UNIVERSITY OF URBINO *Carlo Bo*
Ph.D. PROGRAMME IN GLOBAL STUDIES
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GLOBAL SOCIETY, CROSS-BORDER MOBILITY AND LAW

Research Project Proposal

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1. Title of the Research Project and Keywords

Title: Socio-economic implications in cross-border corporate mobility. The role of international law in tackling contemporary challenges of the EU internal market

Keywords: *Cross-border Corporate Mobility*; *International Law*; *Conflict-of-laws, Freedom of establishment, internal market, social considerations*

2. Research Area

Area 12: Legal Sciences.

Main disciplines: International Law; Private Law, European Union Law

Involved Scientific Disciplinary Sectors (SDS): IUS/13 (International Law); IUS/01 (Private Law); IUS/14 (European Union Law).

3. General Presentation of the Project and State of the Art

The legal and socio-economic implications of "cross-border corporate mobility" will be investigated in this Ph.D. research project. The notion of "cross-border corporate mobility" concerns several varieties of modifications of the corporate structure that have a connection in a plurality of national legal orders, such as conversions, mergers, divisions, transfers of seats and/or registered offices (ITEM 2021).

Any situation involving the legal systems of several States can be considered "cross-border". To ascertain which law governs (*rectius*, the law of which State) cross-border cases, private international law has a pivotal function: through so-called "conflict rules" (or conflict-of-laws rules), it designates the State whose law will regulate the cross-border legal case. Although the laws of every State are potentially suitable to regulate a cross-border situation, only one must be selected by the legislator since deemed most appropriate to take into account all the interests, purposes and rights to which the State authorities intended to give priority: private international law pursues "conflicts justice" (justice in the choice) and not "substantive justice" (CUNIBERTI 2022).

For example, in the case of a transfer of seat abroad, the "conflict-of-laws rules" must be used to ascertain which national law will be applied to issues related to representation of the company, liability for corporate obligations, but also matters as protection of workers, creditors, shareholders, contractors involved in these operations (GERNER-BEUERLE ET AL. 2018; SCHUSTER ET AL. 2016).

On November 27th, 2019, the European Union adopted the Directive 2019/2121/EU establishing for the first time a regulatory framework on cross-border mergers, divisions, and conversions (SCHMIDT 2016). This directive amended the previous Directive 2017/1132/EU, extending procedural rules for cross-border mergers to divisions and conversions. Furthermore, the provisions on cross-border conversions now include in their scope also the relocation of a company's registered office (statutory seat) (see Art. 86b, Directive 2019/2121/EU) (COSTA ET AL. 2018; DAVIES ET AL. 2019).

With this legislative act, the EU tried to provide companies with a favourable legal and administrative environment, adequate for growth and capable of addressing the new economic and social challenges of the globalised world (see EU COMMISSION 2018, p. 1). Indeed, companies play a crucial role in promoting economic growth, creating jobs, and attracting investments within the EU, thereby contributing to enhancing the collective socio-economic well-being (MONTI 2010; AMTENBRINK ET AL. 2019).

To date, each State has its own domestic conflict-of-laws rules to determine the applicable law to the acts (contractual, administrative, registration) necessary to the constitution of a company and its internal organisation (GIULIANO-LAGARDE 1980, p. 12).

There are two fundamental theories on which various national conflict-of-law rules are based: the "incorporation theory" (*Sitztheorie*) and the "real seat theory" (*Gründungstheorie*). The first attributes relevance to the law of the State where the company has accomplished the incorporation process, while the second stresses the relevance of the legal order of the State where the company's administrative or production seat is located. (GERNER-BEUERLE ET AL. 2020). The adoption of either theory has significant consequences.

Consider, for instance, the case of a company with the statutory seat in State "A" that relocates its principal place of business in State "B" without relocating the statutory seat. In this case, the competent judge of State "A", imagining that State "A" adopts the *incorporation theory*, will have to apply the law of the State where the statutory seat is located (State "A"). But, on the contrary, if judicial action is brought before a judge the State "B", who is adopting

the *real seat theory*, the applicable law will be the law of the State where the place of main business is located (State "B"), irrespective of the place where the statutory seat is located.

Legislative gaps: Currently, in the EU there is **no private international source of law** that provides uniform connecting factors to determine the legal order governing the internal affairs of companies engaged in cross-border mobility (*lex societatis*) (SCHMIDT 2016). So, each Member State is free to establish its conflict-of-law rules (COSTAMAGNA 2019) on the basis of one of the two fundamental theories (*incorporation theory* vs. *real seat theory*), although each conflict-of-law rule has its specificities.

Case law gaps: Even if the **European Union Court of Justice (EUCJ)** has played a significant role by broadly interpreting the provisions on the freedom of establishment (Articles 49 and 54, TFEU), declaring certain national provisions and practices incompatible with EU law and recently expressing a preference for the incorporation theory (see EUCJ, *Edil Work 2*, C-276/22 of 25 April 2024), the difficulties of achieving regulatory uniformity have not been overcome yet (GERNER-BEUERLE ET AL. 2020; LEHMANN 2024).

This general configuration originates significant problematic issues:

- **LEGAL UNCERTAINTY:** The main risk is the **mutual incompatibility** between connecting factors of different legal orders: in fact, two States involved in a corporate transfer might both seek to apply their national legislation to the same legal situation (positive conflict); or, they might each refer to the other State legislation, both declining to apply their own (negative conflict). The **legal uncertainty** arising from this regulatory setup makes the cross-border mobility harder.

- **NEGATIVE IMPACT ON THE EU INTERNAL MARKET**: The lack of a clear and uniform framework of private international law, ensuring foreseeability in the application of the substantive law of the Member States or the EU, companies are not incentivised to expand their operations beyond national borders, nor are investors from Third Countries intended to invest in the EU market (GERNER-BEUERLE C. ET AL. 2017; MUCCIARELLI 2019). These circumstances can jeopardise the development of the EU single market, the establishment and implementation of which is one of the key objectives of the entire European integration project (see Article 3.3, TEU).

- **NEGATIVE IMPACT ON "SOCIAL CONSIDERATIONS" pt.1: WORKERS, SHAREHOLDERS, CONTRACTORS, CREDITORS.** The substantial legal framework established by Directive 2017/1132/EU (as amended by Directive 2019/2121/EU), provides protective guarantees that must necessarily be integrated with the relevant implementing rules of the Member States. Consequently, the regulatory framework of private international law, through which the implementing national legislation is identified, must take into account the possibility of discrimination and breaches of fundamental rights of subjects in weaker positions (e.g. workers or minority shareholders).

- **NEGATIVE IMPACT ON "SOCIAL CONSIDERATIONS" pt. 2: ENVIRONMENT.** Cross-border corporate mobility is often driven by entrepreneurial decisions aimed at optimising costs by adhering to more lenient environmental regulations, to the detriment of protecting general interests. This is the case, for example, of companies deciding to relocate production or start branches in a certain State that requires more permissive environmental standards. This form of 'environmental dumping' can be adequately mitigated if private international law is able to impose the respect of imperative norms (COSTAMAGNA 2019, COLANGELO 2003).

4. Research Objectives (RO)

- **Research Objective 1**
  Given the heterogeneity of the current regulatory framework regarding *lex societatis* in cross-border mobility (see *supra*, section "LEGAL UNCERTAINTY"), it will be established how strategic business choices may be influenced and how such decisions could be modified if the legal order provided greater certainty regarding the applicable law to companies.

- **Research Objective 2**
  In absence of clear and uniform regulatory framework of private international law (see *supra* "NEGATIVE IMPACT ON THE EU INTERNAL MARKET"), it will be questioned how this uncertainty may affect the development of the EU single market and how a clear and uniform regulatory framework of private international law in cross-border corporate mobility may be helpful.

- **Research Objective 3**
  Considering that Directive 2017/1132/EU (as amended by Directive 2019/2121/EU) provides *material* guarantees (see *supra* "NEGATIVE IMPACT ON 'SOCIAL CONSIDERATIONS' pt. 1"), it will be established whether and eventually how private international law can contribute to take into adequate consideration the specific protection needs of workers and other relevant actors, especially the ones stuck in a weaker contractual position.

- **Research Objective 4**
  Considering that cross-border corporate mobility is often driven by entrepreneurial decisions aimed at optimising costs by adhering to more lenient environmental regulations (see *supra,* "NEGATIVE IMPACT ON 'SOCIAL CONSIDERATIONS' pt. 2"), it will be established whether and eventually how private international law could mitigate the risk of "environmental dumping" directed to the choice of the most permissive national law.

5. Methodology and Expected Results

5.1. Methodology

To properly answer the research questions indicated at the previous para. 4, it is important to adopt a research methodology that includes a thorough preliminary investigation of the European legal framework and the interpretation of the existing rules provided by the EUCJ (**see *infra* i**). Moreover, considering the supranational and cross-border nature of the main topic, the comparison between the legal orders of the EU Member States should not be neglected (**see *infra* ii**). Finally, in light of the remarkable economic and social implications of cross-border corporate mobility, adequate research resources must be devoted to an empirical approach (**see *infra* iii**): "*Law never operates in a vacuum*".

i) LEGAL AND JURISPRUDENTIAL FRAMEWORK

First of all, the research methodology will involve the analysis of existing legal rules. A comprehensive understanding is a condition for effectively achieving the other research objectives. Specifically, attention will be paid to national and supranational relevant sources of law and relevant judicial decisions, along with a thorough analysis of the international doctrinal literature.

ii) COMPARATIVE APPROACH

The comparative approach is necessary for two reasons.

First, cross-border corporate mobility is mainly regulated by directives, i.e. legislative acts that have to be transposed into the domestic law. This circumstance produce 27 national legislations that have adopted divergent solutions.

Second, the absence of uniform EU private international law rules concerning cross-border mobility (see above, para. 3 - Legislative gaps) requires the identification of the *lex societatis* through the relevant national private international law rules. The choice of which Member State legal orders will be based on specific factors: *a)* type of theory adopted in the Member State (incorporation theory or real seat theory); *b)* dimensions and frequency of flows of corporate mobility; *c)* economic and social impact on the internal market. Data will be obtained through empirical investigation (see below: iii) and through data provided by specialised institutes, stakeholders and the European Commission (e.g.: ITEM 2021; REYNOLDS ET AL. 2016).

iii) EMPIRICAL APPROACH

After thoroughly analysing the regulatory and jurisprudential framework, an empirical investigation will be conducted.

This will help to understand: the actual needs of actors involved and the impact of the heterogeneous regulatory framework concerning potential transfer projectsco.

In this regard, the research methodology will involve qualitative and quantitative surveys addressed to:

- a representative sample of companies engaged in cross-border mobility;
- entrepreneurs trade unions (e.g. Confindustria in Italy or correspondent foreign trade unions);
- workers trade unions;
- international law firms and labour consultant firms that assist companies in corporate mobility;
- notaries and other competent authorities who deal with the scrutiny of the legality of cross-border operations, prescribed by law (Directive 2019/2121) and the stipulation of corporate deeds, certificates and documents.

Qualitative surveys will primarily use in-depth interviews and focus groups. Quantitative surveys will mainly involve questionnaires administered to a broader set of contacts to obtain a more generalised response.

5.2. Expected Results

I. Formulation of potential regulatory solutions.

II. Elaboration of recommendations to companies, trade unions and other professionals involved in cross-border corporate mobility operations.

I. The formulation of normative proposals to fill the current legislative gaps in supranational conflict-of-law rules (see *supra* para. 3) represents the main goal of the research project. Potential regulatory solutions will be formulated on the basis of theoretical reconstruction, analysis of national regulatory choices, case law, comparative investigation.

These solutions will outline conflict-of-law rules to determine the *lex societatis* for companies engaging in cross-border mobility, ensuring coordination with existing private international sources of law that identify the applicable law for other relevant scenarios of company law (e.g., *lex contractus* and *lex concorsus* in case of companies cross-border insolvency). These outcomes should take the form of criteria to be included in an EU legislative act, able to tackle the possible negative consequences mentioned above (see *supra* at the end of para. 3).

II. The information directly obtained from the actors listed above (see para. 5.1, lett. iii) will provide critical insights about their main concerns, needs and level of awareness on the possible legal, economic and social risks. This feedback is crucial for ensuring that the proposed regulatory solutions are pragmatic and fact-based rather than purely theoretical.

The expected results are targeted recommendations (technical reports, scientific publications, information and dissemination meetings) to the following subjects:

- *entrepreneurs trade unions*: the awareness about the differences between national and cross-border corporate mobility is crucial. Indeed, the international nature of corporate transactions creates additional problems (analysed above at the end of para. 3). Trade unions can obtain benefits in the perspective of facilitating their associated companies mobility and trade development.

- *workers trade unions*: rights of workers must also be adequately considered in cross-border corporate mobility. Whether and how private international law can contribute to ensuring adequate standards of protection of these rights will be determined and disseminated.

- *International law firms and labour consultants*: recommendations will be directed towards the professional associations (bars) of lawyers and labour consultants, so as to increase skills and update on the importance of the connection between law, commerce and social considerations.

- *Notaries and other competent national authorities (administrative and judicial)*: public notaries, independent administrative authorities and judicial authorities are the main actors that have to take care of compliance. The effectiveness of preventive and subsequent controls is indispensable since the law is to be applied effectively and not consist of merely theoretical statements of principles.

6. Bibliography

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7. Description of the Research in the Three-Year Period (Feasibility)

– **Year I**

Through the research methodology based on the analysis of relevant legal sources, including case law and doctrinal papers (see supra, para. 5.1 lett. i), a comprehensive legal framework will be established. This will serve as a coherent and comprehensive foundation for achieving the Research objectives (see supra para. 4).

– **Year II**

The first semester of the second year will be conducted using qualitative and quantitative surveys (see *supra* para 5.1, lett. iii). These empirical evidence, in addition to theoretical insights, will strengthen the approach to achieve the expected results I and II (see *supra* para. 5.2).

The feasibility of these activities will be ensured through the contacts obtained within the *Learning by Doing* project (see *Curriculum vitae*) in entrepreneurs trade unions (e.g. Confindustria) and international law firms. Moreover, the notarial traineeship (see *Curriculum vitae*) will help in finding contacts with notaries with experience in cross-border corporate mobility assistance.

The second semester will be dedicated to the comparative approach (see supra para. 5.1, lett. ii): in particular, during a research experience abroad ensured by the international academic references (see *Curriculum Vitae*), to analyse the solution adopted by different Member States.

– **Year III**

The final year will be dedicated to a critical reworking of information. In this way, the expected results will be achieved (see supra para. 5.2): outline normative proposals aimed at filling the current gaps (**RO 1**) and recommendations to main actors involved in cross-border corporate mobility operations, paying specific attention to the potential repercussions on the EU internal market (**RO 2**) and to the modalities in which social interests (**RO 3-4**) have found their place with a view to comparison between legal systems.