



DOTTORATO DI RICERCA IN DIRITTO E IMPRESA

XXIX CICLO

Coordinatore Chiar.mo Prof. Giuseppe Melis

**CROSS-BORDER MERGERS:
AN ITALIAN PERSPECTIVE**

Dottorando

Massimo Schirinzi

Tutor

Chiar.mo Prof.

Silvio Martuccelli

ANNO ACCADEMICO 2016-2017

PhD thesis discussed by Massimo Schirinzi at LUISS Guido Carli University during the academic year 2016-2017. Not reproducible, in whole or in part, without author's express written permission.

Tesi di dottorato di ricerca di Massimo Schirinzi, discussa presso l'Università LUISS Guido Carli nell'anno accademico 2016-2017. Non riproducibile, in tutto o in parte, se non con il consenso scritto dell'autore.

ABSTRACT

According to a theoretical model of a perfect “market for corporate law”, companies should be allowed to select the corporate law they prefer, regardless of the countries where the firm’s activities take place or where the corporate headquarters is.

However, a free demand of law requires freedom of incorporation (as well as freedom of reincorporation) for companies, which can therefore leave the country of origin and switch to the law of a different State.

While in the U.S. this model become reality, in Europe the path has been difficult, and freedom to reincorporate under the law of another Member State is a recent achievement.

Many European jurisdictions refused the pseudo-foreign corporations through a process of disqualification, denying their legal personality and access to justice, or by subjecting them to its jurisdiction.

But, the European Economic Community experience taught that freedom of States to provide restrictions to the entry of foreign companies could be limited by a regional economic integration process (such as the European one). Freedom of establishment guaranteed by the Treaty is likely to come into conflict with the domestic corporate laws of the members States, as well as with the international private laws provided by the same countries as a protectionist tool to ensure the application of the same domestic corporate law.

So, re-incorporations have been admitted in the European Union and liberalized by E.U. derivative law not directly – *i.e.* by allowing "direct reincorporation" abroad – but through cross-border mergers.

With the Directive 2005/56/CE of the Parliament and the Council, 26 October 2005 (Tenth Directive), free choice of law through the European Union has been recognized (but not directly), imposing to Member States to provide specific rules governing cross-border mergers. A company incorporated in a Member State, therefore, can now incorporate a new shell company in another Member State and then merge into said vehicle, determining a change in the applicable law.

Italy has implemented the Tenth Directive by virtue of Legislative Decree (*decreto legislativo*) 30 May 2008, no. 108 (as slightly amended in 2014 by the so-called "European law 2013bis").

The Directive is rich of references to national legislation, as it draws a legislative perimeter aimed at, first of all, allowing mergers between companies of member States and providing them legal certainty, thus avoiding that companies perform complicated transactions often in violation of mandatory rules provided by one or more jurisdictions in question.

Once it has become possible in Europe to choose the applicable law in accordance with companies' economic and strategic interests, also law provisions adopted by the Member States may be considered as products of a specific market, which has been called "*market of rules*".

This mechanism has resulted in a positive form of competition among the States, which started adopting specific measures in order to improve their domestic corporate rules and their own models of corporate governance.

In this scenario, the Italian reform that has introduced multiple voting shares mechanism in the Italian corporate law system (Legislative Decree no. 91/2014, converted into Law no. 116/2014), may be easily put in relation with the awareness of the Italian government to have “lost” one of the historical Italian corporation, FIAT S.p.A.. Therefore, it shows how corporate mobility may have the effect to stimulate the States to improve their corporate law in a perspective of harmonization of corporate law at the EU level.

In consideration of the above, it should be concluded that the market of rules, which put national corporate laws in competition among each other, may be seen as a useful instrument able to gradually remove the differences still existing among Member States’ legislations. This would led to a global harmonization, which may be define as “*de facto*” and “from below” harmonization.