These legal instruments indirectly enable companies to transfer their corporate seat to another Member State without being wound-up. Whether a direct transfer of the company seat for other company forms

will be possible, depends on the outcome of the draft Fourteenth Company Law Directive and/or the judgment of the ECJ in the 'Cartesio'-case (C-210/06).

The evolution in the ECJ case law and in European company law harmonization seems to illustrate that the freedom of establishment is more and more heading at the 'home country control'-principle. Once a company is constituted in a legally valid way according to the State of incorporation, other Member States cannot deny its legal capacity or impose burdens on the freedom of establishment, unless it would be justified on the basis of the 'general good'⁶. As a result of this, companies can now freely choose the legal system they consider being the most appropriate for their businesses, a situation that in consequence could trigger a competition between EU Member States for corporate charters, comparable to the so-called "Delaware effect" in US corporate law (Enriques & Gelter, 2006). After the incorporation in accordance with the law of that chosen jurisdiction, they will be entitled to set up branches in other EU countries, operating mainly under the corporate statute of their home country. There is ample empirical evidence showing that entrepreneurs have indeed made use of the opportunities for forum shopping offered by the recent jurisprudential developments. Between 2003 and 2006, not less than over 67,000 new private limited companies were established in the UK by residents of other EU Member States, without any operational activity in the UK (Becht, Mayer & Wagner, 2006). The operational activities are located in branches set up in other Member States.

The increased dislocation of the legal structure and the actual centre of business of companies amplify the necessity to elaborate legal instruments to make sure that corporate information is easily accessible to interested stakeholders of the company in the countries of operational activity of the companies (notably creditors and public authorities). The following section examines to which extent the current European regulatory framework concerning disclosure requirements imposed on private and public limited companies is adapted to the new business reality.

3. Business transparency in the single market

In order to facilitate the exercise of the freedom of establishment, the European Community has enacted eleven Company Law Directives. These were important in relation to limited liability companies that frequently extend their activities beyond their national borders. The harmonization realized by these Directives aims at reducing red tape by helping companies to operate throughout the EU on the basis of a single set of rules and a unified management and reporting system. In the light of this, only the harmonization relating to disclosure requirements will be analysed.

3.1. Supply of company information to business registers

In order to increase transparency and confidence in the governance of companies, to protect investors, employees and the public against corporate cheating, fraud and mismanagement, both private and public companies are required to disclose a far-ranging set of corporate and financial information.

As far as corporate data are concerned, Article 2 of the First Company Directive requires non-listed and public limited companies to disclose information covering every aspect of corporate life: ranging from its constitution (such as the instrument of constitution), through its corporate life (balance sheet and profit and loss accounts for each financial year) until its liquidation. All this information must be notified to the business register located in the territory in which the company is incorporated.

In view of the national dimension of business register microstructures, the setting-up of most cross-border or out-of-state company structures (e.g. branch establishment, creation of a subsidiary) will require filing in business registers in other Member States of data which often are already available in the home state of the company. For example, the establishment of a branch by a EU-company in another Member State goes along with extensive disclosure requirements pursuant to the 11th Company Law Directive in order to ensure the protection of persons who deal with companies through the intermediary of branches. A closer look at the latter Directive learns that the compulsory disclosure covers documents not only relating to branch-specific data (such as the address and activities of the branch), but relating to general company related data as well; hence, the disclosure requirements concerning company data (such as the duty to file information on the appointment, termination and identity of persons who are authorized to represent the company, the winding up of the company, the appointment of liquidators, accounting documents and so on) duplicate with data already filed in the home state of the company. From the perspective of the company, the need to comply with these requirements in various jurisdictions entails superfluous costs, taking into account as well the possible disparities in the disclosure obligations, and the need to have documents translated and certified.

In the case of companies, the shares of which are traded on a regulated market in the EU ('listed companies'), the disclosure requirements flowing from European securities regulation, notably the Transparency Directive (Directive 2004/109/EC), are far more extensive. The information to be disclosed pursuant to the Transparency Directive consists of annual and half-yearly financial reports, interim management statements (or,

alternatively, quarterly financial reports required under national law), ongoing information (such as major shareholders notifications), the disclosure of inside information which is prescribed under Article 6 of the Market Abuse Directive 2003/6/EC and, if applicable, more severe disclosure requirements imposed by the issuer's home Member State. Together with its public disclosure, the information must also be notified to the competent authority and to the officially appointed mechanism (OAM) of the issuer's home Member State, set up pursuant to Article 21 (2) Transparency Directive (Huemer, 2005).

In contrast to the disclosure of company data, the Transparency Directive opts for a system that avoids the unnecessary duplication of filing requirements. Fully in line with the 'home country control' principle, the notification of information must be made only to the competent authority and to the officially appointed mechanism of the home Member State. In order to determine the home Member State, a distinction between two situations should be made. In most cases the home Member State under the Transparency Directive will coincide with the country of incorporation. However, issuers of debt securities with a denomination per unit of more than EUR 1000 can choose their home Member State among the member states in which they have their registered office and where their securities are admitted to trading on a regulated market.

The home state rule as regards the supply of information leads, in a cross-border context, to a 'one stop shop' for the issuer: financial information must only be filed with the competent authority and the officially appointed mechanism of *one* Member State; conversely, the other Member State where securities of the issuer are listed ('host states') are prohibited from imposing more stringent disclosure requirements than those laid down in the Transparency Directive⁷. In addition to this, the European legislator recognises that any obligation for an issuer to translate information into all the relevant languages in all Member States where its securities are admitted to trading has deterrent effects on the cross-border admission of securities to trading on regulated markets. Therefore, the Transparency Directive stipulates that the issuer should, in certain cases, be entitled to disclose financial information drawn up in a language that is customary in the sphere of international finance. (Karmel, 2005) In fact, this leads to the use of English as the lingua *franca* in most cross-border securities issues.

Despite these improvements, the European legislator still maintains, within the home state, a system of multiple information supply channels. The Transparency Directive is based on a concept of intermediary-based dissemination, under which issuers must supply the information to the competent authorities at the same time they disclose financial information and make it available to the officially appointed mechanism. Moreover, the Transparency Directive does not affect the home Member State's right to require the issuer to publish, in addition, parts of or all regulated information through newspapers. Such a requirement looks increasingly anachronistic in an era of broadly accessible internet-based technologies.

For listed companies with establishments in different Member State, the combined requirements to disclose corporate and financial data may end up in a burdensome situation for the company and a fragmentation of information from the point of view of the investor. To illustrate this, we take the example of a public limited company with its registered office in the UK, having a branch office in Belgium and the shares of which are admitted to trading on Xetra (Frankfurt's stock exchange). In view of the disclosure requirements described above, this company will have to file corporate information with business registers located in the UK and in Belgium, as well as to disclose financial information and to notify it to the competent authority and to the OAM of Germany. Moreover, Belgian law will require a certified translation of the company documents into French or Dutch; while German law may require the information to be made available in German or English and to publish notices in newspapers. This multiplication of often divergent requirements not only increases the risk of non-compliance, and ensuing liability risks for executives, but it also leads to fragmentation of the available information over several registers or databases in different countries. It is obvious that this is likely to affect, both for companies and investors, the potentialities for taking advantage of a single European marketplace.

3.2. Retrieval of information by end-users

In order to assess the degree of fragmentation of relevant information when companies use their freedom of establishment, we will hereafter distinguish between company information in the narrow sense, and financial information for listed companies.

The disclosure requirements as regards corporate information result in the situation where, in principle, information about a company is filed in the business register of each Member State where the company deploys activities on a permanent basis. As each business register will contain basic information about the company's head office on the one hand, and country-specific information about the local establishments on the other hand, no consolidated data are readily available about the functioning of the company on an EU wide basis. For instance, the business register of the country where the company's head office is located does not contain information on the existence branch offices located in other countries. This fragmentation threatens both the accuracy of corporate information and its accessibility for interested stakeholders.

As regards the accuracy of the information, there is always a risk that the information contained in a multitude of business registers, as a result of multiple filings is not fully consistent. Furthermore, as business

registers do not work on a real-time basis, the multiplication of filings in different Member States is likely to generate time lags between business registers. The differences as regards the delay for the update of data in different business registers may in some situations be harmful for various stakeholders. For instance, when the company has been dissolved on the home register but would still have a branch office registered in another Member State, the branch could continue to trade in the host state without an associated registered parent company.

With respect to the accessibility of data contained in business registers, until a few years ago most business registers in Europe still existed as mere 'paper repositories' of company data, providing in fact only very limited opportunities for access to and dissemination of the company information. As a result of the 1999 recommendations of the SLIM working group on the simplification of the First and Second Company Law Directives, Article 3 of the First Company Law Directive was amended by Directive 2003/58/EC with a view to ensuring the electronic accessibility of the data filed in the company registers. These modifications will obviously result in both cost reduction for filing by companies, and in increased accessibility to data. The improved data accessibility is, however, limited: only the request for specific documents and the delivery thereof must be made available in electronic form. The Directive does not provide for an automatic open access to the register for searches by interested parties; neither does it create any interconnection between business registers enabling end-users to obtain data on a foreign company through their domestic business register.

This situation generates substantial information asymmetries for the various stakeholders, in particular when they are less familiar with the access to business registers located in other Member States, possibly also facing language barriers. Policy efforts to promote the interpenetration of national economies through the facilitation of the cross-border establishment of companies should therefore focus also on the need to improve the access to information both locally and in a cross-border context. The existence of today's web based network technologies clearly contrasts in this respect with today's legal provisions regarding business register organisation (COM 2007).

As far as financial information is concerned, the prospects in terms of retrieval are, mainly for two reasons, significantly better compared to the access to corporate information.

First, contrary to the Company Law Directives, the European Transparency Directive organizes the access to information about listed companies at an EU-wide level. In order to actively promote the integration of European capital markets, the Transparency Directive obliges Member States to ensure that issuers disclose financial data in a manner ensuring a fast access to such information on a non-discriminatory basis. In this way all investors and other interested third parties, independently of the Member State where they are located, should be assured of equal treatment when seeking access to such information.

Second, the Transparency directive requires Member States to set up a national 'one-stop-shop' system in relation to the retrieval of financial data through the appointment of one single 'Officially Appointed Mechanism' (OAM) at national level, to which issuers will have to notify the 'regulated information' listed in the Transparency Directive. These OAMs will function as repositories of all financial information that has been filed by issuers and can be viewed as the official single access point to that information (CESR-06/292). Hence, this should enable end-users to take advantage of a single source for the regulated information of all issuers for which the Member state qualifies as 'home state'. More importantly, the Transparency Directive also obliges Member States to draw up appropriate guidelines with a view to further facilitating the public access to relevant information on issuers. The aim of those guidelines shall be to enable the interconnection of databases and registers with a view to aggregate data about the issuers from different (public) sources. Notably, the Transparency Directive envisages the creation of (a) an electronic network at national level between national securities regulators, operators of regulated markets and national company registers and (b) a single electronic network or a platform of electronic networks across Europe. If such a network or platform would be in place, the access to financial information beyond the substantive and geographical scope of a single OAM would be possible. Such a network would create a one-stop-shop in relation to the retrieval of financial as well as corporate information about issuers across Europe. (See also Recommendation 2007/657/EC in this respect) However, the achievement of this one-stop-shop would not imply any changes to the several-stop-shop relating to the supply of data, nor to the issues described above concerning the retrieval of corporate information.

Taking into account the possibilities offered by network technologies and the example for listed companies, the question arises whether further regulatory action is not required in order to organise the company law related filing obligations incumbent on companies in the perspective of the interconnection of business registers at European level. This issue will be discussed in the next section.

4. Avoiding multiplication of filing requirements in cross-border company transactions and improving access by end-users

4.1. Reduction of burdens in relation to the filing of information

The desire to facilitate the cross-border mobility of companies through a reduction of regulatory burdens associated with the filing obligations concerning company data has been highlighted in different policy initiatives but this was until now not translated into concrete initiatives. Especially the SLIM ('Simpler Legislation for the Internal Market') Working Group on the simplification of the First and Second Company Law Directives is relevant in this respect. The Working Group acknowledged the importance of modernizing the business registers through enhanced electronic filing and access, in the prospect of interconnecting business registers with the aim of facilitating access to data across borders, and eventually to move to a "home country" principle as regards filing requirements incumbent on companies. In this regard, a parallel would be made with the "home country" principle as followed by the European Court of Justice case law concerning the freedom of establishment. As already mentioned, these recommendations resulted in the amendment of Article 3 of the First Company Directive with the effect that, as from 1 January 2007, business registers are obliged to convert documents filed by paper means into electronic form. Although this amendment is clearly less far-reaching than the recommendations issued by the SLIM Working Group on the simplification of the First and Second Company Law Directives, it is a first step in facilitating the remote access to business register data.

4.2. Reduction of burdens in relation to the retrieval of information

Internet based technologies should allow for better dissemination of company information. Instead of physically going to the business register, wherever it may be located, end-users could connect to the internet in order to consult information about a specified company. In this regard, the amendment of Article 3 of the First Company Law Directive earns the credit for providing the availability of electronic forms of company data filed in European business registers. Although it does not provide for an automatic open access to the register for searches by interested parties, the reality shows that business registers are willing to make their databases available for open access through the internet.

Furthermore, today's information and communication technologies could also be used to interconnect business registers from different Member States. In this way, the accessibility of company data could further be simplified for interested third parties. An example of this is the interconnection of business registers realized through "European Business Registers" (EBR), a European Economic Interest Group composed of the (central) business registers, whether public bodies or private businesses, of most of the EU Member States. EBR provides a single point of multilingual telematic access to a part of the information held in the registers participating in the network. By searching on a company name, the EBR-network will produce a company profile that contains the most important information available in any business register connected to the network. The advantage of such a kind of network is obvious. It puts end-users in the position to search company information on an EU-wide basis through a single access point.

4.3. The interconnection of business registers and filing obligations: in search of a regulatory model

Starting from the proposition that the availability of company information is essential for various interested parties (creditors, competitors, government), it is submitted by the SLIM Working Group on the simplification of the First and Second Company Law Directives that regulatory costs for the company can be reduced through the interconnection of business registers without threatening the interests of other stakeholders. In theory, ICT could realize the elimination of multiple filing of identical information in three ways.

First, the duplication in filing requirements could be eliminated by the provision that only country-specific information must be filed in each national business register where a specific EU-company has a branch or agency. After all, current technologies make it possible to provide direct access across Europe to company information filed in the home state. Although such a system would be more cost-effective for the company itself compared with the current situation, as it would avoid any duplication in publication obligations, it would still stick to a several-stop-delivery concept. Moreover, it would require a modification of the Eleventh Company Law Directive on cross-border branching. Finally, this model would not fundamentally eliminate the fragmentation of company data across different business registers.

The second model, the 'home country principle', would require each company to file its data exclusively in its home state, including the specific data relating to an out-of-state branch. Through the interconnection of registers, all data would be accessible all over Europe. Under such a system, which is comparable with the aim of

the Transparency Directive, all information relating to the Europe-wide activities of a company (including out-of-state branches) would be centralised in the country of its registered office, and would be made available either directly, or through the interlinkage with the business registers of other Member States. This “home state” system would clearly benefit both companies (low cost of filing) and end-users (one-stop-shop in terms of accessibility), but it is inconsistent with the present legal framework, which is still based on the filing in the national company registers of all countries concerned of the transaction or the cross-border establishment.

The third model adopts the principle that the home state data can be used for the purpose of complying with filing obligations in other member states where a company transaction is realized. Under this system, the interconnection of business registers would not result in a fully-fledged home state rule, but would nevertheless reduce regulatory costs by limiting the additional filing requirements to the country-specific data. Apart from reducing costs for the company, this system has the advantage of accessibility of all relevant data in each member state. It is also consistent with the present legal framework.

Although the second model would be the most effective in terms of both filing costs and retrieval burdens, it would require a fundamental change in the present regulatory framework. In the present situation, the third model constitutes a second-best solution. Therefore, the following section will provide more details on a European research project (BRITE) that aims at the design of architecture to implement the third approach, through the interconnection of and advanced interoperability of national business registers.

5. The future is BRITE?

BRITE (Business Register Interoperability throughout Europe) is a three year (2006-2009) research project under the European Commission’s 6th Framework Program that should build the foundations for complete cross-border interoperability between business registers at a European level. The main project objective is to develop, implement and demonstrate an advanced interoperability model, an ICT service platform and a management instrument for business registers to interact across the EU. Thus, the platform would facilitate cross-border access to and exchange of official company information. This would in turn enable to initiate processes facilitating filing requirements associated with cross-border mobility and establishment of companies as well as the creation of value added services connected with business register data.

The benefits of the implementation of such a BRITE platform are obvious.

Regarding the filing of company data, company management may greatly benefit from the automation of the branch registration process. It would enable the host business register to remotely retrieve the documents required to process a branch registration, and potentially allow the parent company to register a branch in another member state directly from its home register (a one-stop-shop in terms of delivery of corporate data). Following the third approach as explained in section 4.3, the system would neutralize most costs related to duplications in disclosure requirements enforced by the Eleventh Company Law Directive. It also opens up perspectives in view of the forthcoming Directive on the transfer of the registered office, the transfer of the seat of SE’s, cross-border mergers etc.

As far as retrieval of company information is concerned, the BRITE platform has the potential to both improve the accuracy of the consulted data and the access to the data by interested parties. As mentioned before, third parties could suffer severely from any delay in updating information filed in host business registers. To take away the unremitting suspense about the accuracy of company information, BRITE is designing robust links between the register of the branch and that of the company. These would allow host registers, through an alert or notification service, to be automatically notified of critical company status changes and therefore receive an early warning, allowing them to take appropriate action. In its turn, companies deploying economic activities in other Member States than their home state could benefit from stakeholder’s reinforced trust in the accuracy of company information. Thus, creditors or investors could take better informed decisions as they will be provided with easier access to company information, such as the location and number of registered branches. More specifically, if a search on a company is being made, the platform will interrogate every business register connected to it and will retrieve corporate data on a consolidated basis.

If such a platform would be in place, it would be possible to revisit the SLIM proposals for the registration of branches, as the technological conditions would be in place for a further simplification of the regulatory framework (see also COM 2007). The SLIM Working Group indeed recommended that the Eleventh Company Law Directive should be altered to provide that the registration of a branch should take place on the register where the company is registered, and that no further registration should be necessary where the company establishes the branch. However, that proposal was not brought forward by the Commission because the technological infrastructure was not in place to support proper control and disclosure.

6. Enabling other users to gain access to company data

The availability of company information is, in today's complex economies, not confined to allowing various 'private' stakeholders (creditors, shareholders, etc.) to gain access to relevant data about the legal form, the company history and the operations of the company. Increasingly, public authorities show an interest in obtaining access to company data for the purpose of discharging their own public functions. The increased potential for (cross-border) mobility and restructuring of companies in the EU amplifies the need for adequate search engines. Gaining easy access to and use of electronically stored company information may present obvious advantages in the context of e-Government as well, as it is likely to diminish the administrative burdens for companies in their relation with public authorities. For instance, the electronic access to company data by a public authority in the context of requests for subsidies or of tender offers may lead to waiving the obligation for the applicants to provide this information in the first place. Finally, a platform created for the interconnection of company registers could be used as a prototype for the access to and exchange of other data about companies in the context of specific disclosure obligations or of various forms of public supervision of economic activities. The latter will be illustrated through the use of interconnected business registers for the combat against money laundering.

As far as combatting against money laundering is concerned, the increasing internationalization of capital flows and financial transactions concurrently enlarges the opportunities for resources obtained from illicit financial activities to cross borders undetected and make their way into the real economy. Considering the fact that money launderers more often use legal persons (in an attempt) to conceal any connection between a criminal activity and the resources obtained from it, the data contained in business registers are invaluable in the detection of legal and corporate structures used for the purposes of money laundering and terrorist financing (Schott, 2006). An enhanced transparency of business registers may thus be considered as an effective tool for the main actors in the field of anti-money laundering. To shed more light on the possible impact of a platform interconnecting business registers in the field of anti-money laundering, a distinction between two categories of actors (financial intermediaries as well as financial intelligence units) will be made.

Firstly, it is submitted that the stage in which cash derived from criminal activities is going to be injected into the regular economy (i.e. the placement-stage) offers the best opportunity for detecting money laundering. To that end, the Third Anti Money Laundering Directive 2005/60/EC requires financial institutions and other undertakings likely to receive the proceeds of crime to assist financial intelligence units (FIUs) in their fight against money laundering and terrorist financing. This entails for the financial institutions and other bodies the obligation to keep track of the persons with whom they enter into a business relationship, and to follow up on this information on a regular basis. These 'customer due diligence' obligations will in general include the identification of companies, its shareholders ('beneficial owners'), board structure etc. It is obvious that a platform interconnecting business registers may be a useful tool to comply with these obligations. Due to the linkage between business registers, financial intermediaries would be in the position to access, through a single entry point, all the public corporate data about their clients available in all business registers throughout the European Union. This gathered information must be used to promptly inform their financial intelligence unit, on their own initiative, where they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted. Considering the improved quality of the customer due diligence that financial intermediaries could thus achieve, reports of suspicious transactions could be more accurate, which subsequently leads to better investigation and prosecution of money laundering.

Secondly, financial intelligence units (FIUs) may benefit from such a platform by the increased access to consolidated corporate data. Beside the improved access to corporate data and the more accurate reports they could receive, the BRITE platform could assist FIUs in their specific needs through the elaboration of 'event notification services'. The purpose of these services is to enable FIUs to reduce the monitoring costs of suspicious persons or companies, through a system of automated tracking of these subjects in the business register data. For instance, a FIU could, through the BRITE platform, ask to be notified whenever person X appears as board member of a company in one of the business registers connected to the platform. In a more sophisticated approach, the notification service could be used for defining and notifying flows of events concerning business register data which can possibly point to a suspicious situation for the FIU (e.g. the fact that companies are set up and wound up within a very short period of time). Thus, a better access to and use of business register data could provide a valuable additional tool for public authorities in the discovery of connections or networks between persons and companies, which is vital in the money laundering process.

7. Conclusions

The organisation of the supply and dissemination of corporate information through business registers in Europe is a showcase about how nationally organised information systems can be at odds with the objective to promote cross-border economic activity while at the same time preserving the need to adequately inform and protect the

users of the registers. The legal environment for business registers should take account, however, of the changed technological environment and the increased possibilities offered by networks. From a legal perspective, the interconnection of existing information systems into a network offers the advantage of being consistent with the principle of subsidiarity: instead of centralising data into a European register, the interconnection of existing registers preserves the 'national' organisation of the register systems, while at the same time taking advantage of the universal access to the data, their exchange and their aggregation. While this approach prevails in the disclosure of (financial) information for listed companies in the European Union, with the possible creation of a European network of national 'officially appointed mechanisms', the company law disclosure system still lags behind the possibilities offered by ICT.

The potential of the BRITE project illustrates how technology can act as a catalyst for lawmakers in reducing red tape for entrepreneurs, and at the same time increase the use of public information for various public and private actors. More fundamentally, it also demonstrates that the law should adopt a more open attitude towards the possibilities offered by technology. While the regulation of business registers is essentially confined within a national, territorial organisation leading to multiplication of filing requirements for multinational business enterprises, the Transparency Directive radically opts for a 'home country'-approach, thereby favouring the exploitation of network effects in a harmonious conjunction between law and technology. European policymakers should consider exploring the use of a similar approach not only in the field of business registers, but also in other domains of e-government.

References

1. Becht, M., Mayer, C. & Wagner, H.F. (2006). *Corporate Mobility and the Cost of Regulation*. ECGI Law Working Paper N. 70/2006; available on www.ssrn.com.
2. Communication from the Commission on a simplified business environment for companies in the areas of company law, accounting and auditing, COM (2007) 394.
3. Drury, R.R. (1999). *Migrating Companies*. European Law Review Volume 24, pp. 354-372.
4. Enriques, L. & Gelter, M. (2006). *Regulatory competition in European Company Law and creditor protection*. European Business Organization Law Review Volume 7, pp. 417-453.
5. Hirt, H.C. (2004). *Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd*. European Business Law Review Volume 15 (issue 5), pp. 1189-1122.
6. Huemer, D. (2005). *European Law on Capital Markets – Quo Vadis?*. Cornell Law School Papers Series, available on <http://lsr.nellco.org/cornell/lps/clacp/5>.
7. Karmel, R.S. (2005). *Reform of Public Company Disclosure in Europe*. Brooklyn Law School Legal Studies Research Papers, available on www.ssrn.com.
8. Omar, P.J. (2005). *Centros, Überseering and Beyond: A European recipe for corporate migration (part 2)*. International Company and Commercial Law Review Volume 16, pp. 18-27.
9. Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, available at <http://www.europarl.europa.eu>.
10. Recommendations by the Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives, available on http://ec.europa.eu/internal_market.
11. Schott, P.A. (2006). *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*. The World Bank, 296.
12. Vaccaro, E. (2005). *Transfer of Seat and Freedom of establishment in European Company Law*. European Business Law Review, pp. 1348-1365.
13. Wymeersch, E. (2003). *The transfer of the Company's seat in European Company Law*. Common Market Law Review Volume 40, pp. 661-695.

Notes

¹ See for example the ninth recital of Directive 94/45/EC.

² The direct applicability of the principle of freedom of establishment in the legal order of the EU Member States has been stressed and reiterated by the ECJ in several cases such as Case 2/74, *Reyners* [1974] ECR I-631 and Case 79/85, *Segers* [1986] ECR I-2375.

³ Particularly the First Company Law Directive (Directive 68/151/EEC) and the Eleventh Company Law Directive (Directive 89/666/EEC) and more generally, the Second Company Law Directive (Directive 77/91/EEC), the Third Company Law Directive (Directive 78/855/EEC), the Fourth Company Law Directive (Directive 78/660/EEC), the

Sixth Company Law Directive (Directive 82/891/EEC), the Seventh Company Law Directive (Directive 83/349/EEC) and Directive 2005/56/EC.

⁴ The incorporation theory, which is followed by the United Kingdom, Ireland, the Netherlands and Denmark, basically connects a company to the jurisdiction of its place of incorporation. In contrast to this, the more continental theory of the 'real seat', adhered by Germany, France, Belgium, Spain, Luxemburg, Greece and Portugal, takes the actual centre of administration as connecting point to determine the governing law of a company. (Drury, 1999) While the former theory is more export-minded as it allows companies to be kept governed by the law of the country in which they are incorporated, the latter theory is indeed more defensive by requiring companies to reincorporate in the country in which they actually deploy their main economic activities.

⁵ Case C-212/97, *Centros ltd v. Erhvervs-og Selskabssyrelsen* [1999] ECR I-1459; Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd* [2003] ECR I-10155.

⁶ See for example Case C-19/92, *Kraus* [1993] I-1663 and Case C-55/94, *Gebhard* [1995] I-4165.

⁷ Although it must be noted that the ECJ no longer accepts more severe disclosure requirements than those laid down in the Eleventh Company Law Directive.