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THE EUROPEAN BUSINESS LAW BETWEEN TRADITION AND INNOVATION

1. The heads of the European business law.
2. The harmonisation of the European business law between tradition and innovation.
3. The harmonisation of the European business policy for companies.
4. The recognition of the European companies.

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Abstract

The paper deals with the importance of the European harmonised law system during the present and the future evolution. For the beginning, we define and analyse the fundamental elements of the European law and provide a history of the European law's evolution.

A distinct part of the paper deals with the European law institutions, especially the Court of Justice which defines and influences the juridical system analysis and its specific instruments.

The main conclusion of the paper is that the harmonised law system represents a challenge for the EU 27.

1. The statute of the International Court of Justice, in article no.38, marks out the greatest part of the international law heads (D. Sandru, 2006). These heads can be used as heads for the community law, as well. It is a result of the idea that the origin of the community law can be

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found in the constitutive treaties, in the institutions and the Member States' practice and in the regulations' renewal, which is made by the Court of Justice.

From a quantitative point of view, the greatest part of the community law's heads is represented by the constitutive treaties (as primary or main heads) and by other rules which are connected to the adopted documents (acts) by the community institutions, in order to apply these treaties (as derivative or secondary heads).

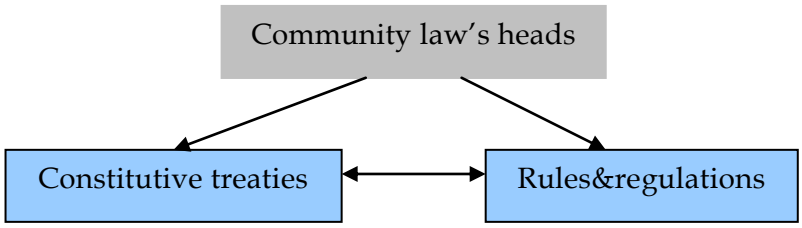

Figure 1: Primary and derivative law heads

From a general point of view, the community law is defined as:

- all low regulations applied in the community law order, even if some of them are not written;
- the general law principles or the jurisprudence of the Court of Justice;
- the law rules which come from the ex- community law order (from the community's foreign relationships);
- the complementary law, which comes from the conventional documents signed by the Member States in order to apply the treaties.

The European primary community law consists of three institutive treaties of the Communities, which were permanently modified, completed and adapted to the new realities.

This process leads to the implementation of a lot of conventional instruments, which are specific to a Community or to another, or which are common for all the three.

There are two primary law heads. The *originating treaties* come first of them all. Under the European Coal and Steel Community, the main instrument was the Paris Treaty signed on the 18th of April 1951, and came

into force on 23rd of July 1952. This Treaty is renewed by numerous additional annexes and protocols which have the same value as the treaties, sometimes. Such documents are the protocols on the Court of Justice's status and on its privileges and immunities.

Moreover, there are two Rome Treaties for the European Economic Community and EURATOM signed on ther 25th of March 1957. They are accompanied by numerous annexes and protocols, including the most important one connected to the European Investment Bank's statute. Other important protocols are those connected to the Court of Justice's privileges and the immunities signed on 17th of April 1957 and came into force on 14th of January 1958.

The treaties and the modifying documents are difficult to present exhaustively because the initial treaties' changes and the completions result only from the treaties themselves, from a large and diverse number of other documents (normative documents) of the community institutions (under the simplified revision procedures) or from other particular documents (specific decisions which ask for a Member States' ratification).

The most important changes which had relevance on the three communities are the following:

- the instruments which implement the common institutions of the three communities (the Convention related to some common institutions, which was ratified and came into force at the same time with the Rome Treaties; the treaties which created a unique Council and Commission of the Communities and Unique Protocol on the privileges and immunities which were signed at Brussels, on 8th of April 1965, and which came into force on August 1967);
- the treaties connected to the Communities' budgets, in order to grow the financial power of the European Parliament (Luxembourg Treaty signed on the 22nd of April 1970, which came into force on 1st of January 1971 and the Brussels Treaty signed on the 22nd of July 1975, which came into force on 1st of June 1977);
- the Decision signed on the 21st of April 1970 with regard to the replace of the financial contributions with the community own resources. This decision was based on the articles 231 of the European Treaty and came into force on 1st of January 1971. Nowadays, it is replaced by the decision signed on the 24th of June 1988;
- the multiply and diverse adhering documents adapting and completing the previous documents;

- the European Single Act adopted in Luxembourg and Hague on 14th of February 1986 by 9 Member States. On 28th of February 1986, Italy, Denmark and Greece adopted the same document. The European Single Act modified the three constitutive treaties, completed the European Treaty and created a juridical basis for the European Council and the European politic cooperation;
- the Maastricht Treaty signed in 1993;
- the Amsterdam Treaty signed in 1999;
- the Nice Treaty signed in 2003.

The derivative heads of the European community law represent the institutions' unilateral documents. They are not in the presence of a conventional law, but in the presence of an "institutionalised" law, which represents a set of rules (documents and norms which are defined by the community in order to apply the treaties).

The main characteristic of the European Communities is that the capacity to create law rules is institutionalised. That means it is conferred to some specific institutions and organisms which have to implement it under an established procedure. As a result, it is a normative power which is comparable with the legislative power. The Court of Justice uses the terms of the legislative system of the Communities, especially in connection with the European Treaty.

The official designation of the derivative (secondary) heads is given in Article 234 of the Treaty: "in order to execute missions under the Treaty's conditions, the Council and the Commission establish regulations and directives adopt decisions and formulate recommendations and notices". Moreover, there is a list of different document categories and a systemic presentation of the specific juridical effects of everyone.

We can consider that the nature of an act doesn't depend on its name and the authority which adopted it, but it depends on its object and content.

The regulation represents the main head of the community law. It is used by the Community legislative power. Its juridical effects are defined in Article 249 of the Treaty, and it has comparable effects as the national laws.

The regulation (and the law) has a general influence. It contains general and impersonal stipulations which are abstract. This is the normative working condition for the treaty system. It hasn't been confused with the decision (D. Sandru, 2006).

Another characteristic of the regulation is its obligatory character. The recommendations and the notices "don't oblige" are stipulated in the Article 249 of the Treaty.

The regulation foreseen in the directive forbids derogatory or incomplete application measures.

Under the regulation, the community authority has a complete normative power able to prescribe a result and to impose the ways of implementation, as well.

The regulation is effective in all Member State and directly focused on their internal law consisting on their subjects' own rights and duties.

The directive represents a form of the two steps process applied legislation. It seems to belong to the law technique framework but it is completed by the decree application measures. The treaties' redactors option circumscribed the directive application measures to provide instruments for the creating of a harmonised juridical framework of particular institutions, a formula based on charge division and the national levels cooperation with the community.

The directive goals should be more flexible and trusty as far as the national peculiarities are concerned being interested in the community special needs to provide the legislation in accordance.

The 249 Article of the Treaty stipulates that "the directive makes the connection between the recipient Member State and the goals, allowing the national authority competence to establish the instruments and the way, laying emphasis on essential differences between the directive and its regulations.

From a general point of view, the directive doesn't bear any influence as it is focused on specific Member States. When a directive is addressed to all Member States, it becomes an indirect legislative procedure. The Court of Justice qualifies it as a document bearing such an influence.

The directive isn't directly applicable. As a result, the Court admitted that the directives can have such an effect on the Member States only under certain conditions.

The decision is characterised in Article 249 of the Treaty as "an obligatory document in all its elements for the nominated receivers". The decision doesn't always bear the same effects, being able to carry out multiple-purpose functions under the Treaty system.

Unlike the regulation, the decision doesn't bear a general character influence, as it is focused on the Treaty stipulations being applied to particular situations. It is assimilated into the national legislation and consists of an instrument to execute the community administrative decisions in the name of their legal authority.

A decision is able to establish an objective carried out relying on national measure support, under the international influence of one or more Member States (as for example, the decision to accelerate the elimination of the trade taxes).

Unlike the directive, the decision is obligatory in all its elements, not only in achieving a specific result. It can be legitimately detailed and is able to forecast the instruments used to achieve that specific result. The Member States have the possibility to select only the juridical form of the implementation under the national juridical order.

The decision doesn't imply to respect the unity principle in the direct applicability subject. It is the regulation that asks for that principle.

On the other hand, the decision has a direct effect when the receiver is an interest or an action, because it modifies the juridical situation.

The recommendation and the notice "don't chain", because they haven't coercion force. As a result, they aren't perfect law heads. But they are very useful instruments to orientate the behaviours and the legislations. Even though the European Commission notice aim the Member States, proper or their actions they express only an opinion (the Commission's notice on 25th of September 1979 to the Irish government respecting the harmonisation of some specific social regulations in connection with the road transports).

The European Commission and Council's recommendations invite the Member States to adopt one rule or another of conduct, which belong to the non-compulsory directives and play a concrete role of "to draw the national legislation closer to reality".

There are *different categories of EU foreign commitments*, multiplying and diversifying in a greater participation to the international relationships. They are real law heads for the community juridical order.

2. The trade operations are influenced by the integration law and all the consequences of this process. We can't obviate the impact of the trade exchanges on the operators. As a result, it was necessary to leap from the

trade operations (trade acts) to an instrument which is able to make possible these operations (companies).

The interest of the establishing order was to eliminate any barrier of the national borders against the companies' entrepreneurship and organisational abilities, in order to obtain an efficient use of the inputs on the Single Market. The companies can substitute for the Member States, because they have the main role in the world economy, under globalisation. As a result, these companies operate across the national borders.

For the beginning, the implementation of the Treaty on the companies implied the harmonisation of some specific institutions of the companies' material law domain.

The 12 legislative directives allow the possibility to develop new entities, which characterize the Single Market System.

The companies, especially the joint-stock companies and the vacancies, were under a continuous harmonisation process.

The next step of the companies' integration within the European Communities was the proposal to adopt a regulation about the European company statue. This project developed later under the European cooperative company. The European company had a sinuous road. The first action of the European Communities was connected to the adoption of a regulation for the European economic interest group, in 1985.

The corollary of the harmonised legislation of the European entities is the regulation for the European company from 2001.

There are two requirements disputing issues of settlement: harmonisation and smoothing. The first method is focused on the harmonisation of some specific elements of the national legislations, where the companies have to perform some common conditions for all the Member States.

The harmonisation of the companies' law was covered by the directives, but the Member States can analyse some aspects, even though their duty is a teleological one.

Under the 12 directives, the Member States had a straight action margin, because this domain is very strict.

The second method covers the European uniform legislation, which has a national head (French), connected to the economic interest group. But the latest form – the European company – represents an innovative juridical solution.

The progress made in the implementation of these entities was carried out relying on the direct regulations.

From the technical point of view, the community rules are uniform, even though the regulations allow the Member States to interpret or to introduce supplementary conditions for these specific entities or to apply the national legislation.

The directives focus on the harmonization, close or coordination policies, even that they don't ask the Member States to introduce a uniform law for all the companies or some particular juridical forms in the least (joint-ventures, for example). The proposal for a European company law model is rejected, as the traditions and the institutions are different, even in the same law system (Roman-German law) or between two juridical pools (Roman-German and English-Saxon) (J. Hanlon, 2003).

The Regulation on the European company stipulate in its preamble (point 4) that the present juridical framework, in which the companies have to operate inside the E.U., is mainly based on the national legislation. As a result it doesn't match the economic framework and to achieve the objectives stipulated in the Article 18 of the Treaty (free movement). This situation represents an important obstacle in the grouping of companies of different Member States.

The Council Regulation on the Statute for a European Company of the European Union was adopted on the October 8, 2001 (EU, 2001, European Council, 2001). It contains rules for the European Public Companies known as a Societas Europaea (SE) (Latin for "European Company").

There is also a statute allowing the European Cooperative Societies. A European company can be registered in any member state of the European Union, and the registration can be easily transferred to another member state. There is no EU-wide register of SEs (an SE is registered on the national register of the member state in which it has its head office), but each registration is to be published in the Official Journal of the European Union. As of September 2007, for example, at least 64 registrations were reported (seeurope-network.org., 2008).

The legislation harmonisation was the first step of this process. It was followed by smoothing away excessive differences.

The doctrine stipulated that the company law harmonisation process is still incompatible. The EU and the European company law were not able to face the challenges connected to the business Europeanization.

The latest regulations are technical and consist of obstructions for the future striking down of the law. Eversince 1994, many changes have been made to support the European company in the endeavours of meeting the requirements of the present global trade.

3. An important EU need is to provide the economic and juridical unity. In order to achieve that, provisions have been structured for the companies operating under a community direct regulation applicable across all the Member States. These companies operate together with those companies which are regulated by the national specific law.

The provisions of this regulation allow the creation and the management of the European companies, which become free of disparity and territorial obstacles to implementation which come from the National Company Law.

The juridical regulations which cover the European company haven't affected the achieving of the future economic needs. They must allow the fusion of the companies of different Member States, the creation of a holding or the implementation of common branches.

Moreover, every joint-venture, which has the statutory and central administrative headquarters inside the E.U., can be transformed into a European company without being dissolved and going through liquidation, if it has a branch in a Member State, different from that where are its statutory headquarters.

The national provisions are applied to the limited companies which offer their stocks using the public supply or to the transactions with the real estate. When a European company is established using a public real estate supply or when a European company wants to use such financial instruments, the national provisions are applied, as well.

A European company has to be organised as a stock company, which represents the best way for the financing system and its management. In order to ensure that these companies have reasonable dimensions, it is necessary to fix a minimum capital level, but it has not to be an obstacle for the SMEs to turn into a European company.

A European company has to be efficiently managed and monitored. Nowadays, there are two different forms of management for the limited companies. The European company can choose between these two systems. As a result, it is necessary to define exactly the responsibilities for those covering the management and those covering the monitoring.

According to the general rules and principles of the private international law, when a company can get the control over another one, which is under a different juridical system, its rights and obligations for the minority shareholders and for the third parties are stipulated in the Law of the companies under control. This law does not affect the obligations of the company which exercise the control using its own law (the need to elaborate consolidated accounts, for example).

Nowadays, there it is not necessary to have specific rules for the European companies under this domain.

The rules and the general principles of the international private law must apply to the European company which has the control and to that which is under control, as well. We must consider the law system which operated in the limited companies of the Member State where the European company has its statutory headquarters.

4. There are two approaches about the headquarters in the EU:

- *the registration theory*: used in Denmark, UK, Ireland and Netherland;
- *the real headquarters theory:* used in France, Germany, Luxembourg, Portugal, Belgium, Spain and Greece.

The first system considers that the registration of a company binds that company to respect all the provisions connected to its legal regime and it will be governed by these laws anywhere it will operate.

When the main headquarters are moved to another Member State, there are no legal problems. The real problems appear for the secondary headquarters, especially for the branches, that do not have legal personality.

The second system uses the law of the place (location) where are the trader's main interests. It can be differently demonstrated from a Member State to another.

The real headquarters theory appeared later, in France and Germany, in the nineteenth century. It is based on the local interests' protection.

The real headquarters doctrine has nevertheless some limits, because it is uncertain and arbitrary in terms of its effects. Moreover, the control will become more difficult according to the e-trade development in terms of the company's location.

The implementation of the registration theory can support the E.U. to go a step further in the companies' domain, because it promotes the lowest standards and the *legal arbitration,* which represents a possibility of choosing the most appropriate legislation statue.

The European Commission decision vs. France, appealed under the Article 169 of the European Treaty, considered that France had not respected its stipulations in the Article 52 of the Treaty. Practically, France did not provide fiscal benefits for the branches and the insurance companies of other Member States for the same terms as for the French companies.

Under the Segers case, there were implemented the provisions of the Articles 52 and 58 of the European Treaty. These provisions allow any manager of a society to benefit by the national insurance in case of sickness, even though his company was created according to other Member State's legislation and the company's social headquarters is in another Member State, as well.

A prejudicial action, under Article 52 of the European Treaty, opposed the possibility of the Member States' legislation to bind the companies established in these countries to create branches in other Member States, to subordinate the right for a tax exemption to the situation in which a holding activity consists a majority ownership of the branches' stocks of the same Member State. As a result, the national judge is not bound to interpret the legislation according to the community law or to apply the law into a situation which is out of the community law, as well.

Another pattern of legal shareholding was that in which the company's management and control were in Denmark, the shareholders being Danish, the director being also Danish and the company registered in the UK. The company's recognition depended on the Danish laws, because Denmark was the location of the "real headquarters".

According to the Daily Mail case, the British corporate law allows a company which has its registered office in the U.K. to establish its business and administrative headquarters into another Member State without losing its legal personality or the quality of the company for the British law. According to the British law, only those companies which have the fiscal residence in U.K. are object of the British taxes. The fiscal residence is the location of the business centre.

The Articles 52 and 58 do not offer any right to a company, which is established according to a Member State's legislation and which has there

its statutory headquarters, to transfer its business center to another Member State, while it keeps its legal personality in the former state (paragraph 24, Court of Justice, Article 81/87).

Under the Daily Mail decision, the Court of Justice, relying the traditional relationship of the law conflict passed an important judgment: freedom of decision. As a result, the Member States themselves have to resolve themselves this dispute on the rules of agreement with the legal harmonisation across the EU. As far as, the rigorous protection of striking down legal rights is concerned, that decision represented a step backwards.

The Court of Justice eliminated the main headquarters in the application of the Articles 43 and 48 and created a deterrent effect for the companies' trans-border mobility.

Another point of view, connected to these legal shoulders, is that of applying the substantive law to the companies.

Nowadays, the Council Regulation 1346/29th of May 2000 on insolvency procedures allows the opening of the main insolvency procedure in that Member State in which it is the centre of the debtor' s main interests. This centre has to meet the location in which the debtor led its interests and it can be checked by the third parties.

This regulation can be applied only when the debtor's main interest centre is located inside the E.U. and it is connected to the real headquarters' system.

In the recent Uberseering case, the Court applied the rules connected to the establishment of liberty and admitted that a Dutch company can move its business headquarters to Germany.

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