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# The Interconnection of Company Data – a Way Forward in Development of Freedom of Establishment?

**Hana Horak [a], Kosjenka Dumančić [a], Kristijan Poljanec [a]**
[a] Department of Law, Faculty of Economics and Business University of Zagreb, Zagreb, Croatia

**ABSTRACT**

In this paper authors have analysed development of legal and technical framework of interconnection of registries of company data at the level of the European Union. Analysis of sources of the European Union Law and case law of the Court of Justice of the European Union has led to the conclusion on importance of integration of registries of Member States of the European Union for affirmation of principle of transparency and development of freedom of establishment. Efforts made so far in this area of law have resulted in adoption of Directive (EU) 2012/17 on interconnection of central, commercial and companies' registries. The aim of the Directive is to create a framework for easier access to companies' data and to increase transparency. Amended provisions of Act on Court Register have been analysed, by which provisions of Directive (EU) 2012/17 have been implemented. Legal solutions which would contribute to overall integration of central register of financial data of Croatian Financial Agency into the system of interconnection of companies' registries are taken into consideration.

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**Corresponding author:*
hhorak@efzg.hr
(Hana Horak)

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## 1. BACKGROUND

By developing possibilities offered by the Internal Market of the European Union (hereinafter as the EU) and by increasing the range of cross-border activities such as cross-border mergers, transfer of registered office, opening of branches, establishment of daughter companies, the need for quicker and simpler access to information on companies, subsidiary companies and branches has increased (see more in Interconnection of Business Registers, MEMO/11/15, Frequently Asked Questions 2011, available at http://europa.eu/rapid/press-release_MEMO-11-115_en.htm?locale=en, accessed 1 December 2015). The transparency of information implies updating of information in the national registers of companies on regular basis. Such approach should increase the confidence of investors, creditors, potential business associates and consumers into companies (Barbić, 2008; Horak, Dumančić, 2011). The European Company Law is the field of law which prescribes many obligations for companies, particularly in relation to disclosure of information for the purpose of protecting the company's shareholders, creditors and other interested parties (Horak *et al*., 2011). Embracing digitalisation and creating a modern digital framework for companies, which will bring more transparency and security, has been on the agenda of the European Commission. Availability and transparency of registers on companies' data is the precondition for duly functioning of market relations (Gilotta, 2010; Horak *et al*., 2011). In fact, increase in cross border transparency is precondition for cross-border mobility and the access to cross-border restructuring (see Report of the Reflection Group on the future of European Company Law,

Brussels,5 April 2011, available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf, accessed 22 December 2015). In cases of doubt whether to give an advantage to the principle of voluntary or to the principle of mandatory disclosure of information, the principle of mandatory disclosure of information and their submission should be in advantage in front of potential voluntary disclosure (Gilotta, 2010). This way the aforementioned principle of public dislosure of information, as an assumption that everyone is familiar with the register content, is achieved (Barbić, 2008). In environment where transparency is more and more affirmed as postulate of modern business activities on the European and global market, the national court and other storages of information on companies, which content in some Member States is related to the assumptions of authenticity and the principle of confidence, are "mirrors" of the legal state of a company. The Member State laws prescribe the establishment, organization and content of registers on companies, which leads to the information unevenness. One of the ways to overcome the difficulties regarding the decisions based on the state of companies' registers is their networking at the EU level. An increased cross-border companies' activity implies the need to ensure as high availability of information on companies as possible by modern communication means (Horak *et al*., 2011).

Digitalisation is one of the top priorities of the European Commission. The Digital Single Market Strategy was presented by the European Commission in May 2015 (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Commitee of the Regions: A Digital Single Market Strategy for Europe, SWD 2015 100 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN, accessed 22 December 2015). Within e-government Action plan for 2016 up to 2020, which will be under public consultations until 22 January 2016, the European Commission will seek to interconnect across the EU (see eGovernment Action Plan 2016-2020, Public Consultations FAQ https://ec.europa.eu/digital-agenda/en/news/egovernment-action-plan-2016-2020-public-consultation-faq, accessed 22 December 2015). In her speech held in October 2015 during the Conference on Company Law in the Digital Age EU Commissioner for Justice, Consumers and Gender Equality Věra Jourová stated that "EU law should be pioneer of innovative solutions" (Jourová, 2015). Digital solutions which would allow access to more meaningful and comprehensive information on European companies and their structures are considered to be one of the possible steps for the digitalisation of company law and corporate governance. Nevertheless, the extent of digitalisation of company law in the EU differs quite significantly between Member States (Jourová, 2015).

As the concrete outcome of long legislative considerations, Directive (EU) 2012/17 of the European Parliament and of the Council of 13 June 2012 amending Council Directive (EEC) 89/666 and Directives (EC) 2005/56 and (EC) 2009/101 of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers (2012 OJ L 156/1) was adopted. The term "business register" is used in terminology of key documents of the European Commission in this field. In all documents, the aforementioned term comprises all central, commercial and companies' registers within the meaning of Article 3 of the First Company Law Directive (EEC) 68/151 of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (1968 OJ L 65). The term "business register" is *genus proximum* and as abbreviated title hereinafter it will be used the Directive on interconnection of business registers. The term "business register" as *genus proximum* for all registers of companies' data available in public is also used by the Croatian version of e-Justice portal. In July 2014, the

EU Member States initiated the procedure of implementation of Directive on interconnection of business registers into the national laws. The Republic of Croatia (hereinafter as the RC) implemented the provisions of Directive on interconnection of business registers into the Croatian register law.

The contemporary tendencies in this vivid (and rather new) area of EU law have motivated authors to scrutinize possible impact which digitalisation could have on freedom of establishment in the area of business register law. After abovementioned introductory remarks, in the second part of the paper, authors have given the overview of existing forms of cooperation between the EU Member States as regards the exchange of information available in national registers. In the third part of the paper, the interconnection of national registers in Member States is considered in the context of freedom of establishment. Freedom of establishment is one of the four fundamental freedoms of the EU. The term comprises actual performance of economic activity, on continuous and permanent basis, via establishment in another Member State within the unspecified time period (among others refer to Babić, 2006; Barnard, 2013; Bodiroga - Vukobrat, Horak, Martinović, 2011; Craig, De Burca, 2011; Horak, Dumančić, Šafranko, 2012). Judgements of the Court of Justice of the EU have been analysed in the fourth part. In the fifth part of the paper, the overview of amendments to the Croatian register law has been given. Potential legislative solutions are taken into consideration, which would enable an overall involvement of the Croatian central register of financial information and other national business registers into the European system of interconnecting the business registers. The paper ends with the conclusion.

Aim of the paper is to show that networking of national registers of companies data is not only a matter of technical cooperation among EU Member States. It has legal implications for freedom of establishment as well. Increased possibilities for achieving the cross-border mobility and restructure of companies extend the need for appropriate search methods (Maresceau, Tison, 2008). Correct implementation of Directive on interconnection of business registers and future measures that will be adopted in this field require anticipation of technical solutions and preparation of an overall legal and cost-benefit analysis of networking of national registers. In that way, conditions for correct and timely implementation of new solutions will be created, as well as the fulfilment of objectives prescribed by the Directive on interconnection of business registers. Such holistic approach should contribute to full realization of freedom of establishment.

## 2. COOPERATION BETWEEN THE MEMBER STATES AS REGARDS THE EXCHANGE OF REGISTER INFORMATION

### 2. 1 European Business Register and BRITE

The European Business Register is the form of voluntary cooperation between national registers of companies' data and IT service providers which has recognized the importance of cross-border cooperation in company law. The project started in 1992 as the form of technical cooperation and has been supported by the European Commission. It comprises wider number of European countries, the majority of which are EU Member States. Currently there are 27 European states participating in the European Business Register. Three former Yugoslav republics participate in the European Business Register: Former Yugoslav Republic of Macedonia, Republic of Slovenia and Republic of Serbia. The advantage of this system is its simplicity. By submitting the query to the database in its own language, a citizen, business entity or public authority can find a company or, in some countries, a natural person in all national registers of companies' data participating in this project. Although it concerns an informal form of cooperation, it should be mentioned that legal basis of cooperation is contained in the Information Sharing Agreement (see EBR Service website available at

http://www.ebr.org/index.php/about-ebr/, accessed 22 December 2015). Based on this Agreement, the network members provide to each other a non-exclusive right to access the information registers. Information in the national registers of companies becomes available via European Business Register network in a form of standardized reports. Furthermore, one should distinguish the European Business Register as a form of cooperation between the European registers from the European Business Register as a legal person – the European Economic Interest Grouping (EEIG). Some states participate in the project, but their registers are not a part of the European Business Register of EEIG, as such company form is not allowed by their national law. The establishment of the European Business Register was considered as a good initiative, but certain disadvantages arose with time. In the first place, there was a lack of funds in order to include all EU Member States. Secondly, the European Business Register is initiative to simplify the cross-border access to information, while the area of cooperation between the registers in companies' cross-border activities (merger, transfer of seat) is not covered. Besides, it concerns the private legal initiative of contractual character, which complicates the implementation of legal mechanisms for achieving the higher level of efficiency of system itself.

Disadvantages of the European Business Register were tried to be overcome by implementing the research project known as the Business Register Interoperability Throughout Europe (BRITE). The project is envisaged as the form of connecting the business registers. The project officially began on 1 March 2006 and was completed in March 2009. It is mostly supported by the European Commission funds (Maresceau, Tison, 2008). 19 members from public and private sector participate in this project. These are European Corporate Governance Institute, European Business Register, Chambers of Commerce, IT companies, universities, small and medium entrepreneurs. The project aims at developing and applying the new model of cooperation, information platform and management system so that business registers could cooperate within the EU territory (see more on European Corporate Governance Institute website available at http://www.ecgi.org/brite/, accessed 22 December 2015). The focus of the cooperation is on the cross-border transfer of seat, mergers and supervision of branches registered in other EU Member States. Within the project framework, the Directory of Registers with information on responsibility, location and contacts in registers has been established. The important segment of the entire project is the establishment of so called "branch disclosure service" on status/change of status of the foreign founder company. The purpose of this infomation service is to disclose the register, in which the branch is registered, on legal status of the foreign founder company according to information available in its register, as well as on potential changes of its status. Such form of cooperation helps in establishing the termination of existence of Founder Company, which refers to termination of existence of branch as well.

### 2.2 Internal Market Information System and e-Justice Project

This information system was developed in 2006. It aims at improving the cooperation between the public authorities in EU Member States concerning implementation of EU law in various fields. Internal Market Information System serves today as tool for better implementation of rules on recognition of professional qualifications, on services provision, on employment, on euro cash transport, on patients' rights, on electronic trade (see IMI User Handbook available at http://ec.europa.eu/internal_market/imi-net/about/index_en.html, accessed 22 December 2015). Public authorities exchange information based on the requests processed in the system, whereat a structured set of questions and answers is used in all EU official languages. The advantage of this information system is in the fact that all EU Member States are included into its operation.

The main objective of the e-Justice Project is implementation of the e-Justice portal. The portal should serve as practical tool for easier access to judicial information, institutions, registers and other services. The portal provides an access to data on national, European and international law, case law at national, European and international level, organization of judiciary in EU, legal professions, legal aid, mediation, family, inheritance and criminal law issues, defendant rights in criminal proceedings, as well as on business, land and insolvency registers. The portal should become a unique European electronic access point to access the judicial data. It is expected that it would contribute to faster realization of activities for citizens, legal experts, judicial authorities, workers and other professionals. The portal should enable the "efficient access to justice", which is indicated in providing the service of finding a legal aid from lawyers, public notaries, court interpreters and other experts involved in legal procedures. The portal has been developing since 2007 along with a wide support of Member States and European Commission. The importance of portal consists in its interconnecting with European Business Register, whereby the objective of the first phase of the European Business Register integration into the portal system has been achieved. The procedure of "phase integration" of the European Business Register into e-Justice portal has been announced in the Action Plan for establishing the e-Justice (see Multi-Annual European e-Justice Action Plan 2009-2013, 2009 OJ C 75, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XG0331(01)&from=EN, accessed 30 September 2015).

## 3. INTERCONNECTION OF NATIONAL REGISTERS ON COMPANY DATA AND FREEDOM OF ESTABLISHMENT

### 3.1 Problem definition and scope of application

The interconnection of business registers in the EU is considered to be a success story (Jourová, 2015). During public discussion on impacts of proposed Directive on interconnection of business registers, three basic groups of problems were recognized. According to the Commission Staff Working Document accompanying Proposal for a Directive of the European Parliament and of the Council amending Directives (EEC) 89/666, (EC) 2005/56 and (EC) 2009/101 as regards the interconnection of central, commercial and companies registries' (SEC 10, 24 February 2011, hereinafter as Impact Assessment, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011SC0222, accessed 22 December 2015) these were: lack of updated information in registers in which the foreign branches are registered, weaknesses in cooperation during pursuing the procedures of cross-border merger and seat transfer, as well as problems with cross-border access to register data. The lack of updated information increases a business risk in a way to harm the interested stakeholders of capital market (Maresceau, Tison, 2008). A duty to meet the companies with often different national requirements as regards the information disclosure increases the risk of data fragmentation (Maresceau, Tison 2008; Andenas, Wooldridge, 2009) and reduces the legal certainty which requires a larger engagement of companies on harmonizing contents of registers. The information technology has been considered as a 'catalyst' for legislator in its efforts to reduce the administrative barriers for entrepreneurs (Maresceau, Tison, 2007). Lack of information reduces the confidence in authenticity of data in registers of merged company and newly established company, i.e. in register in which the company has registered its seat and register in which new seat has been entered. The data availability is significant for all those who have, by investing the part of their equity, taken over the risk in a form of loss invested in case of poor business results.

Business transparency and timely disclosure of information via business register networking system can be considered from the perspective of enhancing the shareholder's right to

information and increase of confidence into capital market. Availability of information on company enables usage of shareholder's rights and creates conditions for shareholder's rights to be not just of nominal but of real character as well. Inability to access the company data stimulates the so called "absentee landlords". Increase of cross-border activity results in increase of cross-border interconnection of companies, which subsequently has legal implications to shareholder's rights. In that sense, the importance of transparency of relation between the affiliated companies has been recognized as the basis for protecting the minority shareholders (Jurić, 2006). The interest holders in company must know whether and at what price to invest in a specific company (Horak, Dumančić, 2013).

The availability of data on status changes in registers is important for protection of employees' rights representing a part of company which is merged or transfers its seat (Bodiroga-Vukobrat, Horak, 2003). It can be said that disclosure of information acts as "powerful tool affecting the companies' behaviour and protecting the investors" (Horak *et al*., 2013) and prevents illegal and unethical operations as in company itself so on market (Horak *et al*., 2013). Interconnection of registers may contribute to achieving the aforementioned objectives at supranational level.

The absence of interconnection, language barriers, heterogeneous forms of register search and organization have been recognized as main obstacles which interested parties are facing with when seeking for cross-border access to information from national registers (Horak, Dumančić, Poljanec, 2014). When searching for companies data, it is required to search the registers of all Member States due to non-existence of unique access point. The Member States apply different methods of companies' identification in national registers, which makes it complicated to identify a company. Precisely the "national" organization of registers is recognized among scholars as reason for high costs (among others, see Maresceau, Tison, 2008). The absence of harmonized rules, by which the obligation of entering the relevant data in short period, following the event which data are related to, would be prescribed, has been a serious problem leading to unevenness of register data. Besides, the EU constantly performs the analysis of existing companies' obligations regarding disclosure of information. Whenever possible, the EU tries to reduce the administrative burden for companies (Horak *et al*., 2011).

Making prerequisites for simplified access to companies' data and affirmation of cooperation among the national registers is in accordance with provisions of EU law on freedom of establishment. It was clearly stated in Commission Staff Working Document accompanying the Green Paper on Interconnection of Business Registers' (Progress Report, SEC 09, November 2009, available at http://www.ipex.eu/IPEXL-WEB/dossier/document/SEC20091492FIN.do, accessed 22 December 2015). Directive on interconnection of business registers was adopted aiming at developing the normative framework for interconnecting the registers of companies' data. Increase of confidence into the Internal Market and competitiveness of European economy, as well as improvement of cooperation between business registers represent the general objectives of proposal to the Directive on interconnection of business registers. Special objectives include development of safe business environment for consumers, creditors and other business associates, enhacement of legal certainty, reduction of administrative burden for companies, acceleration of cross-border mergers and transfers of seats and update of branches data. Better availability of companies' data is achieved by prescribing the legal obligation to make available the data stored in registers of other Member States and by prescribing the cross-border cooperation of registers in procedures such as cross-border merger and transfer of company seat. In other words, legal solutions should relate cross-border mobility (mergers, transfer of seats, opening of secondary establishments etc.) of national companies to cross-border access to the information stored in various national registries (see Report of the Reflection Group on the

future of European Company Law, Brussels, 5 April 2011, available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf, accessed 22 December 2015). Enhanced transparency stimulates cross-border investments (Christensen, Hail, Leuz, 2014; Gilotta, 2010). In addition to that, enhanced transparency arising out of solutions of the aforementioned directive and national regulations that implement it, contribute to development of business-friendly environment and establishment of confidence in the EU Internal Market.

The Directive is not aiming at establishing certain supranational register of companies' data (Recital 10 of Directive on interconnection of business registers) nor at harmonizing the national systems of central, commercial and companies' register (Recital 11 of Directive on interconnection of business registers). By distinguishing the aforementioned three groups of registers, national differences in establishment of registers of companies' data have been taken into consideration. The heterogeneous establishment of national registers of companies' data makes the implementation of this directive quite demanding from the legal and financial point of view. By reading the Directive on interconnection of business registers, it can be concluded that no term of "court register" nor any other term, which would suggest the jurisdiction of specific authority over the register of companies' data, has been mentioned anywhere in the directive. Thus the scope of Directive on interconnection of business registers is not restricted to interconnecting court registers or ministry of justice registers, but *all* registers of companies' data within the storages that could be incorporated under the compromise term of "business register". In some Member States there are national central registers (e.g. in Great Britain, Sweden, Ireland). In some Member States there are commercial registers at local (Handelsregistern in Nord Rhein Westfalen, Germany) or regional level (die Firmenbücher in Austrian federal states). Besides the court registers managed by regional and local courts, in some Member States, the ministries are responsible for companies registration (Cyprus, Denmark, Ireland, Portugal, Slovenia, United Kingdom etc.), while in some Member States the chambers of commerce (Greece, Italy, Netherlands). In Spain, there are Registradores Mercantiles (local administrative offices in Spanish provinces and cities). In the RC, it primarily concerns the "court register", i.e. register managed by commercial courts, in which information on companies and other subjects of company law are stored.

### 3.2 Interconnection of foreign founder-company register and branch register

Tight cooperation between national authorities and registers of companies' data at all levels is essential when it concerns the branch establishment. The Directive on interconnection of business registers prescribes an obligation for companies' registers to make available, without delay, the information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company data. Upon receipt of information on company being struck off, its branches should likewise be struck off the register without undue delay. The prescribed obligation represents a step forward for the European company law, since before there was no legal obligation for registers to exchange information. Implementation of these provisions ensured the minimum of legal certainty for all those who "enter" the legal relations with branch, since rights and obligations "taken over" by a branch office will be acquired by the founder company.

The existence of the aforementioned legal obligation is relevant for affirmation of freedom of establishment. Prohibition regarding the restriction of freedom of establishment is related to prohibition of restriction during the establishment of branches by nationals of any Member State established in the territory of any Member State. According to the Article 49 of the Treaty on the Functioning of the European Union (Consolidated version 2012 OJ C 326)

freedom of establishment includes the right to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is affected. The pursuit of business activities in another Member State through branch offices is a form of secondary establishment (Horak, Dumančić, Pecotić-Kaufman, 2010; Horak *et al*., 2012). Since company aims to pursue some sort of economic activity through its branch on specific market on more permanent basis, the confidence of stakeholders and consumers in authenticity and completeness of register in which the branch is entered is of great significance. Creation of possibilities for all those who enter the legal relations with company through its branch in order to get familiar with company legal status, for which the branch takes over the obligations and acquires the rights, is important in case when company- foreign founder is bankrupt (see European Commission Modern Insolvency Rules: European Commission kicks off EU-wide interconnection of insolvency registers, Press Release, 2014, IP/14/774, available at http://europa.eu/rapid/press-release_IP-14-774_en.htm?locale=en, accessed 30 September 2015) or in winding-up proceedings. In case no information on the opening of any winding-up or insolvency proceedings are submitted to the branch register, which could entail relevant legal consequences, e.g. company termination, there is a danger that third party continues to operate with the branch of non-existing company (Maresceau, Tison, 2008). Legal illusion is thus created – secondary establishment (branch office) operates without its primary establishment (foreign mother company, founder). If transparency could have been obtained through data exchange between two registers, it would be useful for secondary establishment – branch, as there would be no suspicion of third party in company existence and duly functioning.

The following situation may be imagined: foreign company terminated its activities due to the bankruptcy in the beginning of 2015. Its branches still pursue the activities and enter into legal relations with third parties. At the moment the bankruptcy happened, the creditors' claims became the bankruptcy estate claims and they became bankruptcy estate creditors with uncertain reimbursement outcome. Damage that suffers who knew nothing on bankruptcy, as the branch register was not immediately informed on such situation is high. In the conditions of such legal uncertainty, a question of general branches credibility arises, which could endanger the possibility of more permanent and stable pursuit of economic activity in a form of secondary establishment. The question is how market would react on reopening of branch of the aforementioned company when and if that company recovered or continued to pursue its activities through bankruptcy plan. If it is taken into consideration that such situation could have been avoided by timely and prompt exchange of information, it is best indicated how apparently pure technical interconnection of registers of company data can have significant legal implications for fulfilling the content of freedom of establishment – possibilities of permanent and stable pursuit of economic activities in a long-term perspective.

The economic activity carried out by a branch will be permanent and stable only if market and stakeholders have confidence in the branch, i.e. its founder. In economic theory it is assumed that increase of transparency reduces the "information" asymmetry between investors and increases the market liquidity (Christensen *et al*., 2014; Gilotta, 2010). It should be taken into consideration that regular capital inflow is a prerequisite of stable business pursuit. The latter is nowadays represented mostly as loan capital, capital collected by issuing various types of securities (Pervan, 2013). Disclosure of financial data by registers will contribute to reduction of information asymmetry in relations investor – company, thus to reduce the capital price and contribute to its optimum allocation (Pervan, 2013). If there is a need to create conditions for achieving the secondary establishment in a part in which it would refer to establishment of branches, then interconnection of registers is important. Namely, development of registers network may be expected only if administrative conditions exist, i.e. if there are no administrative barriers that would dissuade foreign founders from establishing new branches.

The European Parliament, the Council and the European Commission are competent for carrying out the duties in respect of abolishing those administrative barriers, resulting from national legislation, the maintenance of which would form an obstacle to freedom of establishment (see Article 50 para 2 of the Treaty on the Functioning of the European Union, Consolidated version 2012 OJ C 326). The policy efforts in promoting the interconnection of national economies by simplifying the cross-border companies' establishment should be focused on need to improve access to data in local and cross-border context (Maresceau, Tison, 2008) and such efforts seem particularly important when it comes to interconnection of Founder Company and its secondary establishment.

## 4. INTERCONNECTION OF BUSINESS REGISTERS AND THE COURT OF JUSTICE OF THE EU

In the context of the aforementioned, the judgement in *Texdata Software GmbH*, C-418/11, EU:C:2013:588 should be mentioned. The judgement should be observed in light of tendencies regarding the interconnection of national registers aiming at removing the administrative barriers to freedom of establishment. Among others, national court referred the question (*Texdata Software GmbH* EU:C:2013:588, para 25) "does EU law and, in particular, the freedom of establishment, as laid down in Articles 49 and 54 of Treaty on the Functioning of the EU, preclude national rules under which, in cases where the statutory nine-month period allowed for compiling and disclosing annual accounts to the relevant court maintaining the commercial register is exceeded, that court is required, first, to impose immediately a minimum periodic penalty of EUR 700 on the company (…) due to a failure of timely disclosure (of annual accounts, added by authors) and, secondly, to impose immediately a new minimum periodic penalty of EUR 700 on the company (…) in respect of further failure for every two-month period thereafter, (…) without first allowing them (company and bodies authorised to represent it, added by authors) an opportunity to state views on the existence of the obligation to disclose (annual accounts, added by authors) or to invoke any obstacles to doing so and, *in particular, without prior examination as to whether those annual accounts have in fact already been submitted to the court which maintains the register in the judicial district of which the principal place of business is situated; (...)* (emphasis added by authors).
The EU Court of Justice interprets (*Texdata Software GmbH* EU:C:2013:588, para 63) that freedom of establishment includes the right to pursue activities in other Member States, among others, through a branch. The term "restriction" (*Texdata Software GmbH* EU:C:2013:588, para 64) from Article 49 TFEU covers the measures that prohibit or prevent the execution of freedom of establishment or make it less attractive. In its answer, the EU Court of Justice states (*Texdata Software GmbH* EU:C:2013:588, para 67) that system of penalties is applied equally towards the Austrian companies and foreign companies with branches in Austria. Accordingly, the system does not place companies which are established in Member States other than the Republic of Austria, but which have a branch there, in a factual or legal situation that is less favourable than that of companies established in Austria. Secondly (*Texdata Software GmbH* EU:C:2013:588, para 68) no penalty is imposed if the company concerned fulfils its legal obligation to disclose (annual accounts, added by authors), as required under EU law – an obligation applicable in all Member States. Consequently, the penalties that may arise are not capable of prohibiting, impeding or discouraging a company governed by the law of a Member State from establishing itself, through the creation of a branch, in another Member State. The EU Court of Justice concludes (*Texdata Software GmbH* EU:C:2013:588, para 69) that system of penalties in subject cannot be regarded as constituting a restriction of the freedom of establishment and that Articles 49 TFEU and 54 TFEU do not preclude such a system.

Judgement in *Meliha Veli Mustafa v Direktor na fond "Garantirani vzemania na rabotnitsite i sluzhitelite" kam Natsionalnia osiguritelen institut*, C-247/12, EU:C:2013:256 deals with legal consequences regarding the entry of decision to open insolvency proceedings in the register of companies. Pursuant to the Bulgarian insolvency law, the right of employees to guaranteed claims in the event of insolvency of their employer arises on the date of the entry of the judicial decision to open insolvency proceedings in the register of companies (*Meliha Veli Mustafa* EU:C:2013:256, para 9) and it is related only to claims made within the period of six calendar months prior to the entry of decision to open insolvency proceedings in the register (*Meliha Veli Mustafa* EU:C:2013:256, para 10). The declaration must be submitted by the employee within thirty days of the date of the entry in the register of companies (*Meliha Veli Mustafa* EU:C:2013:256, para 11). The insolvency proceedings were opened on the Orfey company and decision to open insolvency proceedings was entered into the register on 2 March 2010 (*Meliha Veli Mustafa* EU:C:2013:256, para 17). The decision on termination of business activity, the realisation of assets forming part of the insolvency estate and the distribution of the assets were entered into the register on 20 May 2011 (*Meliha Veli Mustafa* EU:C:2013:256, para 18). Ms Mustafa was continuously employed from 19 June 2006 until 20 April 2011 under employment contract. Ms Mustafa has legitimate but unpaid claims against Orfey in respect of her gross salary for April 2011 and an allowance in lieu of annual leave to which she was entitled after 2 March 2010. By application of 16 June 2011, she submitted an application to the guarantee fund for the payment of those claims (*Meliha Veli Mustafa* EU:C:2013:256, para 19) The guarantee fund refused that application on the grounds that the application had not been submitted within the statutory period of thirty days from the date of the entry of the decision to open the insolvency proceedings in the register of companies and the claim arose after the decision was entered in the register (*Meliha Veli Mustafa* EU:C:2013:256, para 20). By concluding that it concerns the right to claims arising in the period between registrations of the two insolvency decisions (*Meliha Veli Mustafa* EU:C:2013:256, para 22) the Bulgarian Supreme Administrative Court doubts that national regulations, which right to the guarantees payment relate to the entry of the first decision into the register instead to every stage of insolvency proceeding, even though that decision does not order the termination of the employer's activities and payment, do not comply with Directive (EC) 2008/94 of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (2008 OJ L 283, hereinafter as Directive on employees' rights). For the purpose of this paper it should be mentioned that EU Court of Justice considered the question of whether the Member State may autonomously determine the date of entry of decision to open insolvency proceedings as the reference date before which employees' claims are guaranteed (*Meliha Veli Mustafa* EU:C:2013:256, para 28). Since, under conditions of established insolvency, the decision to open insolvency proceedings is sufficient to apply the provisions on claims payment from guarantee fund (*Meliha Veli Mustafa* EU:C:2013:256, paras 32, 33 and 37) while Directive on employees' rights allows Member States to determine the reference date before which employees' claims are guaranteed (*Meliha Veli Mustafa* EU:C:2013:256, para 41), the aforementioned directive should be interpreted as not requiring the Member States to provide guarantees for employees' claims at every stage of the insolvency proceedings of their employer and, in particular, it does not preclude Member States from providing a guarantee only for employees' claims arising before the entry of the decision to open insolvency proceedings in the register of companies, even though that decision does not order the termination of the employer's activities (*Meliha Veli Mustafa* EU:C:2013:256, para 43).

Although the judgement does not concern the problem of cooperation between the register of foreign founder and register of its branch, for the purpose of this paper, the case might be hypothetically observed in the context of cooperation between the registers in the event of

insolvency of a company – foreign founder. As it has already been emphasized, one of the reasons for interconnection of companies registers is to enable the third parties (e.g. employees), who enter the legal relations with foreign founder branches, to be timely informed on possible insolvency of foreign founder, in case the latter causes relevant legal consequences as per law of the state of company register. Since significant property-right consequences regarding the employees' claims are related to the moment of entry of a decision to open insolvency proceedings, such information should be, pursuant to Directive on interconnection of business registers, submitted to the registers in all Member States in which the Orfey company might established branches having employees. In case the employees found out about the insolvency upon the expiry of thirty days from the date of entry of decision to open insolvency proceedings in the register of companies, they would lose the right to the claims payment from guarantee fund. It can be concluded that, in case the Orfey company had a foreign branch, the exchange of information between two registers before the expiry of thirty days would have been of great significance for acquiring the employees' rights. That aspect of interconnection of national registers offers additional security to employees who are no longer obliged to monitor the state of register of another Member State.

A timely exchange of data on insolvency of a foreign company-employer and their entry into branch register is extremely important in case in which it should establish which state guarantee institution is responsible to pay for claims when employee works in one Member State, while insolvent employer is registered in another Member State. The aforementioned question occurred in *Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk v Lønmodtagernes Garantifond, C-117/96*, EU:C:1997:415 (hereinafter as *Mosboek*) and *G. Everson and T. J. Barrass v Secretary of State for Trade and Industry and Bell Lines Ltd*, C-198/98, EU:C:1999:617 (hereinafter as *Everson*).

In *Mosboek* the EU Court of Justice stated that the guarantee institution responsible for the payment of employee's claims is the institution of the State in which either it is decided to open the proceedings for the collective satisfaction of creditors' claims or it has been established that the employer's undertaking or business has been closed down (*Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk v Lønmodtagernes Garantifond, C-117/96*, EU:C:1997:415, para 28). In *Everson* it was decided that the guarantee institution responsible for the payment of employee's claims, in case the employees have been paid through branch, is the institution of state of employment, i.e. of the branch (*G. Everson and T. J. Barrass v Secretary of State for Trade and Industry and Bell Lines Ltd*, C-198/98, EU:C:1999:617, para 25). The security of payment of employees' claims, enabled by new technical solutions, affects the employees' readiness to get employed in foreign branches, i.e. to take advantage of freedom of movement as guaranteed by EU law.

## 5. INTERCONNECTION OF BUSINESS REGISTERS AND CROATIAN LAW

### 5. 1 Provisions of the Court Register Act

In July 2014, the Croatian Parliament adopted the Act on Amendments to the Court Register Act (Official Gazette of the Republic of Croatia, No. 93/14, hereinafter as AACRA 14). Thus the RC fulfilled its obligation to contribute to the development of national legal framework for interconnection of business registers. The majority of articles regulate the issue of interconnection of registers through the system for exchange of data on branch offices. The basic legal base has been established. It has been done in order for data and documents of a branch operating in the RC and founded by company with registered seat in another EU Member State to become available in public through the system of interconnection of central, commercial and companies' registries pursuant to Article 4 para 2 of Directive (EC) 2009/101

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 (2009 OJ L 258). It is extremely important to ensure data availability on opening and termination of insolvency and winding-up proceedings, as well as on striking-off of entry subject. Article 83 b para 1 of amended Court Register Act (Official Gazette of the Republic of Croatia, No. 1/95, 57/96, 1/98, 30/99, 45/99, 54/05, 40/07, 91/10, 90/11, 148/13, 93/14, 110/15) is not quite in accordance with text and meaning of Directive on interconnection of business registers.

Namely, the Directive on interconnection of business registers is aiming to ensure not just availability of data on opening and termination of bankruptcy proceedings as one type of insolvency proceedings but of *any* type of insolvency proceedings. The term "insolvency proceeding" is wider and includes, beside the classic insolvency (or bankruptcy) also summary insolvency proceeding, personal management, waiver, small claim insolvency, international insolvency and insolvency plan (Dika, 1998). In case some other insolvency proceeding is opened or terminated on the company, in accordance with Insolvency Act (Official Gazette of the Republic of Croatia, No. 71/15), such information should be available through the system of interconnection of registers, since the Croatian term should be interpreted in accordance with the intention of the Directive on interconnection of business registers. In addition to afore-mentioned, pursuant to Article 83 b of the Court Register Act, the Croatian registers would submit information on insolvency or winding-up of domestic entry subject if they would entail potential legal consequences in the Member State of branch of domestic company. It seems that such solution does not correspond to the wording and meaning of the Directive on interconnection of business registers as it mentiones no submission of information on opening and termination of proceedings with potential but only with actual effects. Principle of legal certainty and predictability should be followed in this regard.

In accordance with Article 83 b para 2 of the Court Register Act, court rergister is bound to ensure the receipt of information on the foreign branch founder, i.e. information from the register where the foreign parent company is registered if any inslovency, winding-up or striking-off proceeding has been opened there. It should be mentioned that information on opening and termination of the aforementioned proceedings are submitted free of charge, which should be welcomed as good solution that will enable faster exchange of information and their better availability.

Regarding the aforementioned significance of cross-border cooperation between the national registers in the area of cross-border mergers of companies, the provisions on cross-border cooperation in amended Articles 83 a and 83 b of the Court Register Act are applied *mutatis mutandis* to companies being merged, pursuant to Article 3 of Directive (EC) 2009/101/ 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 (2009 OJ L 258). Domestic companies are often subject to acquiring by foreign companies, while branches of foreign companies operate on the teritorry of the RC. Significant presence of foreign capital speaks enough on importance of regular and meaningful implementation of provisions on cross-border interconnection of companies registers. Accordingly, implementation of the Directive on interconnection of business registers should be observed as a continuation of harmonization of the RC company law as regarding the register regulations on cross-border mergers from December 2013 (Act on Amendments to the Court

Register Act, Official Gazette of the Republic of Croatia, No. 148/13). Its implementation will enable better functioning of regulations on cross-border mergers.

Directive on interconnection of business registers prescribes cooperation between the registers, not between the national governments or ministries as regarding the exchange of information on amendments to national regulations. The legislative solution of Article 83 d para 2 of the Court Register Act, according to which the RC Government ensures the availability of information on amendments to national regulations through the Ministry of Justice, which prescribe the mandatory disclosure of information and documents being subject to exchange through the system of interconnection of registers, does not seem to be in accordance with the European legislator intention on cooperation between the registers, i.e courts and administrative authorities competent for managing various central, commercial and companies registers. It will require the appointment of judicial officer in commercial court who will monitor the amendments to regulations in this field and submit them to the e-Justice portal on regular basis.

Complete transposition of Directive on interconnection of business registers will be possible only upon the adoption of implementing acts by which the technical frameworks of implementation of register interconnection system will be established. Commission launched Implementing Regulation (EU) 2015/884 of 8 June 2015 establishing technical specifications and procedures required for the system of interconnection of registers established by Directive 2009/101/EC of the European Parliament and of the Council (2015 OJ L 144). This regulation established technical details for electronic communication among national business registers in terms of branch disclosure notification and cross-border merger notification. In order to make it more user-friendy, the service time frame shall be 24 hours each day per week, with availability rate of the system of at least 98 % excluding scheduled maintenance. Thus, the EU has established not only legal but technical requirements for business-friendly environment when it comes to online information retrieval from the national business registers.

In line with current tendencies in the field of digitalisation of business registers, the RC should start with preparations of technical and financial manner. The RC Government and authorities of the Ministry of Justice should intensively monitor adoption of implementing acts and technical solutions proposed in them. Since the involvement of companies' registers and other central registers of companies' data into European network requires technical adjustments, authorities should carry out public procurement procedures for equipment and information services needed for implementation of new solutions. The latter causes additional financial expenditures which should be foreseen in budgets of individual administrative sectors and commercial courts.

The first step in closer supranational cooperation should be participation of the RC in the network of the European Business Registers as one of the already existing forms of cross-border cooperation between the EU Member States and beyond. One of the main reasons for this is the large presence of foreign capital invested into establishment of branches, subsidiary companies and acquiring of shareholder's rights in domestic companies. In general, every company with registered seat outside the RC will be bound to establish the branch in order to pursue the permanent activity in the RC, whereby the creditors and domestic employees are protected (Horak *et al*., 2012). The foreign capital comes from the states such as Austria, Germany and Italy, whose registers are part of network of the European Business Registers. Companies with registered seat in the RC invest their capital into companies in Slovenia, Serbia and Macedonia, whose registers also participate in the European Business Register. Interconnection of registers from these states and registers in the RC would simplify the cross-border transactions. The RC should have become a part of this project earlier. If it happened, the RC would become part of the Paneuropean process of interconnection and

cooperation of national companies registers. As a stakeholder of such process, the RC would get acquainted with general objective of harmonization of register law in this field – simplification of cross-border operation and increase of transparency as key elements for growth and development of the Internal Market. Anticipated recognition of objectives of the present forms of cooperation in the field of registers interconnection brings to anticipation of legal solutions thus creating the preconditions for timely and good-quality preparation of all legal, technical, financial and personnel solutions. Such *modus operandi* would create a framework for regular and complete implementation of Directive on interconnection of business registers which is the normative expression of present tendencies. For years the RC has been outside such forms of cooperation. The RC capability to harmonize its technical possibilities with requirements of the digitalised EU company law is yet to be indicated.

### 5.2 Register of Annual Accounts and other business registers

As previously stated, interconnection of companies' registers includes not just the interconnection of court registers but *all* registers containing the data on companies. In Article 5 of the AACRA 14 it is stated that "(…) it is left to the Croatian Government to establish a unique identifier, i.e. a method of its determination for entities in court register with potential entities *in other registers* (emphasis added), which may also be a part of the system of interconnection of registers (emphasis added). In the RC, there are several central data sources on companies. It concerns the registers of Financial Agency (hereinafter as FINA). Registers managed by FINA represent the central location of data on business entities operation. According to data available on FINA webpage, there are the Unique Register of Business Entities Accounts, the Register of Annual Accounts (hereinafter as the RAA), the Register of Digital Certificates, the Register of Concessions and the Register of Court and Notary Public Collaterals (see http://www.fina.hr/Default.aspx?sec=971, accessed 22 December 2015). There is enough room for legislator to amend the regulations which regulate the storage of companies' data in some of these registers, not just in court register.

In addition to already enumerated registers of business information, registers such as the Digital Land Register, the Register of Vessels, the Unique Register of Accounts, the Register of Digital Certificates, the registers of Concessions, registers of the State Intellectual Property Office, public procurement registers, the Register of Court and Notary Public Collaterals and registers of the Central Depository and Clearing Company and the Croatian Agency for Supervision of Financial Services could be considered as central registers of business-related data and thus included in interconnection of business registers. Such wider approach would be also in line with conclusions of the Report of the Reflection Group on the future of European Company. According to its conclusions, it should be possible to retrieve information from all national business registers of the Member States from each entry point throughout the Union (Report of the Reflection Group on the future of European Company Law, Brussels, 5 April 2011, available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf, accessed on 22 December 2015).

## 6. IN CONCLUSION

Tendencies regarding the development of the system of interconnection of companies' registers on the EU internal market are concentrated on implementation of solutions which will contribute to better availability of companies' data, reduction of administrative barriers and improvement of the operation transparency level. Directive on interconnection of business registers and accompanying Regulation establishing technical specifications and procedures required for the system of interconnection of registers aim at putting in place the

harmonized legal and technical framework for achieving the aforementioned objectives. Integration of central, commercial and companies' registers will contribute to affirmation of the freedom of establishment of companies and their branches. By interconnecting the branches registers and registers of the foreign entry subject, a timely information of stakeholders, creditors, potential business associates and employees will be provided in situations representing the business risk such as insolvency, winding-up or striking-off of the entry subject in national register. Enhancement of legal certainty and confidence into companies contributes to integration of the Internal Market. The EU Court of Justice case law should be observed in that sense. The latter has opened the questions related to judicial cooperation between the Member States as regarding the registers and issues met by the Internal Market stakeholders are recognized in practice. Some of prominent issues are non-conformity of the national registers content, data fragmentariness and language barrier. Amendments to the Croatian register law should be observed in this legal context in a part related to cross-border cooperation. It can be concluded that amendments to the Court Register Act are not sufficient to fulfil the intention of the Directive on interconnection of business registers. It is required to amend the laws that regulate the establishment of all financial data registers. The RC should monitor intensively the procedure of adopting all implementing acts in this field in order to prepare itself legally, technically and financially for complete implementation of new technical provisions which entered into force in July 2015. The RC should not circumvent the Digitalisation Agenda and should take active role in it. One of the first steps in enhanced cross-border cooperation would be membership in the European Business Register as already existing form of Paneuropean cooperation in which the RC major trade partners already participate.

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