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THE NON-DISCRIMINATION PRINCIPLE THROUGH THE CONCEPT OF ESTABLISHMENT OF COMPANIES IN EUROPEAN UNION

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ABSTRACT

The non-discrimination principle is one of the essential principles in the area of European public and private law too. The importance of this principle also takes a great place in field of company law, especially in the area of "freedom of establishment of the companies" in the European Single Market (*hereinafter ESM*).

Freedom of establishment of companies is closely related to the general concept of "free movement of people, capital, goods and services," in ESM. In fact, freedom of establishment is a substantive part of the process of creation the internal market in EU. The freedom of establishment is based on the Treaty of the functioning of EU (*hereinafter TFEU*). According to article 49 from TFEU (*previously article 43 et seq. EC Treaty*), restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. This prohibition also applies to restrictions on setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. In-depth exploration of this issue is conditioned by the interpretation of the Court of justice of European Union (*hereinafter CJEU*), which embodies the real legal regime of freedom of establishment. Freedom of establishment of companies is closely related to the principles of healthy and fair competition and equal access of the companies too.

This article seeks to elaborate fundamental theoretical aspects of this issue, considering certain case - study analyze of CJEU judgements. The main focus is on the non-discrimination principle, legal effects of the CJEU judgments, free market and competitiveness, and finally, determination of the concept of primary and secondary establishment of companies in EU.

INTRODUCTION

Freedom of establishment of companies in the ESM is an extremely complex issue. A thorough study of this issue implies the necessity of exploring the legal regime and economic regularities of numerous topics of company law, including the non-discrimination principle as a fundamental principle of the functioning of EU. In order to achieve in-depth analysis of this issue, we focus on several special subject-matters, such as: *cross border merger of trade companies, EU Directives regarding the freedom of establishment, the concept of primary and secondary establishment, national legislation of member*

states, and finally, *the practices of Court of justice of European Union* (*hereinafter CJEU*). Taking into account all these aspects, we elaborate this article in three headers and several items.

The essence of this subject-matter is the implementation of non-discrimination principle, and unification of the concept of primary and secondary foundation in the ESM. The origin of the idea of freedom of establishment lies in the economic basis, i.e. into the need of establishment of competitive European companies. More precisely, the origin of the idea is in the idea of creation EU, which basically was founded as an economic community, without borders in trade of goods and services. From economic viewpoint, EU is constructed in order to create free market of goods and services, and to become a competitiveness economic power.

Influences by the process of globalization and liberalization of the market, concentration of the capital and creation of "*giant/competitive companies*" become logical consequence in the global world. Due to the expansion of the economy at East, (China and India), and the impact of the US economy, Europe had a great interested in creation competitive companies in the global market. In this direction, many changes have been made in the legal system, and all of them strive toward the free access to the market, free merges and acquision, cross-border merger, and freedom of setting up agencies, branches and other business organizations.

These goals are closely related with the freedom of establishment of the companies, and the unification of the primary and secondary establishment. Namely, through the freedom of establishment, EU created legal basis for free access of the companies of member states, contributes to growing the competitiveness and quality of the goods and services, free access to labor market etc.

This huge significant of the concept of freedom of establishment, also steams from the fact that on the account of the free movement of the capital, EU compromised certain interests of one outstanding important category of subjects as: workers, creditors, minority shareholders etc., (Tushevska, 2015). These economic interests for ESM are transformed in the *Treaty of the functioning of EU* (*hereinafter TFEU*). Actually, the concept of freedom of establishment is implemented in article 49 and 54 from the TFEU; pursuant to which, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State (ex Article, 43 TEC). According to this solution, the companies are free to choose their own place of business by establishment in any state of EU, or by relocation of their branches or subsidiaries in the territory of another Member State.

In order to avoid any type of dilemma regarding the status of this subjects, article 54, paragraph 1, (*ex Article 48 TEC*) emphasize the equal treatment of the companies with the nationals of the member states. Hence, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Taking into account the non-compliance of the national legislation regarding the treatment of the legal persons and subject with status of trader, prevent any kind of misunderstanding, defining in article 54, paragraph 2 that "companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Nevertheless, the principle of non-discrimination experiences different interpretation case by case. This kind of practice generates non-equal treatment of the companies, legal uncertainty, and highlighting the weakness of EU system in this area (Klenovsky, 2010). According to article 49, paragraph 2, "*freedom of establishment*" shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms, under the

conditions laid down for its own nationals by the law of the country where such establishment is effected. Apparently the definition is quite straightforward, but, the experience from the practice indicate misalignment in the in the viewpoints, including the rationale of the CJEU. In this article, despite the provisions from the directives, we consider the practice of the CJEU. Bearing in mind the current dilemmas, we begin this research with the question of primary and secondary establishment of the companies, implementation of the non-discrimination principle, and the perspectives of European companies, beyond the question of the origin of the company's capital.

1. ESTABLISHMENT OF THE COMPANIES IN EUROPEAN SINGLE MARKET

1.1. THE GENESIS OF THE LEGAL REGIME OF THE ESTABLISHMENT OF THE COMPANIES IN THE FRAME OF THE EU

Company law represent one of the filed in which process of harmonization is the most difficult to be implement. Guided by the beginnings of the process of harmonization, also bearing in mind the last developments in this area, we highlights that EU failed to reach a compromise for certain questions, or it reached it only as a dead letter.

Basically, the process of harmonization of company law, take place simultaneously with the harmonization of the whole EU law (Vasilevic, Radovic, Jevremoic-Petrovic, 2012). It's true that the main idea of the EU was not to harmonize the company law in whole, but, there was a great idea to eliminate differences in certain segments that are crucial to achieve its main purpose of establishment.

Elimination of the differences in member states regarding certain issues from company law, play an essential role in reaching the basic economical goal of EU. Of course the importance of the all issues regarding company law is not identical. Namely, our opinion is that the fact that fifth directive concerning the arrangement of the structure of the companies was never adopt, is not an obstacle for achieving certain goals. Contrary to this, failure to adopt fourteen directive on cross-border merger, adversely affected on the unification of this issue.

In the field of establishment of the companies, EU tried to adopt several directives and convention in order to achieve compromise on certain issues which are essential for creation of ESM. In this direction the Draft Convention for acknowledgement of trade companies and other legal subjects from 1969 was created, as well as Draft convention for cross border merger of joint stock companies from 1973. These drafts were never adopted. In 2005 EU approaches toward the adaptation of Tenth Directive for cross border in EU. During the period of providing this filed with proper legal regime, EU ascertained that the most relevant instruments for this purpose are the directives and ordinances. At the time when these conventions where proposed, the idea of freedom of establishment was not matured. As an aggravating circumstance for meeting this goal, also exists the fact that conventions shall be ratified from member states (see more about this at Vasilevic, Radovic, Jevremovic-Petrovic, 2012, pp.43-88).

In order to achieve this purpose, EU approach toward the adoption of several directives in the field of EU company law. Hence, Second Directive of EU company law, adopted in 1976. This Directive provides rules for establishment of joint stock companies. The third Directive from 1978 applies to national merger of joint stock companies, and finally, the tenth Directive from 2005 was adopted, and it concerns cross-border merger. In the array of this field, EU proposed the adoption of Directive number fourteen, which concerns cross-border change of the head office. This Directive was never adopt.

These directives, whether directly or indirectly, seriously contribute to the process of implementation of freedom of establishment. Among numerous questions of company law, establishment of the

companies is directly related to the main idea of EU for creation of free market. These directives also contributed to the unification of the rules for establishment of the companies in any member states. In favor of this, in 2001 the ordinance for statute of joint stock companies was adopted, which essentially contribute to the implementation of the concept of freedom of primary and secondary establishment (Grubesic, 2009).

Analyzing the practice of establishment of the companies in EU, we found that the main obstacle for unifying this concept in EU is the different perception for primary and secondary establishment of the companies: So, what does it mean primary and what secondary establishment of the companies in EU? Does the freedom of establishment of companies also mean freedom of relocation of their headquarters in the territory of other member state? What does the process of discrimination and non-discrimination in establishment of companies in EU means? Does discrimination means providing different conditions for establishment or relocation of companies with foreign capital? In which cases companies may directly refer to article 49 and 54 from TFEU?! In order to clarify these issues, we'll approach toward the delineation and determination of the concept of primary and secondary establishment, in correlation with principle of anti-discrimination.

1.1.1. PRIMARY ESTABLISHMENT OF COMPANIES IN EUROPEAN UNION

Primary establishment of the companies means foundation according to legal regime typical for the state in which the head office of the company is registered. Concept of primary establishment of the companies, also include relocation of the main head office in other member state (Wedin, 2010). Mainly, the biggest dilemmas and disputes in this field stems from different legal regime in member states.

Before we begin to explore this issue, in this part of the article we'll elaborate the theory of establishment of the companies from the perspective of headquarters. Namely, legal literature recognizes two theories for the term of headquarters such as: theory of the real headquarters and the theory of incorporation of the companies. According to the comprehension of the member states that accept the first theory, the headquarters of the company is the place where the administrative center (*management*) of the company is. Contrary to this, according to the theory of incorporation, the headquarters is the place where the company is registered in the proper trade register (Wymeersch, 2003).

The various understanding regarding the concept of the headquarters in the member states, contributed towards the misalignment in practice. Namely, TFEU in the part in which it provide the freedom of establishment highlights the registered office, central administration or principal place of business within the Union. So, TFEU leave space for the member states to arrange the concept of headquarters. This moment is a base for the whole misalignment in this area. Nevertheless, essential disputes derived from the question: *is there a direct effect from the article 49 and 54 from TFEU*? CJEU and European company law did not make clear this question. Namely, if CJEU ascertained direct effect of article 49 and 54, the most of the cases would have wrapped up with breach of the non-discrimination principle. Contrary to this, member states usually reject the registration or relocation of the headquarters of the companies, beyond re-establishment in the new territory.

Consequently, the essence of this subject-matter is in the degree of convergence of national law with the law of EU. Nevertheless, we highlights that the request for convergence is necessary concerning the application of article 49 and 54 from TFEU. The questions such as corporate government, share capital and similar, are irrelevant for freedom of establishment in EU. So, still remain the fact that primary and secondary establishment are the most important for research of this question.

1.1.2. SECONDARY ESTABLISHMENT OF COMPANIES WITHIN EUROPEAN UNION

The secondary establishment of companies is regulated in the TFEU, i.e. in article 49 which provide that freedom of establishment also concerns right of setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. The right of secondary establishment within the EU is e legal basis for carrying out business activities in other member state. This model of doing business enables expansion of the business activities, beyond the border of member state, retaining the legal status in the state where is the real head office. This type of practice for expansion of business activities, did not invoke disputes concerning the right of setting up branches, agencies and any kind of other business organization, neither breach of the non-discrimination principle.

It's undisputable that according to EU and national legislation of member states, it's allowable to establish separate business units beyond the territory of the main headquarter. In the most of the cases, this is *condition sine qua non* for doing business in other member state. Consequently to this consideration, article 581 from Law on Trade Companies ("Official Gazette of the Republic of Macedonia" nos. 28/2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014, 41/2014, 138/2014 and 88/2015), explicitly provide that the foreign trade company or a foreign sole proprietor shall be obliged to establish a subsidiary for the purpose of conducting the activity on the territory of the Republic of Macedonia, provided that is has a registered head office, central administration or head office for conducting the activity in other country whose law requires from the trade companies or the sole proprietors entered in the trade register to organize a subsidiary for the purpose of performing the activity on its territory. Yet, the disputes in the field of secondary establishment arise in the case when member state in which the head office is placed, doesn't acknowledge the right of the carriers of commercial ventures beyond the territory where the real head office is. Or the right of setting up any type of business units in contested due to the "fiscal abuse," or abuse of the concept of minimal basic capital.

Experiences from the practice perform diametrically opposed viewpoints regarding the misuse of the concept of establishment. Namely, our opinion is that misuse of this concept becomes an issue when the law prohibits certain behavior in context of freedom of establishment. In this direction, we highlight the acknowledgment of the married couple from Denmark in case (Centros, C-212/97). Married couple established company in United Kingdom with share capital in amount of 100 pounds sterling. With intention to transfer their business in Denmark, they initiated registration procedure for setting up agency in Denmark. With explanation that their intention is to transfer the whole business in Denmark, it cannot be percept as establishment of agency, but as a primary establishment of the company. Relying on this rationale, the Agency of trade and trade companies, rejected the registration of the business unit, pointing out that the real reason for this is to avoid the regime for minimal basic capital in the process of establishment, provided under the Denmark legislation.

Married couple initiated procedure in front of the Denmark Court, emphasizing that the rejection of the registration is completely unfounded bearing in mind the solution from article 49 and 54 from TFEU, simultaneously, that rejection of this registration means breach of the non-discrimination principal in context of article 49 from TFEU. Regarding this issue, Supreme Court of Denmark referred to CJEU, and asked for a preliminary ruling concerning the right of establishment of agencies.

CJEU highlights that the abuse of the freedom of establishment through avoiding the application of actual legislation is prohibit. In its rational the CJEU emphasize that this is especially forbidden when the intention of the parties is to abuse the position of the workers, creditors, minority shareholders and other stakeholders. Despite this, in this case there is no abuse from the married couple. The fact that United Kingdom (*compared with Denmark*) has a more liberal regime regarding the minimum capital for establishment, may not be perceive as a misuse. Hence, the national Court must take into account

this fact, and also recall on article 49 and 54 from the treaty. So the Court must prescribe that Agency of trade is oblige to register the agency of the married couple at the territory of Denmark.

Studying the judgments of the national Courts, and the reasoning of the CJEU, is the best way for thoroughly consideration of this subject-matter. So, numerous cases will be elaborate in order to sum up certain dilemmas concerning the protection of non-discrimination principal through the concept of freedom of establishment within EU.

2. NOTION AND TYPES OF DISCRIMINATION OF COMPANIES

2.1. DISCRIMINATION IN THE FIELD OF EUROPEAN COMPANY LAW

As a fundamental principle of the functioning of EU, the non-discrimination principle has a significant meaning in the field of foundation of the EU companies. When the non-discrimination principle is a subject matter in the field of company law, basically it refers to the protection of this principle in the process of establishment within the EU territory. The breach of this principle usually steam from the existence of different national legislation regarding the primary and secondary establishment of the companies, and the character of the article 49 and 54 from CJEU.

As a carries of business activities in the frame of ESM, companies are set up on daily basis. Regarding the issue about establishment of the companies, legal literature highlights the differences among free movement of goods and services from freedom of establishment of the companies (Gormley, 2011). Different understanding of the concept derive from the fact the takeovers of the companies doesn't mean establishment or opening of the agencies. Accordingly, financial investment is related with the establishment of the companies, but the legal regime is non-applicable. So, the breach of non-discrimination principle is related with the primary and secondary establishment of the companies in EU.

In legal literature as well as in the practice, non-discrimination in relation with freedom of establishment is perceived as a principle that was subject-matter in academic circles for a long time. More precisely, the debate arise around the issue: whether the discrimination only means application of different legal regime in the procedure of establishment of the companies with foreign capital, compared with the domestic companies, or discrimination is interpret in broader sense, and its perceive as prohibition of establishment and relocation of the head office, cross-merger of the companies and setting up of the agencies, branches and other business units. In this context we recall on the sentence: to prohibit discrimination, Member States must treat their own nationals equal to nationals from other Member States (Craig, De Búrca, 2010). Practice is familiar with numerous and various cases concerning the primary and secondary establishment of the companies. Relying on the practice, the breach of the non-discrimination principle may be perceived differently, on the base of existing practice and exposed arguments. So, the exploration of the judgements and their reasoning on previous questions, are with the biggest impact on the defining of the breach of non-discrimination.

2.1.1. DISCRIMINATION OF PRIMARY AND SECONDARY ESTABLISHMENT OF THE COMPANIES IN EUROPEAN UNION

In the temporary conditions of doing business, expansion of the transnational companies, and unification of the EU legislation, the uniform concept of headquarters doesn't yet exist. This misalignment regarding the concept headquarter causes many dilemmas in the implementation of the freedom of establishment. Namely, the main question is does the real head office means the place where

the business is really doing, or, it is the place where the administrative center is situated, or finally, it's the place where the company did registered its head office. This subject matter is closely related with the main question about the breach of the non-discrimination principle.

Due to the actual situation *in concreto,* and the effects of the article 49 and 54 from TFEU, *freedom* of establishment is differently interpreted. Anyway, CJEU displays wide range of judgments, which illustratively preform the breach of the non-discrimination principle and right of establishment. In this context we recall on the (Case C – 79/85), also known as Serges case. In this case, Mr. Serges and his wife were Dutch citizens which established company with head office in the United Kingdom. After the establishment of the company, they initiated procedure for opening subsidiary of this company in Denmark. In fact, through this subsidiary they carried out all their business. The dispute concern with the freedom of establishment, especially the breach of the non-discrimination principle was set on the table when Mr. Serges turned to the Agency for health insurance in order to exercise his right from his insurance policy. The Agency rejected this request of Mr. Serges arguing that the company is established on the ground of foreign law. Consequently, notwithstanding the fact that the biggest part of the business they pursue in Denmark, they should addressed to the Agency in United Kingdom (Altinişk, 2012).

Citing the explanation of the agency, Mr. Serges appealed to the authorized Court in Denmark, underlining his right on the ground of the insurance policy. In his request Mr. Serges emphasized the fact that compared with the citizens of Denmark he's discriminated. The Court in Denmark asked the CJEU for preliminary ruling, and set up several questions including the acknowledgment of the status of branches and subsidiaries of the companies with headquarter in United Kingdom.

In his rationale, CJEU highlights that Mr. Serges has a right on execution of insurance policy from the Denmark Agency. More preciously, that it's completely forbidden to reject the acknowledgment of the companies which is legally founded in any member state, under condition from article 49 and 54 from TFEU. It seems to us that any different rationale of the CJEU in cases as Serges means direct discrimination according to article 49 and 54, and against one of the fundamental principles of functioning of EU (See more about this in: Vasilevic, Radovic, Jevremovic-Petrovic, 2012, p. 53).

According to our opinion one of the most disputable simultaneously and most complicated cases concerning freedom of establishment is the Daily Mail case (C–81/87). The dilemma and dispute in this case was the question about the protection of fiscal rules and observance of the freedom of establishment. *In concreto,* Daily Mail and General Trust PLC are founded in United Kingdom with registered and real head office in London. The company Daily mail asked the tax authorities to relocate his head office from London to Denmark. According to United Kingdom legislation tax obligations are connected with the place where the head office is. Considering the fact that Daily mail wants to relocate its head office, it's oblige to pay all the taxes. This is case due to the fact that Daily Mail is under jurisdiction of United Kingdom. For this purpose Daily Mail addressed to the Court, underlining that according to article 49 TFEU it has a right to relocate its head office in the terms of the freedom of primary establishment. Daily Mail also emphasize that relocation of the head office in other member state may not be conditioned by prior approval of any other authority including the tax administration in London (Lowry, 2004).

Before making a decision, the British Court referred to CJEU with one preliminary ruling: does article 49 TFEU guarantees the right of free relocation of the head office, beyond the prior approval from the tax authority in London? Unlike in the Serges case, CJEU took the view that Daily mail is under full jurisdiction of United Kingdom. Bearing in mind the fact that his real and registered head office is in London, UK is authorized for its taxes. Consequently, Daily Mail may not relocate its head office without approval from the fiscal authorities in London.

Basically, the Court took into account the possibility of abusing the fiscal regulation, and avoidance of paying taxes. If CJEU in Daily Mail case decided to apply article 54 in terms that free relocation means

the possibility for Daily Mail to relocate its head office beyond any kind of approval, it will drag on avalanche abuse in the fiscal legislation and policy. Nevertheless, this viewpoint of the CJEU undergone numerous critics, and it served as a comparison case for many other decisions created later.

Anyway, our opinion is that Daily Mail may not be compared with Serges or Centros case in any context of freedom of establishment. These cases may not be analyzed as a common lens for elaboration of freedom of establishment in EU. Indeed, there is a great difference between ascertaining a breach in case when the agency is founded in other member state, (Centros case) or certain right from the opened subsidiary should be use (Serges case), and cases when relocation of the headquarter should be done, beyond any kind of obligations towards the state in which the previous head office has founded.

As we already mentioned, there is no any kind of abuse in the cases when the companies established in one member state, will use the more liberal legal regime established in other member state. It's is completely acceptable. The only questionable cases in this context are situations when then the head office registered in one member state, should be relocate in other member state (*daily Mail case*). Yet, the Court doesn't have such an opinion in case Überseering. This is primary due to the importance of the criteria, and not because the actual situation.

Finally, beyond all these standpoints concerning the practice of CJEU, current misalignment has its own justification in the field of establishment and non-discrimination principle. Despite the numerous critics and viewpoints for Daily Mail, CJEU acted in accordance with the whole community law and fundamental principles of EU. This is in favor of the need of additional legal instrument for arranging certain issues in the area of primary and secondary establishment.

Experiences form the practices displayed that secondary establishment in EU is less complicated than primary establishment. Article 49 TFEU guaranty the right of secondary establishment which means the possibility of opening agencies, subsidiaries, branches and other business units in other member state. In the context of secondary establishment, breach of the non-discrimination principle most commonly refers to the question if the subsidiary is open for doing the biggest part of the business, or it is opened according the purpose and nature of the business units.

Member states in which the real or registered head office is places usually dispute the freedom of secondary establishment. This is case when the real doing of business is on the territory of one member state, and there is a simulation that it's just a subsidiary which is founded. Concerning this issue we already took a viewpoint above. But, practice is also familiar with cases when the state in which the head office has been removed doesn't acknowledge the legal status of the company. Taking into account that this case is not about the misuse through relocation of the head office, it seems to us that CJEU in case Überseering (C-208/00) rightfully reasoned that Germany is oblige to acknowledge the legal status of the Überseering. *In concreto*, Überseering is established in Netherland as a limited liability company. It decides to remove it real head office in Germany. In Germany it concludes a contract with Nordic Construction Company GmBH. Since the Nordic Construction Company GmBH did not accomplish its obligation, the Überseering appealed to German Court in order to instruct the Nordic Construction on meeting its obligation. German Court dismissed the lawsuit, underlining that Überseering doesn't have a process capacity to be a party in the procedure. It rely this explanation on the ground of theory of real head office, accepted in Germany. More preciously, recalling this theory, shifting the head office in Germany, Überseering lost its process capacity. This dispute becomes a case in front of the Supreme Court, which referred to CJEU and asked if the Überseering lost its process capacity by relocation of its head office? Furthermore, does failure to acknowledge the Überseering means breach of the non-discrimination principle?

CJEU stressed that German Court may not refuse to act upon the lawsuit. Namely, the relocation of the head office is irrelevant for the lack of process capacity. Even more, the decision of the national Court is in direct contravention with the communitarian law.

Except in the part of relocation of the real head office and primary establishment of the companies, CJEU has harmonized working. In this context are the reasoning in Inspire Art (C - 167/01) and Centros elaborated above. Limited liability Company registered as Inspire Art Company was founded in United Kingdom. Right after the establishment, the Inspire Art begins to carry out most of their business in Netherland. Due to this fact it sent a request for registration of the subsidiary to the Trade and Industrial Chamber in Amsterdam. With explanation that Inspire Art carry out most of its business in Amsterdam, the Trade Chamber in Amsterdam pointed out that will register it as a foreign company. Consequently, the Law on foreign trade companies is applicable. Pursuant to the Law on foreign trade companies, there are certain conditions that should be met in order to be registered in Netherland, such as: minimal basic capital, solidary liability of the management and founding members. So, pursuant to the conditions of Trade Chamber in Amsterdam, Inspire Art must accomplish all these conditions.

Due to the fact that Inspire Art lack these criteria, the Chamber refuse to do the registration, and the Inspire Art referred to Court, in order to be enabled for registration under the same conditions as the domestic companies (*relying on article 49 and 54 TFEU*). The court referred to CJEU which in concreto underlined that in this case the community law precludes the validity of the national legislation of Netherland. So, the Inspire Art case enters into the concept of secondary establishment. The fact that it requires minimal basic capital doesn't present any abuse in the terms of communitarian law and its fundamental principles of TFEU.

Pursuant to CJEU there is no abuse of the freedom of establishment in Sevic (C- 411/03). National German court asked for preliminary ruling: *Does the Law on transformation of Germany/ Umwandlungsgesetz – UmwG, article 1 discriminate foreign companies through the concept of cross border merger and secondary establishment*? *In concreto, Sevic AG* and *Security Vision Concept SA* decide to merger by acquisition of *Security Vision Concept SA* to *Sevic AG and Security.* In view of the fact that newly founded company should be in Germany, the request to trade register was sent in Germany to enroll the cross border merger. Trade register rejected the enrollment referred to citing the article 1 of the Law on transformation. The appeal against the decision of trade register was brought by *Sevic AG,* highlighting that this decision breach the non-discrimination principle in term of article 49 and 54 of TFEU (Vasilevic, Radovic, Jevremovic – Petrovic, p. 62).

Nevertheless, the prior standpoints of the CJEU were that cross border merger belongs neither to primary nor to secondary establishment of the companies. More preciously, through the cross border merger the company that is acquired cease, so there is no legal basis for the application of the legal regime for primary establishment of the companies. Affected by the opinion of the main attorney, CJEU changed it standpoint and acted rightly when decide that Law on transformation is discriminatory and contrary to freedom of (Dugová, A. Trnka, M. 2014, p. 133). Yet, the main attorney doesn't perceive this situation as a breach of freedom of primary establishment, but as a breach of secondary establishment. Acquisition means universal transfer of the corpus rights and obligations of *Sevic AG.* Finally, beyond this explanation, we are on the opinion that this debate is irrelevant for the primary and secondary establishment *in concreto.* We highlight this on the ground that article 49 and 54 TFEU guarantee protection of the both forms of foundation. So, it is important to emphasize that cross border merger *de jure* and *de facto* means establishment of newly founded companies pursuant to communitarian law. German legal system should not allow the presence of discriminatory provisions regarding the establishment. If the main goal of EU is considered, than it is completely clarified that "freedom of establishment," means free execution of economic activities on ESM. So article 49 and 54 TFEU must be applied.

Following the critics and practice referred to CJEU, we underlining that the established misalignment due to the fact various solutions anticipated in national legislation and lack of uniform concept of headquarter in EU company law. In the array of numerous judgments that we elaborate in this article, is some parts CJEU displayed liberal approach to the interpretation of the freedom of establishment. Yet, in other parts, CJEU manifested highly rigorous approach of interpretation. The whole experience

from this study take us back on the perception that national legislation are dominant in the field of company law. So, there must be intervention in this area, with focus on proper legal instruments.

3. CONTEMPORARY TENDENCIES OF EUROPEAN LEGILSTAION REGARDING FREEDOM OF ESTABLISHMENT

3.1. THE INFLUENCE OF COURT OF JUSTICE OF EUROPEAN UNION IN THE PROTECTION OF NON-DISCRIMINATION PRINCIPLE

Studying the non-discrimination principle through the prism of primary and secondary establishment of companies, we found that CJEU has a great impact on consideration of this issue. This is due to the fact that there are numerous legal gaps in this field, and many disputes are solved relying on the national legislation of member states. This existing practice imposes the question about the effect of the article 49 and 53, which spontaneously impose the preliminary ruling to the CJEU.

Studying these judgments, we ascertained that CJEU in certain cases set up the protection of non-discrimination principle on a high level. But, in other cases it makes a decision with diametrically opposed interpretation of article 49 and 54 TFEU. Hence, in case Cartesio Oktató és Szolgáltató Bt. C-210/06, the Court acted as in the Daily Mail, with reasoning that that head office may be relocated without liquidation and re-incorporation in other member state.

For the whole critical elite this was unexpected decision bearing in mind the reasoning in previous decisions in Centros, Sevic and Inspire Art. According to the CJEU practices and practice of national legal systems, several legal gaps were filled. In this direction the Directive for cross border merger was created, and it's a guide for the contemporary tendencies in EU in the area of primary and secondary establishment.

CONCLUSION

Analyzing the judgements that were at disposal for purposes of this research, we concluded that that EU may not compromise the non-discrimination principle in the area of establishment of the companies. This is particularly case when it comes to the freedom of relocation of the business undertakings at territory of other member state. We are of thinking that the community should only focused on implementation of legal instrument that will prevent misuse and circumvention of the national legislation, through simulation of doing business beyond the borders.

If the tendency is moving in opposite direction, we considering: which would be the objective of the EU in case when the company established in Italy will fear from discrimination if it decide to remove part of its business in Germany. Or, what is the point of creation of ESM when the greatest impediment for freedom of establishment will be the fear of misuse the right of creditors, minority shareholders and workers. The events from the last decade directly reflects on the free movement of workers, and it is due not to the mergers and acquisitions, but in order to find better place for living in some of member states in EU. Fluctuations of workers were subject-matter in Germany, Italy, United Kingdom, etc. So, jeopardizing the position of the workers is not an argument for obstruction of the freedom of establishment within Europe. Considering the status of creditors, as we mentioned above, the protection steams form the efficiency of the concept of acknowledgment and execution of foreign judgments, rather than from the freedom of primary and secondary establishment.

Breach of the non-discrimination principle is in direct contradiction with fundamental values of EU functioning. If neither measure we'll be taken in a foreseeable future, inevitably will be the

discrimination of the companies, and impediments regarding the freedom of establishment in EU. Following the last developments in the company law of EU, our opinion is that the last decade of 21 century was marked by the protection of the non-discrimination principle in the area of primary and secondary establishment.

Until recently the practice presented misalignment of the legislation in this field and focus on the protection of certain category of subjects. Our opinion is that there must be a better solution for protection of these particular interests on EU level. Indeed, concerning the ESM there is no more important principle than freedom of establishment and non-discrimination. In this context we may not forget that the ultimate goal of the EU is to be perceived as a community which belongs to all citizens in member state. So, the only logical question in this context is: *why it is a fear that certain rights of creditors and workers in daily base transactions will be jeopardize*?! It's true that it's happening in the practice, but, disruption or hindering of the companies foundation is with the fundamental values and objectives of the EU. Finally, EU may use the opportunity for revision of the EU legislation and protect this vulnerable category of subjects. That's how non-discrimination principle will be on the top.

Based on all explanations we are of thinking that the problem is in the existing EU legal instruments. Hence, in this context we underline the request for harmonization of the rules regarding minimal basic capital for foundation and its maintenance due to the creditor's protection. Indeed, minimal basic capital may not be a warranty for the creditor's clams. Its only may be the capital created as a supplement value of the basic minimal capital that steam from the daily basis transactions. In this context, Republic of Macedonia anticipated this concept of protection. Based on the current conditions for basic minimal capital, Republic of Macedonia may protect creditors as a dead letter. In practice the basic capital is far away from the concept of creditor's protection. This is due to the fact that companies enter into transactions above 5000 euros. In the reality, they continuously don't have on disposal this capital. Let's not forget the fact of existing diametrically opposite economical, sociological, political and cultural concepts typical for particular member state.

Consequently, the focus must be on the harmonization of the system of acknowledgment and execution of the foreign judicial decisions. Only this intervention will contribute to more secure position of the workers, creditors and minority shareholders. Member states may also think about the unification of the warranty system for creditor's protection. This is very dangerous zone due to the fact that outstanding obligations strike to insolvency.

If fiscal abuse is the main problem, than implementation of newly legal regime is solution. On the other side, the tendency of increasing offshore companies is present, which require the intervention of the OECD, EU and USA for prevention of the abuse of the territory created as „tax haven."

We also underline the necessity of setting up harmonized working practice of CJEU. As we mentioned above, this is particular important due to the fact that national court must be in compliance with the position from preliminary ruling of CJEU. As viewpoints, these decisions are as well very important for states with status of candidate as Republic of Macedonia.

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