

REGISTRY DISCLOSURE AND EUROPEAN COMPANIES

1. Preliminary Matter. International Commerce Registry Law.

As yet, the positive regulation of commerce registries in comparative law hardly takes into consideration the international dimension of the “company phenomenon” that commerce registries must perform report. The same happens with property registration law, but there is no excuse for the loophole there; it is a fact that property does not migrate, while legal persons do.

We speak of “international company law”, and in view of the way company-related matters have recently blossomed onto the international plane (the presence of a considerable element of foreignness in the registrable juristic facts pertaining to companies), it might be a good idea to create a new category of dogma, international commerce registration law. By “international commerce registration law” (ICRL), I mean *that part of conflict law (or private international law) whose specific object is to study the problems caused by the registration of internationally-trading employers at the proper national registration office for those employers*. The contents of ICRL must address two basic problems, the problem of international registry competence and the problem of the law applicable to the disclosure (by a registry) of “international” (registered) facts.

Since there is no international commerce registry yet, determining each national commerce registry’s sphere of competence is a matter of no small import. International registry competence, unlike international judicial cognisance, is not usually discussed in positive comparative law on matters of companies and commerce registration¹. Nevertheless, the problem of determining the competent “registration venue” for certain juristic company facts must be addressed wherever “international” registrable facts exist, in other words, wherever a sizeable element of foreignness is involved, to wit: mainly where a foreign citizen (a foreign natural or legal person) participates in the registrable fact/act or/and where the form of a foreign document (a foreign registrable title) or/and cross-border company mobility is at issue. The most serious problem that ICRL must face is that of mobile conflicts inherent in the cross-border mobility of registrable employers. In these cases, the registrable fact itself entails some displacement from its connection point, with a possible complication stemming from the involvement of at least two public registries functioning under different legal systems. This occurs in cross-border mergers (e.g. spin-off splits, global transfers) and in the international transfer of companies from one country to another.

As there is a *lex societatis* for legal persons (for the moment, let us just discuss company law), so is it possible to defend the existence of a “registration law.” The “registration law” of a

¹ It is not a bad idea to remember that, with reference to international judicial cognisance in the civil jurisdiction (remember, the registry’s function usually falls under voluntary jurisdiction), Spanish courts are the only bodies cognisant to hear “proceedings which have as their object the formation, the validity, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons having their seat on Spanish soil, and with respect to the resolutions and decisions of their organs”, plus any matter regarding “the validity or the nullity of entries made in a Spanish registry” (cf. Organic Act on the Judiciary, article 22(1), and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, articles 22(2) and (3).)

company means *the set of substantive and formal rules that discipline the company's registrability in certain commerce registries (or the equivalent institution).*

It is the “registration law” of a company that must settle such issues as: (i) The *registrability* of the entity or its establishments (qualification for first registration from the standpoint of the institution's subjective perimeter²); (ii) The *registered contents* (the facts or acts referring to the entity that may or must be entered in the proper public registry); (iii) the *territorial competence* of registry offices (understanding this to be in a decentralised national system featuring a plurality of offices); (iv) the *events/requirements of registration* (possibly including matters regarding the control of legality and possibly foreign registrable titles); (v) the *effects* of registration; (vi) the *registration procedure* (including here registered evidence of foreign laws and the legal capacity and standing of foreign citizens).

From the standpoint of private international law, registration rules are usually understood as “policing rules” and are therefore applied on a territorial basis³. What I mean by this is that *the competent authorities of a given state will apply the registration law for the venue to entities, whether those entities are subject to that state's lex societatis or not, provided that the entities can be registered in that state because they operate on its soil (they have, after a fashion, “roots” in its soil).* Spanish registration rules, just like Spain's “criminal, policing and public-safety laws”, are only binding on entities that “are on Spanish soil” (cf. Civil Code, article 8(1)).

There is a personal, exclusive venue (of registration), and there is a territorial venue (of registration). The registration law for the venue applies to:

- (i) Companies subject to Spanish law (companies whose *lex societatis* has to be Spanish law), whether they are formed pursuant to Spanish law or not (“fictitious foreign companies”), and
- (ii) Foreign companies and business owners that are subject to foreign law and hold their first registration in a foreign public registry but do business on Spanish soil, normally by means of opening a secondary establishment (cf. Code of Commerce, article 15, and Mercantile Registry Regulation, articles 295 et seq.).

Company statutes, we are told by article 9(11) of the Civil Code, have within their realm all things regarding the “*capacity, formation, representation, operation, transformation, dissolution and extinction*” of legal persons. Hence it follows that a tie exists between the *lex societatis* and what we shall henceforth term “primary registration law”: *the role that registry disclosure plays in the formation and regular operation of companies is determined by the registration law for the country whose personal law governs the company's person and personal rights.*

Spanish (registration) law determines the (Spanish) legal/registration procedure applicable to companies and other entities that are Spanish, i.e., subject to Spanish law, and registrable in our registries. This “primary” registration law is applied to “regular” national companies—Spanish companies formed under the Spanish *lex societatis* and first registered in the Spanish registry—and

² Branches of foreign entities whose legal form is equivalent to one of the classified registrable forms of companies should be entered in the Spanish Mercantile Registry. One example of generous acceptance of institutional equivalence is given in the famous Directorate-General of Registries and Notarial Affairs Decision of 29 February 1992 on a British not-for-profit entity that was difficult to regard as equal to a business partnership.

³ SANCHO VILLA, *La transferencia...*, p. 244; GARCIMARTIN ALFÉREZ, “Art. 8, ap. 1”, in ALBALADEJO, M. and ALABART, S. (ed.), *Comentario al Código Civil y a las compilaciones forales*, tome I, vol. 2, Madrid, Edersa, 1995, pp. 100 et seq.; ARENAS GARCIA, *Registro Mercantil...*, pp. 59 et seq.

to “irregular” national companies. Companies unduly formed pursuant to a foreign country’s law (“pseudo-foreign corporations”) and first registered in a foreign registry are regularised in accordance with the law for the venue, by means of entry in the proper competent Mercantile Registry office. This works both ways; the “primary registration law” of foreign entities is the one determined by their own personal law.

Whereas foreign companies can do business in Spain with or without having an establishment on Spanish soil (cf. Code of Commerce, article 15), one may speak of a “secondary registration law”: the registration law applicable to foreign entities—i.e., entities formed and first registered under a foreign country’s law—that do business on the respective soil. Spanish registration law does not require foreign companies to be entered or “first registered” in the Spanish Mercantile Registry just because they do business on Spanish soil, as seems to have been required at one time in historic Spanish registration law (cf. Directorate-General of Registries and Notarial Affairs Decisions of 29 February 1992 and 7 November 1998) and even in certain countries’ modern law⁴. Spanish registration legislation governs everything concerning the registration (in the Spanish Mercantile Registry) of branches in Spain (cf. Mercantile Registry Regulation, Title II, Chapter XI, articles 295-309). Also, as is logical, with regard to registered evidence of the legal capacity and standing of foreign employers and their representatives (cf. Mercantile Registry Regulation, article 5(3)), the very evidence of the applicable foreign law (cf. Mortgage Regulation, article 36), and with respect to registrable foreign titles (Mercantile Registry Regulation, article 5(3) and Mortgage Regulation, article 36).

⁴ Dutch law, Act 17 December 1997, for example, forces foreign companies that have no real tie with their state of first registration but do business inside the country (“pseudo-foreign corporations”) to register as foreign corporations—the Netherlands use the incorporation model—in the Dutch commerce registry as a third-party protection mechanism. Cf. MENJUCQ, *Droit international...*, pp. 62 et seqq. The Paris Chamber of Commerce has heard a proposal inspired by Dutch legislation. IBIDEM, pp. 313 et seqq.

2. European Union Registration Law. Its Most Salient Shortcomings.

The current situation of European registration law is characterised by the following three features:

- (1) Insufficient harmonisation.
- (2) Technical obsolescence.
- (3) Neglect of the international dimension of registration law.

2.1. *Insufficient Harmonisation of European Registration Law.*

The registration law for corporations and limited-liability companies of the different European Union Member States is relative and under-harmonised⁵. As a result of the transposition of the corresponding directives on companies, especially corporations, there are as many different registration laws as there are Member States, each of which laws is applied to the companies subject to that Member State's legal code and foreign companies operating on that Member State's soil. One cannot speak of "European registration law" in the strict sense, because there is no actual European system of registration laws. Probably not even what we might call a "European registration area" exists. Directives, not only the first Directive, are limited to setting minimum registration rules with referral to the registration laws of the states for dealing with other points not covered by the directives.

The "Community registration system" is poor in content⁶. Directives merely establish a set of minimum registration rules. Thus:

- (1) The *minimum subjective perimeter of registration*: The harmonised subjective scope of the commerce registry is restricted to companies and branches thereof, economic interest groupings and now European companies too;
- (2) The *minimum objective contents of registry disclosure*: Basically, as stated in article 2 of the first Directive;
- (3) Certain *minimum requirements for access to registration* for registrable facts such as the necessary existence of the control of legality: first Directive, article 10; and
- (4) The *minimum effects of registration*: Reliability as against third parties (first Directive, **article 6**), the non-authenticating nature of the entry (article 11 *a contrario*), formal disclosure (first Directive, article 3(3)). In all things regarding the registration procedure save the anachronistic publication in the

⁵ This is a widely known fact. The web page of the European Commerce Registers' Forum (www.ecrforum.org) gives a succinct overview of how each state's registration system is organised. We deeply need a comparative law study on the different registration systems. A partial examination in KRAMM, B., *Handelsregister.-Reformvorschläge unter Berücksichtigung des deutschen, französischen und englischen Systems*, Berlin/Baden-Baden, Berlin Verlag Arno Spitz/Nomos, 1998. By the way, the way German commerce registries are managed (by the courts) is not exactly exemplary. There is a magnificent study directed by my colleagues at the Paris Commercial Court, ASSOCIATION SINDICALE DE GREFFIERS DE COMERSE DE FRANCE (Dr P. BEDER), *Les formalités légales au Registre du Commerce de 18 pays européens et méditerranéens*, Paris, 2001.

⁶ *Vide* for all: PAU PADRÓN, A., in the Ilustre Colegio de Registradores de la Propiedad y Mercantiles de España, *Leyes Hipotecarias y registrales de España, Fuentes y evolución*, tome V, vol. II, *Registro Mercantil*, 1990, pp. 13 et seqq.

Official Journal (cf. first Directive, articles 6(4)-6(7)), directives refer to the terms of each country's own national law.

Directives have enabled the development of national registration systems that are enormously different from one another on points as vital as the authority competent to keep the registry and the nature of the registry's function, the territorial organisation of registry offices, the institution's subjective scope, the registry's contents, the technique for keeping and organising records, the preventive control of legality, the effects of registration, the registration procedure...

Each Member State has the power to determine how it wishes specifically to organise registry management (cf. first Directive, article 3). There is no one uniform method of organising registry management in Europe. One can almost say that there are as many ways of organising commerce registration as there are Member States. Generally there is a strong tendency towards organisational specialisation, both with reference to professional qualification and with regard to the "businesslike" management of registry offices. In some countries registry management is a public service run by a specialised organisation of the administration dependent on the ministry of justice, commerce or industry (Nordic countries, the United Kingdom and Ireland). In other countries, the keeping of the registry is entrusted to local chambers of commerce under the supervision, where applicable, of the judicial authorities (the Netherlands). Lastly, registry management may hold some sort of tie to the judicial authorities, as occurs in France and Germany. In the former case, registry management lies within the "consular" jurisdiction (France's *greffiers*, or registry officials, are clerks of the commercial courts); in the latter, it is part of the voluntary jurisdiction. As is quite well known, in Spain registration is entrusted to the Land and Mercantile Registers, who operate under the aegis of the Ministry of Justice.

Each Member State defines the institution's subjective perimeter, i.e., the roster of types of registrable entities. The first Directive only obligates companies to register (cf. article 1). There are basically two types of registries, full commerce registries (employers who are natural persons and employers who are not) and registries of companies. A strong tendency may be noted toward an expanding perimeter of registration, as shown by the British registry's acceptance of limited partnerships.

Each Member State chooses the specific system of territorial organisation its registry is to use (first Directive, article 3(1)). There are systems featuring a central registration office, and there are decentralised systems featuring a number of local offices, sometimes in combination with a central commerce registry. Several complete registration systems may even exist within a single legal system, as in the case of the United Kingdom, which has three commerce registries for England and Wales, Scotland and Northern Ireland.

Community legislation does not issue any prejudgement of the method by which the registry is kept (cf. first Directive, article 3(2)). There are recording registries, and there are other registries that use transcription, "pigeon-holing" or, like the Spanish registry, title registration⁷. The Directorate-General of Registries and Notarial Affairs Decision of 4 February 2000 on the international transfer of a registered office from Liechtenstein to Spain addressed that very problem of the difference in the method whereby the Liechtenstein registry was kept⁸. The draft to revise the first Directive envisages in future, as we shall see, the recovery of historical records by computer and the need to convert documents still submitted on paper into a computerised format. It also foresees the possibility of making formal disclosure available on paper or electronically, as the person concerned prefers. In future, with the planned wording of the first Directive, Member States will even be able to replace their paper files with electronic or optic files, with all due guarantees, it is understood.

The decision as to the best form for registrable titles to take is left to each Member State. Notarised documents are rather an exception in commerce registration. A notary public's services must be used only when the control of legality (cf. first Directive, article 10) is not otherwise organised. In future the draft of the first Directive expressly

⁷ *Vide* the Constitutional Court's Ruling of 24 April 1997: "In a system not of transcription but of registration like that which has traditionally reigned and now reigns in Spain, the documents by whose virtue entries are made exhaust their effects with respect to registration upon serving as the basis for determination of due form and registration. Thenceforth, upon the making of the entry, it is this act that produces the actual effects of registration (constitutive effects, presumption of accuracy, disclosure, conclusive title, inopposability) (...). In short, although the contents of certain entries may be a mere reflection of the contents of the documents, the entry, even the literal entry, of the documents takes place by means of an act that takes on a legal life of its own and produces autonomous effects".

⁸ *Vide* for all: SANCHO VILLA, D., "El traslado de domicilio social a España en el Registro Mercantil", *Anuario español de derecho internacional privado*, vol. 0, 2000, pp. 465 to 483, esp. 475 et seqq.

envisages the need for electronic (not necessarily notarial) documents to bear an advanced electronic signature before they can be admitted as registrable titles.

Each Member State is free to stipulate what the registered contents must be (what facts must be registered), provided that it respects the minimum contents established in article 2 of the first Directive. No few countries include specific facts such as entries on guarantees furnished by the company in British and Irish law, statements about the company's website address or e-mail address and, where appropriate, particulars of the administrators' signatures, general powers-of-attorney in Spanish law, and so forth.

Each Member State is free to determine its own specific system for controlling legality prior to registration (cf. article 10). Possible, also, the system of appeals against the registration authorities' determination of due form. There are considerable differences as to the body where "determination of due form" resides and the scope of determination of due form. There are systems for the determination of due form that are "full" in terms of form and content, and there are other systems involving a more superficial examination (preferably examining form and chain of title). When the register is not a specialist with professional legal training (such as, for example, in registries kept by chambers of commerce), the function of controlling legality is at least partly external to the registry (scrutiny involving more than one authority). Combined systems where registry officials perform their function under the supervision of some other authority or a court (as occurs in Italy and France) are not unusual. In Spanish law, the power to scrutinise documents for due form is fully the register's and is internal to the registry, both for registrable private documents and for publicly recorded documents (the register scrutinises the completed document for due form; the officer attesting to the document authenticates it and gives it form).

2.2. The Urgent Need to Modernise the Commerce Registry in the Framework of the Planned Revision of the First Directive. Spanish Law's Advantageous Situation.

It is impossible not to notice the obsolescence of Community regulation in the matter of registration. That obsolescence is to some extent natural (It is due to the "fossilisation" of Community law; the Directive dates back to 1968), and it occupies two inter-related planes with major consequences in practice and dogma. Faced with the demands of the information society, Community registration legislation is antiquated in terms of both registration disclosure and publication. We shall return later to the obsolete system of disclosure/publication centred on the *Official Journal*.

The design of a modern registration system must allow for the possibilities and new demands associated with the use of new technologies and the simplification of company law. The implementation of an electronic registration office (the "e-registry") must be recognised as urgent. This ambitious project takes up the gauntlet on three challenges: a) the admissibility of registrable documents submitted electronically to the commerce registry, even where submitted by remote means; b) electronic data storage and possibly the recovery of at least the most relevant portion of the historical record, in the best (graphic or other) computerised base; c) the administration of formal disclosure electronically and preferably online.

The introduction of new technologies apropos of registration marches at different steps and speeds in different countries, despite certain unjustified reticence by the Community authorities. Bear in mind that until now there has been no Community demand for legislation. In fairness, we must acknowledge that we are witnessing a progressive admittance of the e-document in registration in spite of the terms of article 9(2)(b) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services; each Member State is allowed to restrict or prevent the real use of electronic contracts in cases requiring by law "the involvement of courts, public authorities or professions exercising public authority". That exception is addressed in Spain's Information Society Act.

My professional experience teaches me that a powerful legislative convergence of registration law in the Union is occurring, in favour of the registrability of the e-document, especially in the case of documents authorised with the "advanced electronic signature" of the signatories. This is despite the fact that article 3(7) of Directive 1999/93/EC of

the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures permits use of the electronic signature in the public sector to be made subject to possible additional requirements.

The European authorities' intention is to harmonise the process of modernising the institution of the registry in the Member States through revising the first Directive. This work falls within the context of the fourth phase of simplifying legislation for the internal market (the SLIM Initiative) begun in October 1998. We have the text of a draft revision of the first Directive approved by the Commission, which has held well in view the conclusions reached by international experts in a working group on company law that in September 1999 published a report on the simplification of the first and second Directives on company law. In view of the preparatory work, we know that the intention is to institute the revision of the first Directive to incorporate electronic technology in registration management on a date set by each Member State, to be no later than 1 January 2007, so the implementation of European-company legislation will not yet be able to rely on a rejuvenated registration system (remember, the entry in force of the European Company Regulation has been put off until 8 October 2004).

The strong points of the revised first Directive's planned wording⁹ are these:

(i) On a date set by each Member State, to be no later than 1 January 2007, all the registration systems of the Member States must allow the person concerned to choose between having registrable documents furnished on paper or electronically, both methods being equally valid and interchangeable. As an exception, Member States may, for certain categories of companies, require the electronic format for certain types or all types of registrable documents and facts (Directive 68/151/EEC, article 3(2)(2)).

(ii) As of a given date, which cannot be any later than 1 January 2007, all registrable documents submitted thereafter, whether on paper or in electronic form, must be registered (filed) electronically. This means all documents submitted on paper after that date must be converted into electronic form (first Directive, article 3(2)(3)). Partial and individual—not automatic—recovery of the historical record is also ordered: Documents submitted on paper before 31 December 2006, as later they must be converted by the registry into electronic form on the basis of an application by the persons concerned (first Directive, article 3(2)(4)).

(iii) Formal disclosure is to be provided both on paper and in electronic format, both being equally valid and interchangeable, at the request of the person concerned. On a given date no later than 1 January 2007, each Member State must provide formal disclosure both on paper and in computerised form, for both information notes ("copies") and "true" certified copies (our certificates). When an application for formal disclosure in electronic form is made, Member States can avail themselves of the possibility of not giving formal disclosure in electronic form where the documents were submitted on paper on dates no later than 31 December 2006 and have been registered for no less than ten years in the registry in question (first Directive, article 3(3)(2)). The revision expressly acknowledges the possibility of regarding electronic certificates as valid public documents if they bear the "advanced" electronic signature of the authorising authority (as in the electronic-signature Directive, article 3(3)(5)).

(iv) Long, involved regulation on the possibility of submitting documents in several languages is also envisaged.

Compared to the demands of the revised law, Spain's current positive law is highly advanced, because it accepts the electronic submission of the electronic document, it features a

⁹ This can be seen at the EC website, www.europa.eu.int.

demanding obligation to recover historical records on an electronic medium, and it regulates in detail formal disclosure by electronic means.

Spanish registration law is governed by the legal and regulatory principle of the public granting of title, so registration in the Mercantile Registry is done by virtue of a public court, administrative or notarial document, with the exceptions established by law or regulation (cf. Code of Commerce, article 18(1), and Mercantile Registry Regulation, article 5). In principle, even in the case of public form, *even remote submission of an electronic document to the Mercantile Registry is admissible*, provided that the document bears the advanced electronic signature of the person who authorised or signed it.

On the admissibility of electronic public documents using an “advanced electronic signature”—not only notarial documents—see Act 24/2001 of 27 December on Fiscal and Administrative Measures and Measures of a Social Nature; section 8 of Act 24/2001 contains a thorough regulation of the “Incorporation of Electronic, Computer and Remote Technology in Preventive Legal Certainty” (articles 106 to 115), which is limited, perhaps unnecessarily, to adjusting—sometimes by simply repeating—common law’s precepts and principles on the electronic signature (cf. Royal Decree-Law 14/1999 of 17 December). Although article 112 of Act 24/2001 only envisages the submission of electronic notarial titles (article 115 of the Act on Notarial Affairs is revised accordingly on the function of such titles), the admission of electronic documentation is general, and not only for electronic administrative and judicial documents (Article 112 of the Act must be placed in relationship with the terms of article 230 of the Organic Act on the Judiciary and article 162 of the Civil Proceeding Act in the matter of judicial documents and article 45 of the LRJAPyPAC and Royal Decree 263/1996 of 16 February on the administrative document), but even in regard to private electronic documents in cases where private documents are admitted as registrable (v.g. in the legalisation of books or posting of accounts; cf. Directorate-General of Registries and Notarial Affairs’ Instructions of 30 and 31 December 1999).

With regard to the *recovery of historical records in computerised form*, the Spanish legislators of the Budget Accompaniment Act went far beyond the Community legislators who revised the first Directive (cf. Transitional Provision Nineteen of the Act, “Obligation to transfer the contents of entries of land and mercantile registries to computerised form”).

Lastly, Community legislators have nothing to demand of Spain on the subject of *formal disclosure in electronic form by the commerce registry*, because the Budget Accompaniment Act revised article 23 of the Civil Code to introduce a new paragraph (paragraph four) that establishes—by referral to the terms of articles 221, 222, 227 and 248 of the Mortgage Act, which were also revised by it—the new legal framework for formal disclosure on paper or in an electronic format.

In particular it expressly regulates the possibility of the register’s issuing certificates signed with the register’s advanced electronic signature at the request of the person concerned (Additional Provision Twenty-Six of the Budget Accompaniment Act obliges the Registers’ Association to render certification services and has been complied with in a timely manner by the Association). Apart from that, it is well known that Spanish mercantile registers provide their formal disclosure online at a single portal whose address is www.registradores.org.

2.3. *Lack of Concern over the International Dimension of the Registration Problem in Union Law.*

European registration law exhibits a startling unconcern over the international company phenomenon. The first Directive restricts itself to laying the foundations for finding international registration competence, as follows: It shall be the legislation (on registration) of each Member State that determines all matters regarding the registration of companies formed pursuant to the *lex societatis* of that state and that of the branches of foreign companies (cf. first Directive and sixth Directive). The “European registration system” stands revealed as singularly insufficient in the presence of cross-border company-moving operations. The lack of concern over the international dimension of the company phenomenon in the realm of registration is one of the biggest practical

obstacles to the viability of this sort of operation in Union territory. The three basic problems revealed by that omission of the international dimension of registration in Community law refer to:

- A) Lack of concern over designing an international registration procedure: Lack of regulation of the mechanisms that are vital for European inter-registry coordination.
- B) Unconcern over the grave difficulties of international determination of due form by registers.
- C) Uncertainties over the registrability of foreign documents.

A) *Absence of an International Registration Procedure.*

Where an operation involves a cross-border structural change or an international transfer of company headquarters, at least two different countries' laws (the law of the country or countries of origin and the law of the country or countries of arrival) and at least two registration systems enter the lists, potentially. Only a **truly international registration procedure** (because of what that would mean in terms of coordinating national registration procedures) could enable a satisfactory registration solution to be reached to a typical conflict over moving. To illustrate what this means, we shall briefly examine the case of an international transfer of company headquarters and the case of a cross-border merger.

In the case of an international transfer of company headquarters, we have one body of substantive and registration law, that of the old country, and a second body of substantive and registration law, that of the new country. Let us suppose, as in the case of the SE, that we are speaking of the international transfer of the real seat of the company and it involves a change of the applicable law. Moving the connection point—the seat of management—brings us face to face with a problem of coordinating the two registration procedures and undesirable grey areas of “statelessness of registration” (a negative conflict of powers: both registration systems want no part) and “double first registration” (a positive conflict of powers: both registration systems claim competence). A company that is moving its registered office will lose all registered evidence of its existence if its entry in the old registry is cancelled before any evidence of the company's first registration in its new registry is given. A company that is moving its registered office will hold simultaneous first registration in two registries if it is entered in its new registry and fails to have its registration page closed accordingly at its old registry. Another unsatisfactory although less serious registration situation occurs if the full original registration record (or at least the current registration record) fails to be transferred to the new registry, and thus the new registry cannot disclose the company's registration status prior to the transfer¹⁰.

In a cross-frontier merger, the situation is very similar to the one described above. Let us suppose, for simplification's sake, a takeover of one company subject to the laws of one country by another company whose *lex societatis* is different. The acquired company will disappear unduly if it is cancelled at its registry of origin before evidence is given that the merger has been entered in the dominant company's registry. On the other hand, the acquired company will remain unduly registered if the merger is entered in the new registry (the registry for the dominant company) but the acquired company is never cancelled at its home registry.

This situation is not unknown in current practice, because it infallibly arises in the internal law of states that have a number of local registries when the same cases occur. In Spanish law,

¹⁰ Hence the Mercantile Registry Regulation, article 309(1) *in fine* requires “the transfer of the page or file from the foreign registry” when entities immigrate. The SE Regulation ignores this point.

when an entity registered in a local registry moves to a location that falls within another registry's bounds (normally another province), or when a company registered in one registry is taken over by a company registered elsewhere. In these cases, internal law establishes a registry coordination mechanism that involves a coordinated registration procedure—participated in by two registration authorities, each administering his part of a single, articulate registration procedure—in several phases that occur in sequence (cf. Mercantile Registry Regulation, articles 19 and 231). On the other hand, in cross-border operations, the Spanish registration system cannot claim to have extraterritorial power, so, although the registration procedure applicable to cross-border operations is regulated for better or for worse (cf. Mercantile Registry Regulation, article 20 for the registration procedure for emigrating companies and article 309 for the registration procedure for immigrating companies), neither registration coordination nor reciprocity is guaranteed¹¹.

Although article 20 of the Mercantile Registry Regulation prudently refrains from ordering the cancellation of companies that transfer their registered offices to a foreign country, but rather attests to such transfers in a proceeding appended after the last entry that merely provisionally closes the company's registration (cf. Mercantile Registry Regulation, article 19, paragraph one, which refers to the Mercantile Registry Regulation, article 20), the register in the new country, who is a foreign authority, cannot be forced to notify the Spanish register *ex officio* that he has made the company's first registration so that the company's registration page in Spain can be definitively closed. The risk that double first registration may exist is evident.

Less satisfactory is how foreign companies' immigration to Spain is regulated in article 309 of the Mercantile Registry Regulation. The Spanish register is not ordered to abstain from entering the company's first registration in Spain and transferring the registration page without first being given proof that there are no obstacles to registration under the foreign country's law and the registration record on file at the old registry according to "scrutiny" by the foreign authority equivalent to the register in order to issue a preventive judgement of legality (as occurs in internal law, for example, apropos of mergers and spin-off splits of companies belonging to different registries; cf. Mercantile Registry Regulation, article 231). Nor is the Spanish register ordered—which Spanish law could well have envisaged—to notify the foreign registry authority *ex officio* that the company has been registered in Spain, in order to procure the definitive closure of the registration page held at the old registry.

Logically, the very nature of registration rules—they are rules applied on a territorial basis—prevents a truly international registration procedure from existing. The most each nation's registration legislation can do is unilaterally regulate how its authorities must proceed in international registration operations. Although it is theoretically possible that two registration regulations may be reconcilable, as a norm they are not, and any actual coordination depends on the good graces of the persons concerned or the good practices (and efficacy) of the registration authorities involved. On the practical side, my experience proves to me that our registries engage in good practices; it is not unusual for Spanish registers to notify their foreign colleagues *ex officio* when these sorts of entries are made and for Spanish mercantile registers to rely on determinations of due form conducted by an equivalent authority on foreign law when endeavouring to ascertain that there are no obstacles to the operation under the foreign law applicable to the case.

B) *Difficulties of International Determination of Due Form for Registration.*

¹¹ See in general: CHECA MARTINEZ, M., "Derecho internacional privado...", *REDI*, 1990, pp. 306-309; FERNÁNDEZ DEL POZO, "La transferencia internacional...", *RGD*, 1993, pp. 11867-11908; ARENAS GARCIA, *Registro Mercantil...*, pp. 412 et seqq.

One of the most serious hurdles to the practical viability of this type of operation resides precisely in the problems of **international determination of due form for registration**¹². We saw above that Community law says that one unavoidable requisite of registry disclosure is the existence of a “preventive” control of legality whose organisation, intensity and contents are left to the legislation of each Member State. In Spanish law, it is well known that that control of legality constitutes one of the keystones of the institution; the determination of due form by the mercantile register is one of the “canonical” principles of registration and has legal standing (cf. Code of Commerce, article 18(2), and Mercantile Registry Regulation, article 6). So, when a registrable right contains a sizeable element of foreignness, it poses the problem of international determination of due form for registration, a topic that Community law has hitherto ignored. The first Directive ignores the question of international determination of due form for registration. A problem of international determination of due form for registration exists whenever the registrable fact contains a sizeable element of foreignness. For example: When a party to the registrable fact is a foreign person (= registry acknowledgement of foreign entities and the faculties inherent in their offices) or when the registrable document is foreign (i.e., executed before a foreign authority and possibly in a foreign language). Nevertheless, the most serious problems of international determination of due form for registration appear in the case of cross-border operations, as we shall have the occasion to see later.

C) *Problems Stemming from the Admissibility of Foreign Documents as Registrable Titles.*

Community law has a major regulatory loophole with respect to **what documents can be registered** in national registries, leading to no few practical problems. As indicated before, the Directive does not settle the question of registrable (formal) titles. European legislators do not consider it necessary to harmonise this matter, as opposed to, for example, the question of the control of legality in registrable documents; this latter preventive scrutiny must always exist in all registration systems of the Union, required by Community law.

In the absence of Community harmonisation, each Member State is free to determine the requirements of registrable (formal) titles. In accordance with the rules applicable to international commerce registry law (*vide ante*), the question of “form of disclosure” is settled by the law of the venue, never by the law of the place where the title was executed (*locus regit actum*; Civil Code, article 11(1)). It is particularly understood that if the *lex societatis* regulating the requirements of formation, operation, etc., is Spanish law, and Spanish law requires registry disclosure in Spain of certain registered facts (formation, transfer of registered office, merger, etc.) before a registrable juristic or other act can attain full *erga omnes* efficacy, the “solemnity or special form” required for registration in Spanish (registration) law must be observed; cf. Civil Code, article 11(2) in relationship with the requirement for authentic titling in the Commercial Code, article 18(1), and the Mercantile Registry Regulation, article 15¹³. “Form of disclosure” is a question pertaining to

¹² For all: ARENAS GARCIA, *Registro Mercantil...*, pp. 430 et seq., also in “Cooperación jurídica internacional y espacio registral europeo”, *Anales CIDDRIM*, 2002.

¹³ The Directorate-General of Registries and Notarial Affairs has declared in some of its decisions that the eligibility of foreign documents for entry in a Spanish registry must be decided under article 12(1) of the CC instead of the terms of article 11 of the CC; cf. Decisions of 11 June 1999 and Decision of 15 March 2000. Obviously the Directorate-General is confusing what is meant by “examination” in the field of private international law (cf. CC, article 12(1)) with the examination for due form that mercantile registers must conduct in the exercise of their authority (the principle of legality in the Code of Commerce, article 18(2), and the Mercantile Registry Regulation, article 6). In the exercise of their duty to examine documents for due form, Spanish registers must obviously apply private international law. Their examination *ex* article 18(2) of the Code of Commerce may lead them to select the conflict rule that is applicable to a

“registration law”, and it is a question, as we all know, of “policing rules” whose application is territorially based.

Even if, as is not infrequent, a registrable act can be classified as an international contract, the formal requirements for registration are determined by the registration law for the place where the registration entry must be made. Whether the company is Spanish or foreign, if the act or contract is registered in Spain, the best form for its registration is that determined by Spanish law. . . even if the act or contract holds a sizeable element of foreignness¹⁴. *The competent registration law shall settle all matters concerning the formal fitness of the registrable title, be it public or private, national or foreign, on paper or in computerised form.* The competent registration law shall particularly determine: (i) if registrable documents must necessarily be set down on paper or, alternatively or even exclusively, they may be electronic; (ii) any authenticity requirements that registrable documents must meet (public or/and private title); and (iii) requirements for the admissibility of foreign documents (authorised by or prepared with the involvement of a foreign authority) for registration.

There is considerable disparity in registry practices on this point. Generally it may be said that the requirement of public granting of title—which has such a long tradition in Spanish law—is not universal throughout the European Union. Nor, by a long chalk, do all countries’ laws require documents to be public in order to be registered (Germany, Austria, Spain); the strength of this requirement depends on what the registrable act is, and so public documents may coexist with private documents as preferred by the person concerned (no registration system requires the services of a notary for posting accounts except ours; non-Spanish cases where a notarial deed is required for acts of “ordinary management” like the appointment of administrators and auditors, transfers of registered offices and so on are extraordinary).

The usual practical problems of international law generally centre on the admissibility in our registries of foreign public documents not issued by a judicial or administrative authority, i.e., the admissibility for registration of foreign “notarial” documents: documents authorised by a notary or a foreign officer for oaths equivalent to the Spanish notary (or consular officers performing the functions of a notary).

In no few countries the admissibility of foreign documents for purposes of registration continues to be a contested matter. There are persons in Germany and in France who deny registration for documents executed by foreign notaries¹⁵. In Spanish law, admitting foreign public documents for registration is the rule, for the terms of article 5(3) of the Mercantile Registry

registered fact containing an element of foreignness. So, in order to determine the applicable conflict rule, registers must “examine” *ex article 12(1)* pursuant to the law of the venue.

¹⁴ The same tie between the requirements of disclosure (by the registry) and the law of the venue exists, in parallel fashion, with regard to the disclosure provided by the property registry and the land registry (cf. Civil Code, article 10; exception under article 9(6) of the Rome Convention) and is usually recognised in a general fashion in doctrine and in comparative law.

¹⁵ The monopoly on access to registration by documents authorised by a national officer to the exclusion of foreign officers has some basis in article 2128 of the French CC. In Germany it is a highly debatable point in doctrine and in case-law. The matter has been raised especially in regard to company documents executed by foreign notaries (generally Swiss and Austrian). The Ruling of the Hamburg OIG of 1 February 1974 rejected the possibility. *Vide inter alia* commentaries on the ruling: BOKELMANN, “Beurkundung von Gesellschaftsakten durch einen ausländischen Notar”, NJW, 1975, pp. 1625-1631; ADAMSKI, C., Form der Rechtsgeschäfte und materielle Interessen im internationalen Privatrecht; Mainz, 1979, pp. 11 et seqq. and 88-95. On the other hand, the Ruling of the BGH of 16 February 1981 finds for the international “fungibility” of notarial documents. The Ruling of the Stuttgart OLG of 3 November 1980 on statute amendment agrees. *Vide* REQUEJO ISIDRO, M., *Ley local y forma de los actos en el derecho internacional privado español*, Eurolex, Madrid, 1998, pp. 118 et seqq.

Regulation and articles 36 et seqq. of the Mortgage Regulation, to which the former refers, show such admittance in all clarity. The same may be said of the admissibility of foreign documents in Spanish procedural law (cf. LEC, article 323). However, in practical terms, the admissibility of a document authorised by a foreign functionary for registration encounters some unjustified administrative resistance, an interesting sample of which may be seen in the customary reticence of our Directorate-General of Registries and Notarial Affairs; compare the terms of the Directorate-General's Decision of 11 June 1999 (admissibility, with reservations, of a "power of attorney" between spouses for the sale of real estate located in Spain and authorised by a German notary) with the resounding inadmissibility of using the services of a foreign notary in international real-estate agreements in its Decisions of 4 January 1993 (at least with the excuse of foreign-investment legislation predating the almost surely contradictory terms of Community law) and the exceedingly deficient and criticised Decision of 15 March 2000¹⁶. There is a valuable opinion by the European Commission dated 27 March 1998, addressed to the Kingdom of Spain, demanding the immediate elimination of the mandatory involvement of a Spanish officer for oaths in foreign real-estate investments in Spain¹⁷.

Even when the applicable registration law admits a foreign document as registrable, as occurs in Spanish registration law, some institutional equivalence requirement is usually involved; documents authorised by foreign authorities can be registered provided that they meet the conditions set for an equivalent Spanish form, the document is duly legalised (or bears an apostille) and is furnished translated or is translated by the register. The Spanish register is the authority who judges "institutional equivalence" (cf. above all Directorate-General of Registries and Notarial Affairs' Decision of 11 June 1999 inviting the register to judge according to her own knowledge or the evidence she is provided with).

The problem is to determine what the term "equivalent public form" means, because there is no such thing as a "European notarial function". Having reached this point, we must now draw a distinction between restrictions on the free exercise of the notarial profession when the profession entails the exercise of "authority" (which restrictions are legitimate, in the light of Community law and the terms of the Treaty Establishing European Community, article 45, former article 55) and the rejection of public documents overseen by foreign notaries or some other authority performing a *function equivalent* to that of the Spanish notary (which rejection is illegitimate)¹⁸.

In particular, there exists a highly restrictive "professional" interpretation of equivalence in foreign-title admissibility, under which foreign documents can only be admissible if executed by (foreign) notaries whose function follows the specific procedural guidelines of the "Latin notary" as

¹⁶ See, for all, the magnificent article by DOWNES PEIRU, N. AND DELGADO CASTRO, B., "La Dirección General de los Registros y del Notariado define ámbitos de exclusividad frente a la futura liberalización del Notariado Europeo", *Revista Jurídica la Ley*, No 5319, 30 March 2001. Also EGEA IBÁÑEZ, R., "Resolución de la DGRN de 15 de marzo 2000. Documento público extranjero y Registro de la Propiedad", *Boletín del Colegio de Registradores de España*, 2002, July August No 85, pp. 1597 et seqq.

¹⁷ The Opinion is quoted and commented on in MIQUEL CALATAYUD, J.A., *El documento extranjero ante el Registro de la Propiedad español*, Centro de Estudios Registrales, Madrid, 2001, pp. 180 et seqq.

¹⁸ *Vide* ARENAS GARCIA, "Lex societatis...", p. 15; IDEM, in *Registro Mercantil...*, pp. 369 et seqq.; FERNÁNDEZ ROZAS-SANCHEZ LORENZO, *Derecho internacional privado...*, pp. 306-311; ESPINAR VICENTE, J.M., "La forma de los actos y de los negocios jurídicos", in VV.AA. (dir. GONZALEZ CAMPOS), *Derecho Internacional Privado. Parte especial*, Oviedo, 1984, pp. 275-294, esp. 286-288; REQUEJO ISIDRO, M., *La ley local...*, op. cit., pp. 148-175; SANCHO VILLA, "El traslado del domicilio social a España en el Registro mercantil...", p. 474; IDEM, *La transferencia...*, p. 243. In comparative law, a study of the equivalence requirement in the exercise of notarial authority: STAUCH R. STÜRNER, "Die notarielle Urkunde im europäischen Rechtsverkehr", *Deutsche Notar-Zeitschrift*, 1995, pp. 343-360. Defending the institutional equivalence of German and Spanish notaries: LÖBER, B., "Beurkundung von Gesellschafterbeschlüssen einer deutschen GmbH vor spanischen Notarien", *RIW*, 1989, pp. 94-96.

opposed to the “Anglo-Saxon” notary (the function performed by the common-law notary public has very little in common with that rendered by our notaries)¹⁹. Equivalence would only exist when the functionary authorising the document is a public certifying officer in the judicial or extrajudicial sphere, basically certifying fulfilment of the requirements of sufficient identification of the party executing the act or contract (certification of personal knowledge or judgement of identity) and the authorising officer’s appraisal of the executing party’s capacity (judgement of capacity), which latter does not have to be express (cf. Consideration of Law Five in the Directorate-General of Registries and Notarial Affairs Decision of 11 June 1999).

I fancy that this interpretation of institutional equivalence to the advantage of the “Latin notary” restricts the cross-border mobility of companies when entities formed under common law are involved or when one or more of the registration systems involved does not make the involvement of a foreign officer for oaths a prerequisite for registration. Especially in company types defined under Community law (such as the European economic interest grouping and the European company), the “notarial deed” requirement must be interpreted flexibly. Albeit only in application of the principle of the “*favor negotii*”²⁰ and preference of contents over form. The demand for a certain public form, especially when the other national law involved does not fix the same requirement (as may occur in cross-border operations), restricts freedom of establishment on the basis of “national interest”, a restriction whose validity, from the Union-law perspective, should be put to the usual legitimization tests (inter alia, proportionality). Let us recall, for example, that European economic interest groupings are registrable by virtue of a mere private document with notarised signatures (cf. Act 12/1991 of 29 April on economic interest groupings, article 22(3)), unlike Spanish groupings, which require a notarial deed (Compare article 22(3) of the Act with the terms of articles 7 and 8 of the Act and articles 264 et seqq. of the Mercantile Registry Regulation in regard to the principle of public granting of title under article 5 of the Mercantile Registry Regulation).

3. The Registration-Related Dimension (of the Problem of) the European Company. Lack of a “European Registration Area” for the SE.

The challenges that the new European company procedure raises in its registration-related dimension are not satisfactorily dealt with either:

- (1) The new rules do not patch up the insufficient harmonisation of registration in the European Union sphere. If possible, they add to the discord; they help highlight the drawbacks and defects.
- (2) The European company does not have a modern system of formal disclosure of international (European) scope, and it still rests on the anachronistic system of gazetting (in national and Community journals).

¹⁹ Generally, *vide* FONT BOIX, V., SIMO SANTONJA, V.L., DE LA ESPERANZA, A., MADRIDEJOS-SARASOLA, J., “Sistemas jurídicos y documentos”, *RDN*, 1982, pp. 51-178; 1983, pp. 77-227; 1984, pp. 66-268; BOLAS ALFONSO, J., LORA-TAMAYO, I.-SAGARDIA NAVARRO, M., “Valor y efecto de un documento extranjero recibido por el Notario”, *Revista Jurídica del Notariado*, 1992, I, extraordinary issue, pp. 367-484; PEREZ-HOLANDA, G., “Valor y efectos del documento extranjero en España”, *Revista Jurídica del Notariado*, 1994, No 12, pp. 59-117.

²⁰ *Vide* on the scope of the principle for all: GONZALEZ CAMPOS, J.D., in a commentary on article 11 in the Ministry of Justice’s collective book *Comentario del Código Civil*, volume I, pp. 137 et seqq.

- (3) At least the rules do some good in that they deal with the problem of international registry cooperation in the “international” registration procedure for the formation of the European company.

3.1. *Prior Matter. Abandoning the Idea of Creating a European SE Registry.*

The preparatory work—significantly, the first SE draft—considered the creation of a European registry of SEs. National registries would surrender their powers to the Community registry in relationship with this new type of company under uniform Community law. The goal then was for all the physical and registered contents in the regulation to belong to Community law. The solution must have seemed logical at the time; the existence of a type of company originally regulated exclusively by rules of Community law would recommend in turn, as a corollary, a Community registration system and a European registration office.

A whole series of reasons contributed to the abandonment of the first draft and its European registry. To begin with, reasons of a technical or, if one prefers, a dogmatic stripe. The European nature of the SE’s regulatory framework need not, in and of itself, impose a system of European registration different from national systems. The existence of a form of organising undertakings, disciplined exclusively by rules of European law, and nevertheless allowing the entity to register in national registries subject to registration rules that have been rendered only very relatively uniform is perfectly conceivable. The economic interest grouping is one such case. All the more reason to do so when dealing with a hybrid of national and European law, such as the European company in the definitive version resulting after the original aspirations were dropped.

Logically, reasons of an eminently practical order contributed to the abandonment of the centralising European solution, reasons not entirely unrelated with the different Member States’ holding fiercely onto their powers, reluctant to surrender any shred to the Brussels bureaucracy. The first Directive on companies did but a poor job of rendering registry disclosure uniform, and it allowed openly disparate registration systems and practices to develop. The creation of a single European registration system would require the *ex novo* design of a body of European registration law, with all the difficulties arising from that. Not only would a registry office have to be created, with the ensuing budgetary allotment, but also the decision would have to be taken to choose one of the models of registration prevailing in Europe or to create an original model of registration to add to the already existing ones. Overwhelming reasons of common sense counsel against such a procedure, obviating the need to invoke major principles like subsidiarity in the Union’s legislative action. In addition, the information society’s new technological possibilities make it possible to find a satisfactory solution to the problem of coordinating different registration systems without the need to create a central European office and a common registration system. The oft-cited Winter Report gives the expert opinion that, for now, it is unnecessary to create a European central electronic filing system, but the report does not fail to observe the advisability of dealing with the problem soon, especially in regard to listed companies (cf. chapter II, General Themes, p. 40, paragraph 6(2)).

In decentralised national registration systems like ours, one part of the organisation that time has revealed to be less necessary is the central registry (Spain’s Central Mercantile Registry), provided that some coordinating, information-providing mechanism is implemented through a registration information network. It suffices for there to be a centralised index for locating entities—that enables queries to be redirected to the correct local database—and a uniform protocol for formal disclosure, preferably accessible at a single registration website. It need not be said that our experience—like the experience of other decentralised systems—can be exported to the European level. The creation of

a European registration space is possible today and compatible with the existence of a plurality of national registration systems. . . provided that sufficient measures are taken to coordinate them.

Two of the jobs of Spain's Central Mercantile Registry are to keep a central registry of names and to process information extracts sent in by local registers (cf. Mercantile Registry Regulation, articles 379 et seqq.). When these functions run smoothly, a registration coordination system can be articulated even where the competent authorities are scattered. Although the creation of a central registration office similar to our Central Mercantile Registry could be avoided at the European level, the rationality of the central office's functions should have been taken into consideration by the rules regulating the SE. From the standpoint of admittance to the registry (registration procedure up to the moment of registration), the existence of disparate national registration practices can be tolerated, but to have no European index of names making it at least possible to know, if not to ensure, whether one's company name is a new one is not so rational. I will go further; it is entirely irrational. The lack of concern over "output coordination" (the establishment of a coordinated European mechanism of formal disclosure in regard of companies) is even less tolerable.

The consequences of having no such central (European) level of registration are evident. They affect the very novelty of names. The SER does not require a file to be maintained for locating entities entered in national registries. This prevents, for example, the Europe-wide achievement of something as elementary as keeping SEs from taking the same name as some other entity (SE or otherwise), even if the second entity is registered in another Member State. Although countries tend to establish corporate-law mechanisms to prevent or deter the creation of corporations bearing the same name as some other, pre-existing corporation or company, with varying luck and scope, this problem is not tackled in its European dimension. In fact, the SER does not prohibit a European company with its registered office in Spain (subject, at least in part, to Spanish law) from having the very same name as some other European company/companies with registered offices in other countries of the Union (cf. SER, article 11). Such a confusion of names would make for elementary problems whose discussion goes beyond the boundaries of this commentary and must be settled at the European level pursuant to rules outside company law (rules on competence).

Anyone intending to form a European company whose name does not include terms leading to confusion with a European trademark can always fall back on checking with the European trademark office in addition to national trademark offices. There is not, however, any equivalent office for company names; applicants must comb through all the national registries, which are not coordinated with one another. This brings us back to the problem of the lack of coordination apropos of formal disclosure, which we shall discuss later.

3.2. Referral to the Registration System under the First Directive in Article 12 of the SER. Its Scope.

In its definitive version, the SER definitively drops the idea of a European SE registry and stands on the first Directive, to which it refers (cf. SER, article 12(1)). To interpret the contents and scope of article 12(1)'s referral to the first Directive and the corresponding national registration system does not pose too many problems. The "registration law" of a company is determined by the legislation of the Member State where the company's registered office is located. As for the sources that regulate the registration question, the serious intellectual problems of article 9 of the SER, with its motley description of the system (?) of source hierarchy, have gone unnoticed.

European companies with their registered office in Spain are subject to "Spanish registration law" in all matters concerning the contents of Spanish registration law. At least in our law there is

only a single registration system, unlike, for example, in the United Kingdom or in Germany, although our system does have a decentralised organisation and, to top it all off, it is a two-level system (local registries/central registry). The competent (Spanish) register will be the register for the company's registered office (SER, article 12(1), Code of Commerce, article 17(2) and Mercantile Registry Regulation, articles 16 and 17). The SE is a registrable entity, the same as corporations are—in general, all business partnerships are—and is registered in the general section of the registry. The registrable facts are the customary ones: those stated by our legislation in regard to the “content of the page” (cf. Mercantile Registry Regulation, article 94 and other concordant articles) in implementation of article 2 of the first Directive. The registration requirements (form and inspection of legality included) are the ones established by Spanish legislation. Spanish legislation also regulates matters concerning the registration procedure (including the system of appeals, without ruling out prejudicial appeals to the Court of Justice of the European Communities) and the effects of registration. The SER reminds us in article 13—and article 15(2)—that registrable acts must be publicised in the national gazette “in the manner laid down in the laws of the Member State in which the SE has its registered office”. This mention/reminder is unnecessary; the unfortunate need to continue publishing notices in the *Boletín Oficial del Registro Mercantil Español* is established in article 3(4) of the first Directive, to which article 12(1) of the SER refers. We hope the draft to revise the first Directive is passed and Spain seizes the opportunity to eliminate publication in the *Boletín Oficial*. In the meantime, publication in the *Boletín Oficial* has not only the effects of providing information or publicising news (modest effects “complemented” by the likewise-modest effects of inserting a notice in the *OJ* under article 14), but also substantive effects, inasmuch as comprehensive third-party enforcement is only attained, unfortunately, with publication in the national gazette (cf. first Directive, articles 3(5)-3(7); Code of Commerce, article 21, and Mercantile Registry Regulation, article 9).

The SER's more important “minor” references to registration are these:

- (i) A pointless complementary instrument of disclosure is added to publication in the national gazette (the *Official Journal*, SER, article 14);
- (ii) At long last Community law sets a clear rule on the acquisition of legal personality at registration, not at publication (cf. SER, article 16(1)). This rule is widespread in all bodies of positive law and governs in Spanish law (cf. Corporations Act, article 7(1), “its” legal personality);
- (iii) Certain special features are established with regard to the effects of registration in terms of the reliability of entries of transfer of registered office (cf. SER, article 8(13)); a new and probably unnecessary rule of several liability for acts done in the name of the SE before registration (cf. SER, article 16(2), in relationship with the terms of article 7 of the first Directive and the Corporations Act, articles 15 et seqq., apropos of an irregular company in the process of being formed) and the design of a specific legal procedure addressing the irregularity of pseudo-foreign corporations (cf. SER, article 64);
- (vi) Fresh registration problems are posed that Spanish legislators must confront, such as the trouble stemming from the existence of a hitherto unheard-of procedure for company formation via the creation of a holding company (cf. SER, article 32) and all the new registrable facts the procedure involves (registration of the draft terms of formation via holding company in the appropriate company registries); the potential need for the possible existence of procedures to be envisaged by registration for supervising the fairness of the exchange ratio (in mergers) in the Germanic style, impeding or allowing registration (SER, article 25), which affects the efficacy of the merger entry²¹; or the potential need for registers to extend their determination of due form to include checking for compliance apropos of employee involvement (SER, article 12(2))²².

²¹ Let us recall that in Germany partners are not allowed to challenge a merger on the sole grounds of their feeling that too low an exchange rate has been set. Nevertheless, a cash compensation is envisaged for injured shareholders, which is settled in proceedings under voluntary jurisdiction heard by the registry official, on the merits of an expert report. Cf.

In general, the SER may be said to be quite conservative on the point of registry disclosure. It sports hardly any new points with respect to the first Directive, and what few it has are slight of impact and marginal. The only fundamental new points that I shall have the occasion to refer to later involve coordination of the registration procedure in cases of international transfer of registered offices and cross-border mergers and concern international determination of due form (*vide infra*).

3.3. *The Anachronistic System of Disclosure/Publication Under the First Directive that the Regulation Perpetuates (and Complicates): SER, Articles 13 and 14.*

The most anachronistic part of the European Union registration system has to do with the compulsory publication of registrable facts in a national gazette appointed by the Member State (cf. first Directive, article 3(4)). SE legislation not only avoids the question of the eventual elimination of gazettes (the revision of the first Directive is scheduled to enter into force before the SER; SER, articles 13 and 15(2) in relationship with the terms of the first Directive continue to require publication), but it also introduces an “encore” publication following the model set for European economic interest groupings (SER, article 14).

A) *The (Unnecessary) Maintenance of the First Directive’s “Dualist” System of Registration Plus Publication.*

When the first Directive was published, there seemed to exist a common opinion on the gap between the institution’s purposes and its means, between the rigorous effect that registration in the commerce registry is called upon to cause in its “material disclosure” facet (basically, the entry can be relied upon as against third parties; unregistered registrable facts cannot) and the poor cognoscibility provided by existing means of “formal disclosure” (the “copies” and “certified true copies,” Spain’s notes and certificates). The traditional institution’s “disclosure” deficiency—i.e.: insufficiency of legal disclosure—seemed to require a certain complement: publication in a gazette was to crown the dualist system of disclosure (registry or “record”) + publication (insertion of an announcement in a gazette giving a short or full version of the contents of the entry or record). As a consequence of this legislative choice, Community legislators were forced to split up the rule on third-party enforceability so that it can unfurl its effects gradually over the different phases, until it reaches its culmination with publication²³.

&& 14 and 15 UmwG. I have said before that in my opinion this solution is quite reasonable and relatively easy (and advisable) to import. The same opinion is given in VICENT CHULIA, F., *Introducción de Derecho mercantil*, 14 ed., p. 467. The current regulation on the nullity of mergers is dreadful, and challenges of mergers based on poorly adjusted exchange ratios pose grave problems concerning the applicable law. *Vide*, for all: PEREZ TROYA, *La determinación del tipo de canje en la fusión de sociedades*, Marcial Pons, 1998, pp. 136 and 137; ANDREU MARTI, M. del Mar, *La nulidad de la fusión*, Aranzadi, 2002, pp. 69 et seqq.

²² The SE cannot be registered in the new registry until and unless proof is given of compliance with the worker involvement arrangements (cf. SER, article 12(2)). Just as occurs with the terms of & 17 of Germany’s UmwG, proof of respect for employee rights is a prerequisite for registrability. In my opinion, regulations should state what document constitutes sturdy proof of these facts, such as a certificate from the negotiating committee or an administrative document issued by the competent labour authority.

²³ *Vide* FERNÁNDEZ DEL POZO, L., VICENT CHULIA, F., “Internet y Derecho de sociedades. Una primera aproximación”, *RDM*, No 237, July-September 2000, pp. 989 et seqq.

The traditional “dualist” regulation is no longer good enough in the current situation, from neither the practical nor the dogmatic standpoint: (i) New electronic instruments of formal disclosure render gazette publication redundant; (ii) The path blazed by the rule of third-party enforcement is as complex as it is incompatible with the requirements stemming from the speed of trade.

Since the first Directive was handed down, the various national registration systems have organised formal disclosure so thoroughly that, since today computerised disclosure is so very much more accessible than the disclosure attained by the distribution of an official gazette, publication is no more than a hindrance, a pointless delay to an entry’s full effects. The size of this delay depends on the diligence of the administration in charge of running the gazette. In Spanish law, for example, disclosure by the *Boletín Oficial del Registro Mercantil Español* adds nothing significant to registry disclosure. It is perfectly redundant (in the best of cases it duplicates the registry’s disclosure), obsolete (it comes on paper), incomplete (it just prints extracts, not all registrable particulars; it does not disclose all enforceable particulars), necessarily outdated (the gap between registration and publication is counted in months) and enormously costly (in fact, the *Boletín* works like a periodically updated tax on economic activity, a pointless agent of inflation).

And so, Community legislators plan to revise the first Directive to permit the gazette to be published electronically or even replaced by some equally effective means employing a system that provides access to information in chronological order through a central electronic platform (revised first Directive, article 3(4)). It is a notorious fact that there are countries that have got a head start on the reform (Italy first, followed by Norway and Denmark) and have already made a rule of “implicit abolition” of publication; under this rule, the publication obligation is discharged with the chronologically ordered insertion of the proper announcements in a central information system. One hardly need say that this procedure gives full efficacy of third-party enforceability a head start.

B) *The Twisted Path of Third-Party Enforceability Implicit in the Disclosure/Publication System. SER, Articles 8(12) and 8(13).*

The general rule that full third-party enforceability only reaches its culmination with the (national) gazette’s publication of the registration entry’s contents (in extract or full form) attains a positively baroque level of complication if we include two new registration problems: enforceability of international transfers of registered offices and enforceability of multilingual registration (and publication).

The enforceability of a registered decision to move registered offices waxes and wanes as we pass from one phase of the procedure to the next. The entry of the transfer at the registry for the new registered office can only be relied upon as against third parties when it is published in the official gazette of the State the office has moved to: cf. SER, article 8(13), indent one, in relationship with SER, article 8(12), which refers to SER, article 13, which in turn refers to articles 3(4) to 7 of the first Directive. However, if the transfer has not yet been published in the official gazette appointed by the State where the old registered office was located (such publication is presumed to be preceded always by the office’s having been struck off the old registry), a third party who is unaware of the new registered office is entitled to a curious choice under article 8(13) *in fine* of the SER, similar to the right the first Directive establishes in the case of discrepancy between what is registered in the registry and what is published (cf. first Directive, article 3(6); Code of Commerce, article 21(3); Mercantile Registry Regulation, article 9(3)).

Despite the fact that transfer is registered in the new registry, a third party acting in good faith will be able to use the old registered office in the following cases:

(i) Where the transfer of the registered office is registered in the new registry but the change of registered office has not yet been published in the gazette of the new country. This conclusion follows from the simple application of the general rules established in the first Directive on what can be relied on as against third parties where there is discord between what is registered and what is published.

(ii) Where the transfer of the registered office is registered and published in the new country, but registration at the old registry has not yet been cancelled. This would be a case of inaccurate registration at the old registry, stemming from a provisional “double first registration” (the company has its first registration in its new country, but its first registration in its old country has not yet been cancelled). This solution stems from the application of article 8(13) *in fine* of the SER, which complements the first Directive’s rules on what can be relied on as against third parties.

(iii) Where the company is deleted at its old registry (which, as its “old” registry, is not the accurate registry), but its transfer to its new registered office has not been published yet in the new country’s national gazette (discord between the contents of registration at the old registry and publication). This results from the application of article 8(13) *in fine* and article 3(6) of the first Directive.

In all these cases of “official” discord, the third party can rely on the old registered office unless it is proved that he was aware of the new registered office. The burden of proof lies on the person who charges the third party with being aware of the change of registered office pursuant to the general rules (cf. SER, article 13 *in fine*, in relationship with the first Directive, article 3(6), Code of Commerce, article 21(4) and Mercantile Registry Regulation, article 9(4)). The third party is presumed to act in good faith unless it is proved that he was aware of an unpublished registered act (cases one and three) or an act subject to registration (in the new country) but not registered (case two). In addition, this is all understood to be without prejudice of the third party’s relying at all events on the “real office” when that office is not the same as the registered office (cf. Corporations Act, article 6(2)) and the *prorroga jurisdictionis* in article 8(16) of the SER.

C) *Absurd Repeat Publication in the Official Journal of the European Communities* (cf. SER, Article 14).

The EEC Regulation of 25 July 1985 on the European Economic Interest Grouping found it necessary to back up publication in the national gazette with European publication. To that effect the formation and the conclusion of a grouping’s liquidation, stating the particulars of registration and publication in the national gazette, had to be published also in the *Official Journal of the European Communities* (cf. EEIG Regulation, article 11). In compliance with the terms established in article 39(3) of the Regulation, Spanish legislation states in article 22(3) of Act 21/1991 of 19 April on economic interest groupings, “*The Central Mercantile Registry, within the month following publication of the registration and cancellation of a European economic interest grouping in the Boletín Oficial del Registro Mercantil, shall forward a copy thereof to the Office for Official Publications of the European Communities, stating the date of the notice*”.

If publication in the national gazette is pointless today, so much more pointless is this additional publication, which, to top it all off, has a different content and efficacy than publication

in the national gazette: Only certain facts (not all) are published, and moreover they are always published in partial form (in some legislations publication in the gazette is publication in full), with publication playing no role whatsoever in the complicated regulatory scheme of the third-party enforceability of what has been registered (in principle, only that which can be registered and is published in the official gazette can be relied on as against third parties). In short, the only effects of publication in the European journal are informative and redundant. Nevertheless, European legislators saw fit to insist on publication in the *Official Journal* for SEs: Regulation, article 13.

Article 13 of the SER repeats the provisions made for European groupings, but on even shakier grounds, since European companies are a hybrid of national law and European law. The facts that can be published are only the creation, termination and transfer of the registered office of the SE (SER, articles 14(1) and 14(2)). Publication is always partial, and its contents are limited to statements on the bare identifying particulars of the entity (name, registered office and “sector of activity”), its registry entry (number, date and place of registration) and publication (date, place and title of the publication): cf. SER, article 14(1). The national authorities must report these particulars to the Office for Official Publications of the European Communities in the month following publication in the national gazette (SER, article 14(3)). Spanish legislators will probably establish a precept similar to the one described above in future internal law, making it the Central Mercantile Register who must provide notification at the proper time. One may assume that the obligation of stating the SE’s “sector of activity” will be discharged by the Central Mercantile Register through the information reported by the local register to the Central Register on the company purpose or “the activity described by the [local] Register in extract form” (cf. Mercantile Registry Regulation, article 387(6)), although it is plain that for information purposes the CNAE number (national economic activity classification number) for the company’s primary activity (which Spanish registers draw from accounting information and use as a basic criteria in statistics) is much more salient.

D) The Advisability of Creating a European Registration Portal on the Internet.

In my opinion, the creation of a European registration area requires much more than the publication of companies’ bare particulars in an official gazette and referral to the terms of each country’s law with reference to the “formal disclosure” of SEs entered in each registry: the “copy of the whole or any part”, whether a “true copy” or not under article 3(3) of the first Directive; certificates (on paper or in electronic form with the register’s advanced signature) and information notes (on paper or in electronic form) in Spanish law (Code of Commerce, article 23; Mercantile Registry Regulation, article 12 and other concordant legislation).

Even if the Official Gazette (or official gazettes, as we shall see) is published in electronic form, as the planned revision of the first Directive envisages for national gazettes, the described system of publication is still of little practical use. It is still necessary to go to each country’s national registration system to obtain legal disclosure of each company through the instruments provided for by each country’s law (not all make their information available on line). What the European company requires is, if not a single registry, at least *a single European company portal where the interested public can gain access to all the relevant company information* (not only the insufficient, bare information published in the *OJ*). A European registration portal under the domain name .eu (cf. Regulation (EC) No 733/2002 of 22 April 2002 on the implementation of the .eu Top Level Domain). The Winter Report (cited above) by the group of experts on company law

revision recently stressed that it is “necessary and desirable” to establish links between the different national registries’ Internet portals (cf. Chapter II, paragraph 6(2)).

The European Union commissioned a group of company law experts to draw up a report on the revision of the regulatory framework for companies. The available documentation clearly shows where the current system of legal disclosure falls short where company information is concerned. In addition to noting the advisability of posting information of third-party interest at the company’s website, the report gives a brief discussion of the problem of coordinating national registries (a problem that the revision of the first Directive should have attacked and the SE Regulation fails to resolve). For lack of a regulation under European law to coordinate national registration systems, this issue is, for the time being, left to the free initiative of the parties concerned. Apart from that, the European Union has to study and conduct consultation on the creation of a single registration system (like the USA’s EDGAR system) encompassing all the public information available only at the national Member-State level so far and whose disclosure is entrusted to the entities in charge of supervising securities markets (Spain’s National Securities and Exchange Commission, the Comisión Nacional del Mercado de Valores) and securities exchanges themselves, referring, of course, to the companies listed there.

All the coordination initiatives attempted to date have been entirely private, although supported and even funded by the European Union. Such is the case of the so-called “European Business Registry” (EBR). In the form of a European economic interest grouping with its registered office in Brussels, several partners for different countries of the European Union have developed a single portal (at the www.ebr.org website) that provides registration information from many—not all—countries. The Association of Land and Mercantile Registers of Spain is a full member of the group and provides information from Spanish mercantile registries through this portal, in parallel with the information it provides at its own website (www.registradores.org). There are also other private but multinational initiatives aimed at developing protocols for exchanging data on commercial undertakings (the crXML organisation at www.crxml.org) and the design of a secure, reliable communications framework using the electronic signature among judicial operators (the EQUITAS Project: www.euro-aequitas.net). Other work is being done through associations. The European Commerce Registers’ Forum (www.ecrforum.org), which I have the honour to preside this year, is a group of the national authorities in charge of the registration of companies in European countries inside and outside the Union, united to study problems of joint interest.

Furthermore, a European portal such as the one posited here would have to take into consideration the problem of language diversity inside the European Union area; it would have to stimulate dissemination in a diversity of languages, even if that makes registry management more complicated.

The first Directive says nothing about the language used in registration, although the different registration systems establish the rule of the “national language(s)”. In Spain’s Mercantile Registry Regulation, we are told that entries are made “in the Castilian language” (cf. Mercantile Registry Regulation, article 36(1), which was expressly declared constitutional by the Spanish Supreme Court on 24 April 1997). Where there are foreign documents, the documents’ “true” translation into Spanish, which the register can make on his own responsibility, must be placed on record (cf. Mortgage Regulation, article 37; Notarial Regulation, article 253). The bill to revise the first Directive goes even farther by inserting article 3 bis to improve cross-border access to company information in various languages. Member States: (i) must allow companies to give their registrable facts voluntarily in any official language or languages of the Community, (ii) may allow companies to give that information in any non-Community language(s).

The problem with multilingual disclosure (registration, formal disclosure, multilingual disclosure) is the reliability of translations. The first Directive makes it possible for Member States to set “authenticity” requirements

(like those provided for in Spain's Mortgage Regulation, article 37: translation on the register's responsibility or by a sworn interpreter). Moreover, the Directive states that the rule on the enforceability of entry contents as against third parties acting in good faith must take into account the fact that versions may differ.

Lastly, "two-way links" between legal disclosure and commercial disclosure must be guaranteed: first, throughout all disclosure the entity voluntarily makes on the World-Wide Web, there must be public record of certain minimum identifying particulars, essentially the company's registration particulars; and second, there must be a record in the commerce registry of at least a domain name or Internet address the entity uses for identification (the "corporate website"). Remember that article 4 of the first Directive says that the registration particulars must be stated on "letters and order forms" (cf. Spanish Code of Commerce, article 24). So, when disclosure is given over the Internet, the same rule ought to apply. In fact, where the company acts as an "information society service provider" it must facilitate its minimum information permanently, easily, directly and free of charge, which information shall include registration information (cf. the Act on information society services and electronic business, article 10; Directive 2000/31/EC of 8 June 2000, article 5(1)). The projected revision of the first Directive has not considered it vital for a company's Internet address to appear among the minimum particulars of registration whose content is established in article 2 of the Directive. However, Spanish legislators have advisedly required "information society service provider" companies to show proof of registration of at least a domain name or Internet address (cf. Act on information society services, article 9 and sole transitional provision). This solution, by the way, was applauded by Winter Report experts (Chapter II, paragraph 6(1), p. 39).

3.4 International Registration Procedure in the SER Where There Is Cross-Border Mobility. Registration Procedure in International Transfer and SE Formation by Merger. Referral.

We have already discussed in some detail Community legislation's shortcomings in terms of the international dimension of registration law in its procedural aspect. As is quite well known, the new SE regulation is intended to facilitate the execution of restructuring and cooperation operations involving undertakings (not only corporations, not only companies) from different States (cf. "Whereas" clause 3 in the Introduction to the SER). SEs are the perfect vehicle for cross-border mobility, because the discipline of their particular statute guarantees the possibility of conducting cross-border mergers and international transfers of company headquarters. Not that the other ways of forming an SE (formation of an SE as a subsidiary, as a holding company or as the result of a conversion) are less interesting or lack an international dimension; it is simply that it is precisely in the international operations where the registration problems and shortcomings noted above are the most serious.

At least the new regulation establishes a relatively (albeit insufficiently) internationally coordinated procedural channel for the registration of operations of international transfers of company seats and cross-border mergers. The procedure is studied in the respective chapters, so we must not stray from our point to discuss it here. Suffice it to know that in both matters a mechanism is established for coordination between the registry that we have called "the old registry" (the registry for the old registered office, the registry for the companies acquired or extinguished through merger) and "the new registry" (the registry for the new registered office, the registry for the acquiring company or the new company formed through merger).

In the case of an *international transfer of registered office*, the old register is not to cancel the page made out to the company—in the SER's terminology, not to "delete" the company from

the original registry—until the company is entered in the new registry; the new registry is obligated to notify its colleague that the company has been registered in the new registry (cf. SER, article 8(11)). For lack of any specific regulation—it would be desirable for the registers to communicate with one another directly using the advanced signature in a secure, confidential framework—one must suppose that the notice may be given through the channel in Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters²⁴.

Note that such notice exists in Spanish legislation (cf. Mercantile Registry Regulation, articles 19(1) and 20(3)). If we follow the system outlined in the Mercantile Registry Regulation, the entry that the old register must make in his books when the SE transfers its registered office abroad—by merit of the automatic notice which is a registrable title—is a “proceeding” that consists in a referral note stating the new registration particulars of the new first registration in the new registry.

The registration regulation given in the SER is not complete; it foresees nothing, for example, on transferring the registration history on file in the old registry to the new registry. The most correct thing—and also the simplest thing—would have been to establish a first obligation of automatic notice in the direction opposite the one indicated above (from the old register to the new one) when the transfer proposal goes on record in the old registry. Once the transfer proposal is disclosed under the SER, article 8(2), the SER should have required first notice to be given of the fact that the procedure was pending, with referral to or transfer of the complete registration file to the new registry, awaiting the new company’s first registration there. The SER should have also given the competent authority in the country of origin (*vide infra*) the obligation to automatically forward the famous certificate attesting to compliance with the foreign law (cf. SER, article 8(8)).

In our system (cf. Mercantile Registry Regulation, articles 19 and 20), an entry cannot be made in the new registry if the document attesting to the corporate decision to transfer the registered office is not accompanied by a literal certificate of the contents of the company’s registration page together with the company’s posted accounts for the last five fiscal years. When he issues that certificate, the register at the old registry accredits the existence of a transfer proposal by making a note in the margin of the last entry made. This step puts a provisional close on the old registry’s entry (Mercantile Registry Regulation, article 19(1)). In a *transfer of the registered office of a Spanish SE to another country*, Spanish legislators ought to provide that the registrable title containing the transfer decision is to be submitted at the Mercantile Registry for determination of due form pursuant to Spanish legislation, in addition to requiring the transfer proposal to be posted at the Mercantile Registry under the SER, article 8(2). The task of ascertaining that there are no registration-related obstacles to the transfer from the perspective of Spanish legislation belongs to the mercantile register, who is the perfect competent authority under the SER, article 8(8). In a *transfer of the registered office of a foreign company to Spain*, on the other hand, Spanish legislation requires the transfer of the full registration page or record (Mercantile Registry Regulation, 309).

The regulation on inter-registry coordination in the *formation of an SE by merger*—a cross-border merger—is even more incomplete. Registration of the merger at the registry holding the first registration of the new SE thus formed or the acquiring company under the SER, article 17(2), has constitutive efficacy (under the SER, article 27(1)): The merger takes effect on the day it is registered. One supposes that the merger will be recorded not only on the page opened for the acquiring or new-formed company (first-registration entry), but also on the pages for the acquired or disappearing companies (cancellation entry). Article 28 of the SER insinuates that dissemination will be in all the registries for the participating companies. However, the issue of registry coordination is not regulated in the least. It is not expressly stated that the old register (the register for the registered office of the company/companies acquired or disappearing ESCALONA, N., in the merger) is to abstain from cancelling—“deleting”—the company registered in his registry until

²⁴ A good monograph on the subject: MARCHAL ESCALONA, N., *Garantías procesales y notificación internacional*, Comares Una, 2001.

it has been accredited that the merger has been registered. Nor is the register where the merger is registered obliged to automatically notify the register for the acquired or disappearing companies that he has registered the merger. Apropos of mergers, there is no equivalent of article 8(11) of the SER that must be applied by analogy.

At all events, our domestic registration rules do have some positive basis on which to cope with this procedural “gap”: A Spanish register who enters in his registry the merger of an SE must automatically forward to the foreign register(s) for the acquired or disappearing companies notice attesting to the merger’s having been concluded and stating the registration particulars of the merger (cf. Mercantile Registry Regulation, article 233(2)). The Spanish register for the acquired or disappearing company must abstain from cancelling the acquired or disappearing company in his registry—a provisional closing entry can be made when the proposal is posted—until he has received evidence that the merger has been registered in the proper registry. If the foreign register in his zeal (and under his registration law) fails to notify our register automatically that he has registered the merger (in which case the certificate itself shall serve as sufficient title for registration purposes), the cancellation shall be done by virtue of a certificate submitted by the person concerned.

We have just indicated that Community legislators feel no need to establish a mechanism for inter-registry coordination in cases of formation through a holding company, although such a mechanism might perhaps be desirable. The holding company situation is worse than a merger, because Community legislators have ignored the question of recording the operation in the registries for the participating companies or the parent company after the new SE gains first registration. . . although they order the draft terms for the formation of the holding company to be disclosed in all the registries for the companies participating in the operation (cf. SER, article 32(3)).

3.5 International Examination for Due Form by the Register in Cross-Border SE Mobility. Preventive Control of Legality as a Requirement for Registrability of the International Transfer and the Formation of the SE by Merger.

Since under the first Directive registrable titles are indispensably required to go through a system of preventive control, administrative or judicial, for legality before registration (cf. first Directive, article 10; third Directive apropos of mergers, article 16; and sixth Directive apropos of spin-off splits, article 14), Member States have established their own best systems of organisation. “Determination of due form”, as we call this control of the legality of the registrable document of an SE, will be done by the person stipulated by each country’s legislation, which must define the scope and intensity of the process (cf. SER, article 12, which refers to the terms of the first Directive). In our case, obviously, determination of due form is the duty and personal responsibility of the mercantile register (cf. Code of Commerce, article 18(2), and Mercantile Registry Regulation, article 6 apropos of the “principle of legality”).

So then, the existence of “preventive control, administrative or judicial” to examine the SE for legality is basic, especially in cross-border operations of structural modification. The way this control is organised lies in the hands of each Member State’s legislation. The vital thing is that it must exist. National authorities must inform the Commission and their fellow Member States who the competent authority for conducting this control is (SER, article 68(2)). Logically, if we do not want to alter our registration system—and there are no good arguments for doing so—Spanish law makes this preventive check of legality the duty, under his personal responsibility, of the mercantile register for the registered office of the company, apropos of the determination of due form by the

register (Code of Commerce, article 18(2))²⁵. The writers of the Company Code Bill have wisely told us on this point, in article 645(3), *“The mercantile register for the registered offices, in view of the data on file in the registry and in the submitted notarial deed of transfer, shall issue a certificate attesting conclusively to compliance with the acts and formalities that must be completed by the company before the transfer.”* The same criterion is followed apropos of transfers of business partnerships abroad generally in article 521(1) of the Bill.

It is well known that the mercantile register’s determination of due form pertains not only to goodness of form and compliance with the chain of title, but also to the content of the operation. If the SE is “Spanish” and transfers its registered office outside Spain, the mercantile register will be the authority competent to give his preventive judgement on legality within the meaning of the SER, article 8(8). If the SE is an immigrant “foreigner” in Spain, the Mercantile Registry for the company’s new registered offices will be the one competent to determine whether a competent foreign authority has conducted the prior control of legality and whether the requirements of content and form that may be demanded pursuant to Spanish law for the registration of companies and other registrable entities in the Spanish Mercantile Registry have been met (SER, article 8(9)).

The authority competent to conduct the control of legality in the country of origin must attest in a “certificate” that the necessary pre-transfer acts and formalities have been concluded. It must, then, confirm not only that any formal requirements established by the law of the country of origin have been complied with and the rigour of the chain of title has been respected (congruence between the title’s terms and the prior history on record in the registry), but also that the requirements of content that we have been examining have been respected, i.e.: that the draft terms and the report have been duly formulated and published; that the decision was made by a duly convened general meeting with the majority or quorum established by the SER, the law and the statutes; that the rights of the State, creditors and members, etc., have been guaranteed. In Spanish law the normal procedure is to have the mercantile register examine the deed for due form, and this examination obviously extends also to controlling/attesting that there are no registration-related obstacles to the operation. The mercantile register scrutinises the regularity of the operation and states at the foot of the document that there are no obstacles. This is clearly the same as a “certificate” (SER, article 8(8), in relationship with the Mercantile Registry Regulation, article 231, by analogy).

If the SE immigrates to Spain, the Spanish register will scrutinise the title submitted for registration, which may even be authorised or controlled by a foreign official. The scrutiny for observance of the foreign country’s legal requirements is facilitated by the report we have referred to above: The Spanish register may rest his determination of due form on merely confirming that there is a report issued by a competent authority attesting that there are no obstacles to first registration stemming from the requirements and solemnities imposed by the substantive and registration law of the country of origin. In his turn, he will, as usual, ensure that the requirements of content and form for a company seeking first registration in Spain have been fulfilled. In particular, he will ascertain whether the statutes the company has subscribed to abide by the terms applicable to SEs with registered offices in Spain.

The SER does not establish any additional requirements for the control of legality beyond the requirement set in the first Directive: The laws of the Member States must ensure that unscrutinised registrable facts concerning the SE do not enter the national registry. To these effects, whether the registrable document is on paper or not, or public or private, is irrelevant. What does constitute a real and welcome innovation is the solution the SER has found for the problem of international determination of due form in cross-border mobility operations (international transfers of company headquarters and international mergers), a solution that draws its inspiration from the principle of institutional equivalence.

²⁵ And not only a formality of execution by the notary authorising the instrument of transfer, as FERNÁNDEZ DE CORDOVA appears to uphold in “El futuro del Derecho de sociedades...”, p. 8. When the notary authorises the instrument of transfer, he does not “determine the due form” of the operation in the technical sense. In order to perform his job, he does not even have to adhere to the prior registered history, which furthermore is not presented to him. It need hardly be said, moreover, that after the instrument is authorised obstacles to the operation may crop up that could not have been taken into consideration as a possible challenge to the merger decision, which may be registered in the Mercantile Registry in the proper caveat or even a court stay of the decision. . . .

Community legislators have undeniably done the right thing. International determination of due form for registration in a cross-border operation of company mobility is an extremely delicate question; the “new” register must be satisfied that the operation respected at least in part (the proper part) a foreign law (that of its country of origin), which the “new” register is not necessarily familiar with, according to a registration history to which he has no direct access and possibly documented in a form—and a language(!)—foreign to him.

In general, it may be said that the new register, like a judge, is not obligated to know a foreign country’s law: Mortgage Regulation, article 36 (cf. Civil Proceeding Act, article 281(2)). The principle of *jura novit curia* does not govern here. Setting to one side the delicate problems of registration technique and procedure regarding evidence—registration law ignores the regulation of evidence of a foreign law during the registration procedure—the new register will in addition be obliged to conduct his determination of due form in the light of a certain registration history (cf. the “registry entries” in the Code of Commerce, article 18(2)) to which he has no direct access, because the page the entries are on is in the “old” foreign registry. Obviously, if, for example, the original statutes called for a special quorum higher than the one set by law for the decision in question, the passing of the decision by the minimum legal quorum should not give rise to a registrable act. . . not even at the new registry.

In an *international transfer of company seat*, the “new” register (the one for the new registered office) must abstain from entering the company in the register for the new registered office unless it has been attested, pursuant to the law of the venue, that the physical and formal requirements for first registration of companies have been met and the statutes of the new company conform to the legal requirements set by its own company law for the chosen form of company. That determination of due form involves no problems of proving foreign law. However, the determination of due form must abide by not only the law of the venue; unless the operation is to regularise a fictitious foreign company, the new register theoretically would have to abstain from first registration of the company if the transfer decision fails to respect the requirements set by the legislation of the country of origin in defence of the interests at stake (members, third persons, employees, the State itself). *Vide* on this the highly pertinent Directorate-General of Registries and Notarial Affairs Decision of 4 February 2000 on international transfer from the Principality of Liechtenstein to Spain. So then, within the framework of this control of legality, the new register should in theory apply—or ensure the correct past application of—the foreign law to the pertinent portion of the procedure (the first part, the transfer decision), under the requirements of the system of distributive application of rules in the case of a mobile conflict (in the case at hand, the connection point taken into consideration for selecting the company law has been moved).

Not too different is the problem of determining due form in a *cross-border merger* operation. The problems that arise are, if possible, even more complex, because more than two companies and more than two legislations and registration systems may be involved; on the one side, the “old” legislations and registration systems (those of each and every one of the companies that are acquired or disappear under the merger), and on the other side, the “new” law and registration system (those of the new company formed by merger or the acquiring company).

The mechanism the SER employs to settle this question is the principle of institutional equivalence. International legal cooperation within the framework of the relatively uniform registration and substantive law of the European Union is grounds enough for the examining authority of the new country to be able (or rather, to have to) rely on the equivalent, preventive control of legality performed abroad by an official or competent authority of the foreign country.

This is the principle of “registry trust” spoken of in doctrine²⁶. In the case of the transfer of the registered office of the SE, the control will rest on the control conducted by the authority of the country of origin who must check for compliance with the requirements set by the legislation of the country of origin with regard to the interests at stake (cf. SER, article 8(8)), and in the cross-border merger of SE’s, the authority of the country/countries of the companies that disappear or are acquired, who must check the “aspect of the legality of mergers” in “the part of the procedure concerning the completion of the merger” (SER, article 26). In both cases it is the register of the country of the new registered office of the SE or the registered office of the acquiring SE or the new SE formed by merger who scrutinises legality in “the part of the procedure concerning each merging company” (SER, articles 8(9) and 25(1)). That is, who sees that the substantive and formal steps required for first registration in the new country (including attesting to compliance with worker involvement requirements) (cf. SER, articles 8(9) and 26(2)-(4)) have been complied with. The register for the new registered office cannot in any case perform first registration without evidence of compliance with foreign legality, furnished through the proper “certificate” (actually a foreign-law legality report similar to the one envisaged in the Mortgage Regulation, article 36).

It is the task of each country’s legislation to determine what authority that is (cf. SER, article 12; first Directive, article 10; third Directive, article 16; sixth Directive, article 14). The SER restricts itself to stipulating that each Member State must inform the Commission and its fellow Member States accordingly (cf. SER, article 68(2)).

From the standpoint of Spanish law, the problem of international determination of due form by our mercantile registers is not as poorly dealt with as in comparative law. This is, *inter alia*, because of the professional qualifications of Spanish registers and because the registration regulation provides a sufficient basis for settling the problem of proving foreign law. Bear in mind that in laws other than our own, the control of legality can on occasions rest on a judgement of legality pronounced by an authority, administrative or judicial, other than the authority in charge of the registry. This typically happens in certain countries and laws where the professional qualifications of the registry official are not guaranteed, and, in certain company operations of greater importance or complexity, by the need to reconcile a number of interests. This does not happen in France, Germany or Austria, where the authority in charge of the registry also conducts an in-depth judgement. This outsourced scrutiny is generally entrusted to a court (in the case of the United Kingdom, with regard to mergers, capital reductions, restructuring, etc.) or some other body, especially where the courts that, in times past, used to administer preventive justice worked badly (so did it happen in Italy with the “case law of merit” and *homologazione* with respect to formation, amendment of statutes and mergers). In some countries, controlling a document’s legality has been entrusted to the notary who is drawing up the instrument, an arrangement that, in the view of doctrine, may prove to be inadvisable given the notary’s possible lack of independence (as in Italy, in lieu of the judge, or the Netherlands).

The Spanish mercantile register is competent to scrutinise the full physical and formal legality of the operation. The same cannot always be said of his foreign colleague. Where it cannot be said, evidence of content and legal force given by the customary means must be demanded (cf. Mercantile Registry Regulation, articles 36(2) and (3), Civil Proceeding Act, article 281(2)). The burden of providing evidence of a foreign country’s law falls upon the person concerned, although the register may—but is not obliged to—conduct such *ex officio* investigations as he deems pertinent and may even apply his own knowledge of the foreign country’s law on his own

²⁶ *Vide* ARENAS GARCIA, *Registro Mercantil...*, pp. 420 et seqq. *Vide* also FERNÁNDEZ DEL POZO, L., “Publicidad contable de sucursales de entidades extranjeras en la XI Directiva y en el RRM”, *RDBB*, 1994, pp. 157-194.

responsibility, and must, if he does so, state accordingly in the entry (cf. Mortgage Regulation, article 36(3), and Civil Proceeding Act, article 282). In practical registration, the register makes reasonable use of the principle of institutional equivalence; it is generally not unusual for the Spanish register to base his examination on a judgement of legality made by a “competent” foreign official or authority (cf. Mortgage Regulation, article 36(2)). Whereas the making of the entry means that there has been a prior control of legality, submission of a foreign registration certificate—duly translated and bearing an apostille where appropriate—issued by an equivalent official is generally admitted as a means of proof of the existence of the registration situations at issue when the point is to accredit the existence of a foreign company or its officers (cf. Mercantile Registry Regulation, article 5(3)), to register a branch of a foreign company (Mercantile Registry Regulation, article 300(1)), to make the first entry of an immigrant company (cf. Mercantile Registry Regulation, article 309) or to post consolidated accounts (Mercantile Registry Regulation, article 375 et seqq.).

So, Spanish legislation would not seem to call for deep revision under the exigencies of the SE rules:

(i) *In a transfer of the registered office of an SE registered in Spain to a foreign country*, the mercantile register would have to issue the certificate when he examines the instrument of transfer submitted to him at the proper time. The simplest thing will be to require the registrable instrument attesting to the transfer decision to be submitted at the Spanish Mercantile Registry so the old register can attest that there are no registration-related obstacles to the operation in a note at the foot of the document used as the “certificate” or, if desired, by issuing the proper “certificate” attesting to compliance with Spanish law. The most logical course is for the issuance of the certificate to be recorded “by proceeding” in the Spanish registry with a standard registration-closing entry. Contrast articles 19(1) and 20 of the Mercantile Registry Regulation with the provisions of article 8(8) of the SER.

(ii) *In the transfer of the registered office of an SE registered abroad to Spain*, the Spanish register will require submission of the “certificate” (translated and bearing an apostille, one assumes) signed by the competent authority and attesting to compliance with Spanish legislation. Contrast article 36 of the Mortgage Regulation with the provisions of article 8(9) of the SER.

(iii) *In the case of Spanish companies disappearing or acquired in mergers*, the Spanish register will scrutinise the operation for due form based on the registrable instrument, from the standpoint of Spanish legislation and the prior registered history, and will proceed in a fashion similar to that envisaged now for the merger of companies registered in different registries (scrutiny of the concordance of prior registered history). Contrast article 231 of the Mercantile Registry Regulation with the provisions of article 25(2) of the SER.

(iv) *In the case of formation by merger of SE’s in Spain*, the Spanish register will require a certificate or certificates attesting that there are no obstacles to the merger. Contrast the provisions of article 36 of the Mortgage Regulation with the terms established in article 26(2) of the SER.

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