Sub-group: Rome X on Company Law

I. Introduction

In the 2013 meeting, GEDIP agreed to work on the issue of the law applicable to companies in the EU (associations and legal entities, in general)[1]. The purpose of this paper is to serve as a basis for the discussion on this issue.

The paper is organized as follows. Section I will briefly explain the reasons for an EU instrument on the law applicable to companies and the core content of such instrument. Section II will summarize the ECJ case law on that issue and will formulate the main principles underpinning that case law. And finally, Section III will present a Draft Regulation on the law applicable to companies.

II. The need for an EU Instrument of the law applicable to companies and its core content

Company Law in Europe is progressing at two levels. First, there are rules dealing with EU companies, i.e. autonomous or supra-national entities created under EU Law (e.g. SE or European Private Company). From a PIL perspective, the SE is based on a link between the registered office and the head office. Thus, Article 7 of the Regulation on the Statute for a European Company (SE) establishes that *"the registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place."*[2]

And secondly, there are rules dealing with national companies that harmonize substantive company law. Though the degree of harmonization is relatively high, there are still considerable differences among Member States on the legal status of a company. Furthermore, there are certain types of companies that fall outside the scope of application of the harmonized rules. The determination of the national law governing a company remains a key issue in practice.

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[1] In this paper, the term "company" must be understood in a broad sense, including any legal entity (*infra*).

[2] Article 8 in turn deals with the transfer of the registered office to another Member State. See however Article 7 II of the Proposal on the Statute for a European Private Company (SPE): "*An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office*".

So far, there is no uniform legal framework on that issue. Following the failure of the EEC Convention of 1968, conflict of law rules on company law remain in the hands of Member States and the content of these rules differs substantially. The connecting factor determining the applicable law varies significantly among Member States. So, for example, one group of Member States has traditionally followed the so-called "Real Seat Theory", i.e. the law governing a company is determined by the place where the central administration of that company is located. Others have followed the "Incorporation Theory", i.e. the law governing a company is determined by the place of its incorporation (where the registered office is located). And a third group has followed a combination of both. The ECJ case law has partially reduced the consequences of this diversity. The Court has set out a minimum degree of "negative harmonization", since it has considered that certain national approaches may imply an obstacle to the freedom of establishment guaranteed by the TFEU (*infra* III). But the ECJ case law has only provided partial answers, mainly addressed to the "host Member State", not to the home "Member State", and on a case by case basis. There are good reasons, therefore, to establish a uniform, consistent and exhaustive framework on the law applicable to a company at the EU level. This framework would facilitate the smooth functioning of the EU market[3].

In principle, the core content of a future instrument should deal with three aspects:

(1) The determination of the law applicable to a company (or *lex societatis*), i.e. the identification of the connecting factor that links a company with a particular legal system;

(2) The scope of application of that law, i.e. the issues that are governed by the *lex societatis* and those that may be subject to an autonomous connecting factor;

And (3) changes to the *lex societatis*. In this sense, the future instrument might incorporate the (non nata) 14th Directive on transfer of seat.

One additional question to be considered is whether the future instrument should also include rules on cross-border mergers. At this stage, since there is a specific instrument governing these transactions (see Directive 2005/56/EC on cross-border mergers), we understand it is preferable to leave them outside the scope of the future instrument. Alternatively, and taking into consideration that the Directive only applies to intra-EU cross-border mergers, we may include a general conflict of laws rule clarifying the "distributive application" of the lex *societatis* of the companies involved in the cross-border merger (see e.g. Art. 163 et seq. Swiss PIL Code). This rule would also apply to de-merger or spin-offs.

Although the tax aspects of these transactions are very relevant in practice, we also understand that they should not be dealt with in the future instrument: its scope of application must be limited to private-law aspects.

III. ECJ case law: summary

[3] See also *European Added Value Assessment. Directive on the cross-border transfer of a company´s registered office 14th Company Law Directive,* 2012.

As said above, the ECJ case law has clarified the impact that freedom of establishment (Articles 49 and 54 TFEU) may have on the issue of the law applicable to companies[4]. The purpose of this Section is to summarize that case law[5]. This is an essential step since the future instrument must be consistent with this case law. It sets out the framework within which the EU legislator may intervene.

Although the rulings are closely interconnected, the ECJ case law can be divided in two groups: those cases dealing with "static situations", i.e. when the problem is the determination of the law applicable to a company; and those other cases dealing with "dynamic situations", i.e. when the problem is a change of the law applicable to a company (=a transfer of seat).

(A) The determination of the *lex societatis*

On the determination of the *lex societatis*, the case law of the ECJ can be summarized in three main ideas.

(1) Companies are creatures of national law. Therefore, they only exist insofar as they have been validly created under the law of a Member State: *"companies are 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."* (Daily Mail, para. 19; Uberseering, para 67; Cartesio at 104; VALE at 27).

(2) Each Member State determines whether and under what conditions a company can be incorporated *under its own law*, and in particular whether not only the registered office but also the real seat must be situated in its territory: *"Finally, a Member State thus unquestionably has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status"* (see VALE at 29). That is, the home Member State determines the relevant connecting factor and therefore whether the company exists and is entitled to exercise the freedom of establishment (Cartesio at 109 and 110).

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[4] **Articles 49 and 54.** Article 49 provides that "*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited".* Article 54, in turn, extends this freedom to legal persons. It provides that companies or firms "*formed in accordance with the law of a Member State and having their registered office, central administration or principle place of business within the community shall, for the purpose of this chapter, be treated in the same way as natural persons who are nationals of Member States".* Note that the text of this provision does not require that the location of the central administration or the principle place of business of the company coincides with the Member State under whose law it is formed.

[5] The cornerstones of this case law are: Daily Mail C-81/87; Centros C-212/97; Uberseering C-208/00; Inspired Art C-167/01 ; Vale, C-378/10; SEVIC C-411/03; Cartesio C-210/06. There are other cases that should also be taken into account, e.g. Segers C-79/85; National Grid, C-371/10.

Example. English law determines the conditions for a company to incorporate under English Law and Hungarian Law determines the conditions for a company to incorporate under Hungarian Law. Hungarian Law, for example, may impose the obligation to have the company´s real seat in Hungary as a condition for it to be governed by Hungarian Law. This implies that the founders of a company may choose the applicable law, but they must meet the requirements of that law, including the location of the real seat, and naturally all other conditions on e.g. formalities, registration, minimum capital, number of members or internal structure. An important part of these conditions is harmonized by EU Law, but not the aspects related to the connecting factor.

(3) However, once a company has been validly incorporated under the law of a Member State, the principle of mutual recognition applies: "*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 centre 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."* (Uberseering at 95, also implicitly Centros at 17 and 22). Furthermore, the ECJ has added that *"The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty"* (Centros, at 27) and it is immaterial *"…that the company was formed in one Member State only for the purpose of establishing itself in a second Member State"* (Centros, at 17; Inspire Art at 95).

Note that those statements have a very relevant impact on those Member States that follow the "Real Seat Theory". The "Real Seat Theory" requires the coincidence between the place of incorporation and the real seat. If, therefore, a company incorporated in another Member State does not have its headquarters in that very Member State, it would not be recognized as such by the "Real Seat Theory" followers. The ECJ has clearly said that this is an obstacle to the freedom of establishment (an obstacle with no justification).

Example. Let us imagine a company incorporated in England with its Real Seat in Hungary. If Hungary follows the "Real Seat Theory"[6] that company would, in principle, not be recognized as such, i.e. as a legal entity under English company law, since the law applicable would be Hungarian Law and it has not been validly incorporated in Hungary. The ECJ, however, has concluded that the non-recognition by the Hungarian authorities of the English company is an obstacle to the freedom of establishment.

(B) Scope of the *lex societatis*

With regard to the scope of the *lex incorporationis*, the ECJ has concluded that:

[6] For the sake of the argument, we are assuming that Hungary Law is based on the real-seat theory. The positive law is however debatable.

(1) The mutual recognition principle encompasses not only the recognition of the capacity of the foreign entity under the law of its incorporation, but in general also the *legal status* of the company under that law. The host Member State cannot impose, for example, particular obligations on disclosure, minimum capital or director´s liability on a company validly incorporated under the law of another Member State (Inspire Art at 142).

Example. If a company has been validly incorporated under English law, the rest of the Member States – including the Member State where the real seat of that company may be located – must recognize the legal capacity of that company under English law. But furthermore, in principle, both the internal and the external aspects of the company should be governed by that law, e.g. the creation, internal organization, minimum capital or the liability of members and directors as such. The rest of the Member State must apply English law as the "personal law" of that company.

(2) The ECJ has accepted, nevertheless, the possibility that there might be certain exceptions, subject to the proportionality test. The host Member State may impose certain obligations to the foreign company (i.e. exceptions to the application of the lex *societatis*) insofar as (i) they are non-discriminatory, (ii) aimed at the protection of general interests (creditors of the company, workers, tax authorities or minority shareholders), (iii) suitable for securing the attainment of the objective they pursue and (iv) do not go beyond what is necessary in order to attain it (Centros at 34; Uberseering at 83 *et seq* ; Inspire Art at 121).

In practice, none the less, the ECJ has been very reluctant to conclude that an exception to the application of the *lex incorporationis* satisfies those conditions. With regard to the protection of creditors of the company, in particular, it has usually invoked the principle *volenti non fit injuria*: *"Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish Law [where the real seat was located], its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark…"* (Centros at 36)

(C) Changes of *lex societatis*

The re-incorporation of a company from Member State "A" to "Member State "B" implies a cross-border conversion and, therefore, a change of *lex societatis*. With regard to these transactions, the ECJ has also set out three main principles:

(1) The home Member State ("A") determines the connecting factor required for a company to be regarded as incorporated under its national law (*supra*), but also *"the connecting factor required if the company is to be able subsequently to maintain that status"*

(Uberseering at 70; Cartesio, at 110; National Grid at 27; VALE at 29). Therefore, the home Member State may subject the company´s right to retain its original *lex societatis* to the condition of maintaining its real seat within the territory of that State.

Example. For a company to be incorporated under its legislation, Hungarian Law requires the location of the company´s real seat to be in Hungary. Accordingly, it does not allow a Hungarian company to transfer its real seat abroad, e.g. to Italy, while continuing to be subject to Hungarian law as its personal law. *From a Hungarian Law perspective*, a transfer of the real seat abroad necessarily entails a change of *lex societatis*. Such a transfer would require that the company cease to exist under Hungarian Law and, then, that the company re-incorporate itself in compliance with Italian Law.

And the ECJ has confirmed that freedom of establishment *"does not include a right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, …, to another Member State whilst retaining its legal personality and nationality of origin"* (Daily Mail at 24; VALE at 34).

Example. In the former example, the freedom of establishment does not include the right of the Hungarian company to transfer its real seat abroad while keeping its Hungarian status.

Note that in other Member States this transfer does not entail a change of *lex societatis*, e.g. a Dutch or a Spanish company may transfer its real seat abroad keeping its status as a Dutch or Spanish company (see Uberseering, at 80). In these Member States, only a transfer of the registered office entails a change of *lex societatis*.

(2) Conversely, when the company transfers its seat with an attendant change of *lex societatis*, this operation should be possible to the extent that the requirements of the law of the other Member State ("B") are satisfied. This conversion while keeping its legal personality, i.e. without prior winding-up or liquidation, is guaranteed by the freedom of establishment (Cartesio at 113). In particular, this freedom precludes Member State B, which enables companies established under national law to convert, from not allowing, in a general manner, companies governed by the law of another Member State to convert to companies governed by its national law (VALE at 41).

Example. An Italian company moves its real seat and its registered office to Hungary with the intention of changing its lex *societatis* (Italian Law → Hungarian Law). This transaction entails a cross-border conversion of the legal status of that company. As long as Hungarian Law permits the conversion of companies established under its national law, it should also permit the cross-border conversion, i.e. the change of the lex *societatis* keeping the same legal personality.

(3) In these cases of cross-border conversion (i.e. change of *lex societatis*), the law of the Member State of destination ("B") governs the conditions of re-incorporation, i.e. the company must satisfy the requirements applicable to national companies of Member State B as regards e.g. registration, minimum capital, disclosure, internal structure or number of members. However, the ECJ has clarified that the principles of equivalence and effectiveness apply (VALE at 53).

Example. In a case of cross-border conversion from Italy to Hungary, the ECJ has concluded that those principles preclude the host Member State from *"(i) refusing …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 (ii) 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"* (VALE at 62).

V. Draft Regulation

The case law of the ECJ has been thoroughly analysed by scholars. However, from a policy perspective, it seems reasonable to take such case law as a starting point. Our understanding is that the future instrument must go further and establish a uniform conflict of laws framework (i.e. not depending on the rules of the home Member State) that is sound and functional.

This framework must be based on three principles.

Firstly, the "Incorporation Model" as a starting point, i.e. a company should be governed by the law of the Member State of its incorporation, regardless of the location of its real seat. A company, therefore, can choose any law as its "personal status", irrespective of the location of its central administration or principle place of business. In principle, this rule should have universal application.

Rationale. From a policy perspective, the adoption of the "Incorporation Model" is the key element of the future instrument. Note, however, that since the ECJ has confirmed that approach from the perspective of the host Member State it does not make much sense not to adopt it from the perspective of the home Member State. The reason is easy to understand. The "Real Seat Theory" is based on the protection of local interests: if the company has its real seat in the forum, this normally implies that it is also "economically established in the forum" and, in this case, local creditors should be protected vis-à-vis foreign company-law rules that do not provide a level of protection equivalent to that provided by the company-law rules of the forum. As has been said, the "Real Seat Theory" is, in fact, a theory of "non-recognition" of foreign entities. However, since the ECJ has established the obligation to recognize companies incorporated in other Member States, keeping the location of the real seat in the forum as a pre-condition for the incorporation of a company as a company of the forum does not make any sense. On the other hand, the floor of harmonization established by the Directive prevents a "race to the bottom" among Member States. With regard to companies incorporated in third countries, that solution may need an additional justification. However, we understand that the most neutral and functional solution is to take the same approach as a starting point (see e.g. German Referententwurf: Gesetz zum Internationalen Privatrecht der Gesellschaften,

Vereine und juristischen Personen) and protect local interests, if any, by expanding the exceptions to the scope of the *lex incorporationis* (*infra*).

Secondly, the integral application of the *lex incorporations,* i.e. this law should govern both the internal and the external aspect of the legal status of a company. Certain exceptions, however, may be justified, in particular those aimed at the protection of third parties.

Rationale. A company has a double dimension: (a) on the one hand, an internal dimension, insofar as *ad intra* a company implies a sum of relationships between the parties to the company contract (typically, members or shareholders and directors); (b) on the other hand, an external dimension, insofar as *ad extra* a company is considered as a legal person. Capacity and liability are the two essential features of this external dimension. The principle of integrity entails that both the internal aspects and the external aspects (capacity and liability) of the corporation should be governed by the same law, *i.e.* its *lex incorporationis.* The submission of all these matters to the same law ensures consistency and predictability. Additionally, it prevents problems of complementarity: the internal and the external dimensions of the company are so closely inter-related that it is advisable to subject both dimensions to the same law. Furthermore, from a policy perspective, the application of the *lex incorporationis* does not raised serious problems: with regard to the members of the company, they have voluntarily agreed to the application of that law and the same applies, as the ECJ has pointed out (*supra*), with regard to third parties (creditors).

Nevertheless, one exception may be justified in order to protect bona fide third parties – something equivalent to that contained in Article 13 of Rome I. Furthermore, a clarification on the law applicable to directors' liability following the case law of the ECJ (C-147/12) may also be helpful to avoid any uncertainty.

Thirdly, a company should be able to change its *lex societatis* by moving its registered office abroad, keeping its legal personality, and regardless of the situation of its real seat.

Rationale. If the instrument follows the "Incorporation Model", a change of *lex societatis* takes place by a mere transfer of a formal element (the registered office) and independently of the location of the real seat, i.e. a change of real seat has no impact of the applicable law.

In the Draft, we have decided to include substantive rules on the change of lex *societatis*, inspired by the Resolution of the European Parliament of 2 February 2012. However, GEDIP must consider whether these rules should form part of this instrument or should be moved to a special Directive on cross-border transfer of company seats. In this case, the future instrument will only clarify when a change of applicable law takes place.

The draft consists of 14 articles.

Article 1 sets out the scope of application of the instrument. It applies to commercial and civil companies in a broad sense, including other legal entities. The scope of the instrument should coincide, in principle, with the exclusion referred to in Article 1 (2) (f) of

Rome I, i.e. "companies and other bodies, corporate or unincorporated". The instrument, therefore, should not be restricted to limited liability companies.

Article 2 establishes the universal application of the instrument.

Article 3 proclaims the main rule of the instrument, i.e. the law governing a company in determined by its incorporation or constitution.

Article 4 deals with the scope of application of the *lex incorporationis* and is based on the principle of the integral application of that law.

Article 5 sets out certain exceptions aimed at the protection of third parties.

Article 6 clarifies the characterization of the rules applicable to director´s liability. It takes into account the case law of the ECJ on this matter, in particular the case C-147/12.

Article 7 deals with changes to the *lex societatis* and identifies the transfer of the registered seat as the factor that triggers a change of that law.

Article 8 clarifies the distributive application of the law of the State of origin and the law of the State of destination.

Article 9 contains certain material rules applicable to changes of lex *societatis*, inspired by the Resolution of the EU Parliament of 2 February 2012.

Articles 10 to 14 deal with problems of application (lois de police, public policy, multi-unit states, renvoi, international agreements).

Draft of Regulation Rome X on the law applicable to companies and other bodies

Article 1. Scope of the instrument

This instrument shall apply to companies, associations and other bodies or legal entities, corporate or unincorporated[7]. It shall not apply to public-law entities.

Article 2. Universal application

[7] In principle, the scope of application of this instrument should dovetail with the exclusion set out by Article 1 (2) (f) Rome I, in order to avoid any gap between these two instruments. However, the delimitation between a mere contract and a "legal entity" is difficult. One relevant element to draw the line between them is whether the "entity" has a legal personality, different from the legal personality of its members, or not (bus see Giuliano-Lagarde Report Article 1 at 6 or Art. 150 Swiss PIL Code). The application of the "Incorporation Model", anyway, reduces the importance of this problem.

Unless provided otherwise, any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 3. Applicable law

A company or other entity shall be governed by the law of the country under which it has been incorporated or, where it has not been incorporated, under which its formation took place.

Where the law applicable cannot be determined on the basis of paragraph 1, a company or other entity shall be governed by the law of the country with which it is most closely connected.

Article 4. Scope of the applicable law

1. The law applicable under this Regulation shall govern in particular[8]:

(a) the foundation of the company, its re-organization and winding-up;

(b) the name of the company;

(c) its legal nature, general capacity and capacity to act;

(d) its internal functioning, organization and financial system;

(e) accounts, auditing and disclosure;

(f) the conditions of membership, the rights and obligations associated with it and the acquisition and disposition of these rights, including the rights of shareholders as such against the company and against each other; and

(g) the liability of the company, its officers and its members for obligations of the company.

Article 5. Capacity [ultra vires doctrine]

The capacity of a company or other entity to enter into relationships with third parties and the powers of their representative bodies or persons shall be governed by the law determined in accordance with Article 3. Nevertheless, any restrictions or limitations established by such law cannot be invoked against third parties when the relationship was concluded in a different country, under the law of which those restrictions or limitations do

[8] See, *i.a.,* article 25.2 of the Italian 1995 Private International Law Code; article 155 of the Swiss 1987 Federal Code on Private International Law; in the US, the "internal affairs doctrine" leads to similar results, see §§ 302-309 of The Restatement Second on Conflict of Laws. See also Giuliano-Lagarde Report Article 1 at 6.

not exist, unless those third parties were aware of them or were not aware of them as a result of their negligence.

Article 6. Liability

1. The liability of members and directors of the company or other entity *as such* shall be governed by the law determined in accordance with Article 3.

2. Companies and other entities [of a third country][9] operating in the EU must disclose their country of incorporation to third parties. Otherwise, the liability of the persons acting on behalf of those companies and entities, its members and directors shall be governed by the law of the Member State where that person is acting, unless the other party was aware or ought to have been aware of that information.

3. The direct liability in tort of members and directors of a company to third parties, in particular liability resulting from their allowing the company to continue carrying on business when undercapitalized, shall be determined by Regulation 864/2007 (Rome II). This instrument shall also determine the law applicable to the liability of members or directors of a company for non-contractual damage caused by the company[10].

Article 7. Transfer of registered office

1. Within the European Union, a company may change its applicable law without losing its legal personality. A transfer of the registered office from one Member State to another Member State shall constitute a change of that law. This change shall take place irrespective of the location or change of location of the central administration and/or the principle place of business of the company.

2. A company incorporated in a Member State may change its applicable law in favour of the law of a third country, without losing its legal personality, if this is permitted by the law of the third country.

3. A company incorporated in a third country may change its applicable law in favour of the law of a Member State, without losing its legal personality, if this is permitted by the law of the third country.

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[9] The limitation of this provision to non-EU companies should be discussed. The key issue is whether the application of this rules also to EU companies satisfies the "proportionality test" set out by the ECJ.

[10] Note that some members of the sub-group have expressed their doubt about this provision: "*The structure, competence and liability of organs of legal entities for non-contractual damages and tortious acts committed by the company vary from country to country, especially if we also consider the laws of non-European countries. It seems unfair to hold some board member personally liable under the law designated by Rome II, if he, under the laws governing the company, had merely advisory functions and had no influence of the company's decisions and behaviour. I would prefer applying the law governing the company, but with a reservation similar to Article 6(2).*"

Article 8. Scope of the applicable laws

1. The decision to change the applicable law shall be taken in accordance with the law of the country of origin. This law will apply, in particular, to measures for the protection of minority shareholders, creditors or employees to the company.

2. The law of the country of destination shall determine the conditions of incorporation of the company, [in particular: its capital, registration, name, structure, …]

Article 9. Special rules [Resolution of the EU Parliament of 2 February 2012] [This provision only applies to intra-EU changes of *lex societatis*]

1. The law of the Member State of destination shall determine the date on which the change of applicable law becomes effective. If the company is registered, that date shall be the date of registration in the Member State of destination.

2. [**Transparency and information rules]** In the case of limited liability companies within the meaning of Directive 2005/56/EC [cross-border mergers], the management or board of a company planning to transfer shall be required to draw up a report and a transfer plan [the content of the plan to be added] and a report explaining and justifying the proposal and its consequences. The representatives of the employees or, if there are no representatives, the employees themselves, shall be informed and consulted on the transfer, within an appropriate period prior to the general meeting of shareholders.

3. **[On the decision by the shareholders]** The transfer must be approved by the general meeting of shareholders by the majority required to amend the memorandum and articles of association under the law of the Member State of origin. Member States may adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer, for example, the right to retire from the company, in accordance with the legislation applicable in its home Member State.

If the company is managed on the basis of employee participation, the shareholders' meeting may make completion of the transfer conditional on its expressly approving the arrangements for employee participation.

4. **[Legality of the transfer]** The home Member State (or Member State of origin) shall verify the legality of the transfer procedure in accordance with its legislation. The competent authority designated by the home Member State shall issue a certificate conclusively declaring

that all the acts and formalities required have been completed before the transfer. The certificate, a copy of the memorandum and articles of association envisaged for the company in the host Member State and a copy of the transfer proposal shall be presented within an appropriate period of time to the body responsible for registration in the host Member State (or Member State of destination). Those documents should be sufficient to enable the company to be registered in the host Member State. The competent authority for registration in the host Member State should verify that the substantive and formal conditions for the transfer, including the requirements laid down in the host Member State for the formation of such company, are met.

The competent authority in the host Member State should give immediate notification of the registration to the corresponding authority in the home Member State. Thereupon, the home Member State authority should remove the company from the register.

In order to protect third parties, the registration in the host Member State and the removal from the register in the home Member State should be adequately published.

5. **[Employees´rights]** The employees' participation rights shall be preserved through the transfer. In principle, they shall be governed by the legislation of the Member State of destination.

However, the legislation of that law shall not be applicable if:

(a) it does not provide for at least the same level of participation as that applicable in the Member State of origin, or

(b) it does not give employees of establishments of the company situated in other Member States the same entitlement to exercise participation rights as they enjoyed before the transfer.

In addition, the legislative provisions on employees' rights should be in line with the acquis.

Article 10. Overriding mandatory rules

Article 11. Public policy

Article 12. Multi-unit States

Article 13. Renvoi

Article 14. International agreements