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ARTICLE

The Law Applicable to Companies Under Albanian Law and Its Implications in a European Perspective

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Abstract The path of Albania towards the European Union necessitates legal, institutional and political reforms. Therefore, Albania is involved in intense legal and political debates to lay sound legal foundations and prepare for the new European reality. Company law among other fields of law is undergoing major changes. This article focuses on the overlapping provisions in Albanian law which are a result of frequent changes of legislation and the process of compliance with the *acquis*. The focal point of this work is to shed light on the provisions defining the law applicable to companies adopted by two different pieces of legislation, both enacted as efforts to approximate the domestic legislation with European Union law.

Keywords Real seat theory · Incorporation theory · *Lex societatis* · Freedom of establishment · Albanian Company Law · Albanian Private International Law

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1 Introduction

The prospect of European Union (EU) membership has always been appealing to Albania. Therefore, the latter has tried to establish strong ties with the Community by entering, right after the collapse of the communist regime, into several agreements with the European (then) Community.[1] Later, the future commitments of EU and Albania were embedded in the Stabilization and Association Agreement (SAA)[2] which led to a new era of cooperation between the Union and Albania. This document entailed, among others, the obligation to approximate the domestic legislation with the *acquis*. Several areas of law were reformed to meet this commitment, *inter alia,* company law.

This paper offers insight into how recent legislative developments in Albania have resulted in conflicting provisions. The state of the art is a consequence of the frequent amendments of the legislation, the lack of complete harmonization within the domestic legal framework and the urge to 'copy' and 'paste' every piece of EU legislation. These provisions are analyzed in a comparative perspective, given the influence EU law has had in shaping the current Albanian legislation, and within the perspective of the jurisprudence of the Court of Justice of the European Union (CJEU).

The article is organized in three parts. Section 2 gives a glimpse of the structure of Albanian law and its notable influence from the *acquis.* Also, it explores the regulation offered by the Albanian Company Law (ACL) on the law applicable to companies by highlighting two ways of constructing the relevant provisions, emphasizing the most lenient regime. The focus of Sect. 3 is the regulation made by the law 'On Private International Law' that offers a better solution to advance corporate mobility and is in line with the reasoning of Sect. 2.3. Section 4 is dedicated to the settings deriving from the Stabilization and Association Agreement and the implications on corporate mobility between Albania and the EU, and to what extent Albanian companies can benefit from the corporate mobility in the EU.

The paper will have more of a theoretical profile (as to the analysis of the Albanian law) due to the significant lack of case law regarding company law issues in general and especially corporate mobility. This is one of the main constrains of this paper and clearly has affected its content. Therefore, the paper proposes possible interpretation of the relevant articles and suggests that Albanian courts should follow the most convenient and reasonable regime. However, while discussing the developments in the EU, references will be made to the jurisprudence of the CJEU and other courts.

[1] See Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation, [1992] OJ L 343/2-9.

[2] Ratified by law No. 9590, 27 July 2006, 'On the ratification of the Stabilization and Association Agreement with the European Communities and their Member State', published in the Official Gazette No. 87.

2 Real Seat and Incorporation Theory Under the Perspective of the Albanian Company Law

2.1 The European Influence on the Albanian Law

As mentioned above, the European Union membership project has nourished law reforms in Albania. The SAA entered between the EU and its Member States and Albania served as a primary impulse to establish trade liberalization and to radically transform Albania's legal foundations in order to comply with the European standards. Almost all major recent legal interventions are inspired by the SAA which constitutes a core document on the reciprocal obligation of EU and Albania. The latter will be further elaborated within the ambit of this paper in Sect. 4. This ongoing 'membership' process has had its externalities as often the *acquis* is not understood correctly or the phenomenon the European law is regulating does not exist in the Albanian socio-economic environment.[3] These issues arise also because the approximation is conceptually misunderstood. It is generally considered as a routine process disregarding the legal, institutional, social and economic peculiarities of the domestic 'importer',[4] and often disregarding domestic harmonization as well.

Under the SAA, one of the areas for which major restructuring was envisioned was company law, a nonexistent concept during almost 50 years of communism. After the dictatorship, the first Albanian Company Law was introduced in 1992[5] with a notable French and slightly German influence.[6] The law was later repealed in 2008[7] with the promulgation of a totally new piece of legislation drafted under the auspices of EU experts who imported the European approach and recent developments in company law. The draft law was a result of the cooperation of two international experts (from the United Kingdom and Germany) who left their imprint on the law,[8] by exporting templates from their domestic regulations. Surely, you feel the clash of two different schools of thought when you first read the ACL. This area of law was vital for the fragile economy, inherited by almost half a century of isolation, and it somehow developed, in its early stages, with no clear legal understanding, and no uniform

[3] Under the obligation of compliance with the *acquis*, Albania has introduced several new pieces of legislation in its domestic legal framework. Some of them totally inapplicable, for example the Takeover Law, promulgated in 2010, has never been put into practice. Also, the law 'On cross-border merger', enacted in 2012, is for the time being inapplicable as it refers to the cross-border merger of Albanian companies and EU Member States companies, but only when the former becomes a member of the EU. It is not applicable for transactions taking place with the companies of the region. So basically, what is happening is that Albania is making legal transplants where there is no need and without consideration of the stage of development and the economic structure of this country. See La Porta et al. (2008), p 324.

[4] See e.g. Kulms (2010), p 8.

[5] Law No. 7638, 19 November 1992, 'On Companies', as amended, Official Gazette No. 8, p 409 (Repealed).

[6] Notwithstanding its French origin, the law adopted the German two tier structure of joint stock companies (named *societies anonyms* under the law) and reserved 1/3 of board seats to employees (a provision which was almost never enforced).

[7] Law No. 9901, 4 April 2008, 'On Entrepreneurs and Companies', as amended, published in the Official Gazette No. 60 (hereinafter: ACL).

[8] Dine (2012), p 44 and p 62.

interpretation.[9] The messy development of this discipline derived from the lack of proper attention towards inherent company law institutes. Corporate mobility, which is the focus of this paper, was left totally unexplored.

Instead, corporate mobility[10] has been in the midst of intense academic debate especially in the context of the EU where freedom of establishment is on the foundations of the Union.[11] Due to the importance this freedom entails, a huge amount of legal literature is produced mainly as a reaction to the jurisprudence of the CJEU.

Meanwhile, in Albania, the political and academic debates have not gravitated towards this issue because other public and constitutional law oriented debates have been stealing the show.[12]

2.2 The Real Seat Facet of Article 8 of the ACL

The law applicable to the company (also known as *lex societatis, the proper law of the company*) has traditionally been settled by two prominent contrasting theories. European countries have been divided in the dichotomy of real seat theory and incorporation theory, which embody different approaches and are inspired by different philosophical stances.[13] Both theories agree that the connecting factor determining the law applicable to the companies is their seat, but they are irreconcilable in terms of determining the seat of the company.[14]

The connecting factor that determines the seat of the company is provided in the Albanian Company Law (ACL),[15] which was enacted after the signature of the Stabilization and Association Agreement.[16]

[9] See Rystemaj (2015), pp 210–224.

[10] In this article, 'corporate mobility' and 'company mobility' are used interchangeably, unless otherwise indicated.

[11] See Wymeersch (2003), p 1.

[12] The political and academic debate has been focused on building a sound institutional framework. The constitutional reform finalized in July 2016 has been at the heart of the debates, with an emphasis on the judiciary as a *sine qua non* condition for the future in the EU.

[13] See for this, De Sousa (2009), p 1. See also, Paschalidis (2012), pp 3–15; Rammeloo (2001), pp 9–20; Szabados (2012), pp 37–39; Wouters (2001), p 108.

[14] Edwards (1999), p 339. See also, Drury (2007), pp 1–20.

[15] From a historic perspective, our legislation has always had clarity issues as regards applicable law to companies. For example, the regulation made by the abrogated law of 1992 was ambiguous. It had no criteria delineating the seat of the company, but instead stated that if the seat of the company is located in Albania, then Albanian law is applicable. But was it the registered seat or the real seat? The law was silent on this issue. In my view, it adopted a mixed system of incorporation and real seat theory when it proclaimed that third parties may rely on statutory seat, and the company should recognize this right even though the real seat is located somewhere else. Basically, the law made an implied reference to the incorporation theory where it recognized the statutory seat as the factor which determines the applicable law for foreign companies and where it declared that the statutory seat can be separated from the real one. But, given the notable French origin of this law (this provision almost replicates Art. 1837 of the *Code Civil* and Art. L210-3 of the *Code de commerce*) it is probably more accurate to state that under the predominant French understanding and interpretation of this provision the real seat theory was established by the already repealed Albanian Company Law.

[16] This agreement entered into force in 2009, after the signature of the Member States, but Albania started to implement its obligation as of 2006 upon the promulgation of the law 'On the ratification of the

According to the pertinent article in the ACL that determines the company seat '[…] the company's head office is the place where the principal part of its business is carried out'.[17] Furthermore, the second paragraph of the same article defines that '[i]f a company's head office is located in the territory of the Republic of Albania, the company shall be subject to the present law'.

Notwithstanding the fact that this is a provision originating from substantive law, it contains a private international law rule because it defines the law applicable to (foreign) companies carrying out business in Albania. *Prima facie*, this approach is an expression of the real seat theory which has been the supported view by the drafters of the law.[18] The reason behind this choice perhaps had protectionist backgrounds,[19] because as the drafters declared, working group members were reluctant to support the incorporation theory.[20] Corollary to this theory, according the traditional view, is the inability of founders to move the head office[21] elsewhere and still retain the legal capacity and the benefit of limited liability (of its shareholders). This theory, under its conservative approach poses danger to free movement of companies as '[…] a corporation can be duly formed in a real seat-doctrine jurisdiction only if it has its real seat in that jurisdiction'.[22] Basically, under this orthodox approach of the real seat doctrine the registered seat and the real seat should coincide[23] because the company should incorporate in the country where its principal place of business or real seat is situated.[24]

Footnote 16 continued
Stabilization and Association Agreement with the European Communities and their Member State', No. 9590, 27 July 2006, published in the Official Gazette No. 87. Art. 70(3) of the SAA. See also, Dine and Blecher (2016), Art. 8, pp 40–43.

[17] Art. 8 of the ACL.
Head Office
(1) Unless the statute otherwise provides, a company's head office is the place where the principal place of business is carried out.
(2) If a company's head office is located in the territory of the Republic of Albania, the company shall be subject to the present law.'.

[18] Dine and Blecher (2016), Art. 8, pp 40–43.

[19] On the protectionist basis of real seat theory, see Lombardo (2003), p 309.

[20] Dine and Blecher (2016), Art. 8, pp 40–43.

[21] Basically, the head office is the seat of the company or the registered seat. See Dine and Blecher (2016), Art. 8, pp 40–43.

[22] Ebke (2002), p 1035, fn. 142 (citing B. Grossfeld, 'Commentary', in: Julius von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Internationales Gesellschaftsrecht* (1998), p 106; P. Kindler, 'Commentary', in: K. Rebmann et al. (eds.), *Münchener Kommentar zum BGB: Internationales Gesellschaftsrecht*, 3rd edn. (1999), p 102; K. Siehr, *Internationales Privatrecht: deutsches und europäisches Kollisionsrecht für Studium und Praxis* (2001), p 309).

[23] Mucciarelli (2008), p 285, fn. 61 (citing P. Kindler, 'Internationales Handels- und Gesellschaftsrecht', in: H.J. Sonnenberger (ed.), *Münchener Kommentar BGB*, vol. 11 (2006), comment 540; F.J. Garcimartìn Alférez, 'El traslado del domicilio social al extranjero. Una vision facilitadora', *Rev. Soc.* (2001), p 112; W.-H. Roth, 'Die Wegzugsfreiheit für Gesellschaften', in: M. Lutter (ed.), *Europäische Auslandsgesellschaften in Deutschland* (2005) p 382).

[24] Ebke (2002), p 1028.

Albanian courts have not yet ruled explicitly on such cases, but as the jurisprudence and the doctrine of countries applying the real seat theory suggests, if the company transfers its seat abroad, it ceases to be subject to the law of the place of incorporation and where the real seat was located. This has been the predominant view so far, but this rigid stance has evolved and real seat countries now offer a more lenient solution.[25] For example, Germany, although a real seat state, has allowed its private limited companies (GmbH) to retain the legal capacity when they move their real seat to another state.[26] The latter will be subject to the laws of the host state (if it is a real seat country),[27] except in cases where the host state is an incorporation state that allows foreign companies to operate in that state and submit to the laws of the state of its origin.[28]

Unfortunately (or fortunately), the substantive Albanian law is silent on this issue. There are no specific rules on cross-border seat transfer, besides the provision that the company may register in the commercial register other locations where it carries out business.[29] But, Albanian courts may fill this legislative gap by acknowledging, under a generous and broad interpretation, that companies are permitted to transfer their (real) seat and still maintain their registered seat in the Albanian commercial register as long as this is not explicitly prohibited.

In this light, it is advisable that if Albanian courts apply the real seat theory (as the *prima facie* meaning of Article 8 of the ACL suggests), they should apply a laxer reading of it by recognizing duly established foreign companies as well as the existence of the connecting factor with the home country.[30]

The degree of corporate mobility under this approach is reduced due to the effect it has on foreign companies transferring their seat and/or business in Albania (the change of the applicable law). Yet, the Albanian legislation offers the opportunity to foreign nationals or companies (especially from the EU Member States) to set up a company, branch or subsidiary in Albania.[31] This is mainly a corollary of the SAA

[25] Belgium has recognized the continuity of the legal personality of the company that transfers its head office abroad. See Wouters (2001), p 111.

[26] This is only possible for GmbH (*Gesellschaft mit beschränkter Haftung*, the German private limited company) which under the MoMiG (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen*, 23 October 2008) reform can move its administrative seat (real office) outside Germany where the registered seat is located. Art. 4a of the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)* of 20 April 1892 (Federal Law Gazette III 4123-1), as last amended by Art. 27 of the Act of 23 July 2013 (Federal Law Gazette I, p 2586) (English translation found at http://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.pdf). In brief, this article provides that the registered seat should be in Germany as stated in the article of association. Because of this, legal scholars in Germany have suggested that the company may transfer its administrative seat to another jurisdiction. See Schulz and Wasmeier (2012), p 84.

[27] Szabados (2012), p 131, fn. 201 (citing D. Martin and D. Poracchia, *Company mobility through cross-border transfer of registered offices within the European Union-A new challenge for French law* (2010), p 386).

[28] Szabados (2012), p 131.

[29] Art. 43(3) of the Law No. 9723, 3 May 2007, 'On Commercial Register', as amended, published in the Official Gazette No. 60 (hereinafter: Law on Commercial Register).

[30] Dine and Blecher (2016), Art. 8, pp 40–43.

[31] The law 'On Entrepreneurs and Companies' does not impede incorporation of companies by foreign persons (individuals or legal persons). Certainly, this process requires a bit more paper work than

that requires no obstacles for the (then) Community companies to set up companies, subsidiaries and branches in Albania.[32]

On the other hand, companies wishing to do business in Albania may register a branch in the commercial register which is subject to the formalities required under the law 'On Commercial Register'[33] that has transposed the Eleventh Company Law Directive.[34] However, this process requires more paper work in order to substantiate the existence of the foreign company. Therefore, the registration of a branch in Albania goes through a meticulous examination of the acts of the company.[35] Although a secondary establishment, technically this may be considered as an opportunity to transfer the head office of a letter box company in Albania, but the branch is not an Albanian company and it is not subject to Albanian law with regard to its internal affairs. It will continue to apply the *lex societatis* applicable to the 'mother' company, unless the 'mother' company transfers its centre of management to Albania. Nevertheless, they are subject to the same disclosure regime as Albanian companies with regard to the information to be published after being first registered in the commercial register.[36]

To conclude, foreign companies, especially EU companies, entail a certain degree of mobility in the Albanian market (through primary establishment and branch opening). However, if they move their head office to Albania, then under the (rigid and conservative) approach of the ACL they will be subject to the Albanian law. Notwithstanding its widespread support in European countries, under the Albanian perspective the real seat theory may have detrimental effects given the advantage that incorporation theory offers in attracting foreign companies.

Footnote 31 continued
registering a company by Albanians, but this is for the sake of getting enough proof as to the legal persons that wish to establish a company in Albania. Art. 29 of the Law on Commercial Register, requires further documents for the foreign legal persons such as: the instruments of constitution and the memorandum and articles of association, documents that prove the existence of the company, documents that proves that the legal person is not winding-up or has started the insolvency proceedings etc.

[32] Art. 50 of the SAA.

[33] Art. 37 of the Law on Commercial Register.

[34] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, [1989] OJ L 395/36.

[35] Art. 28(5) of the Law on Commercial Register, requires the following documents:
(a) the instruments of constitution and the memorandum and articles of association of the foreign company if they are contained in separate instruments, in absence, the equivalent constitution act, under the foreign legislation, and full text of following amendments;
(b) documents that prove the existence of the foreign company in the foreign jurisdiction;
(c) documents that certify the present condition of the foreign company, issued not more than 90 days before the application date, information on registration and representation, including the information on whether the company is winding-up or in the insolvency proceedings;
(d) foreign company's balance sheet for the last fiscal year, if the foreign company has carried out business for more than a year;
(e) the decision or other acts of the relevant body of the foreign company for branch/representative office opening.

[36] Art. 43(3) of the Law on Commercial Register.

2.2.1 *Defining 'Principal Place of Business'*

The real seat facet of Article 8 is also difficult to apply given the difficulty to locate the principal place of business. Indeed, the origin of the connecting factor (*head office = principal place of business*) is unclear because other European countries (from which Albania has imported pieces of company law) that follow the real seat doctrine rely on different connecting factors, such as the place of central management, the place where the general assembly summons, and the location of the board of directors.[37]

Perhaps it was the Stabilization and Association Agreement which primarily inspired Article 8, seeing that, according to the latter, an Albanian company can be labelled as such if it is registered in Albania and has real and continuous links with its economy.[38] Thus, this intrinsic connection with the economy and its legal system is, under the wording of the law, the principal place of business.

One can say that the determination of the head office with the principal place of business resembles the '*oggetto principale dell'impresa*' (the principal object of the company) adopted by Italy, given the slight influence the Italian law has had in drafting the Albanian Company Law.[39] In fact, the latter refers to the activity conducted by the company in order to achieve the scope set forth in its incorporation acts.[40] In other words, '*oggetto principale dell'impresa*' (the principal object of the company) refers to the prevalent activity of the company.[41] In case the scope of the company is not settled in the acts of incorporation then the real object of the company must be observed.[42] Certainly, the place where this object is carried out is essential and must be figured out. In this fashion, the Italian law lacks any guiding criteria. Also, it is noteworthy that Italian law divides the '*sede dell'amministrazione*' (administrative seat) from '*oggetto principale dell'impresa*' (the principal object of the company) as the former does not encompass the latter and vice versa.[43] Yet, this factor (*oggetto principale dell'impresa*) cannot delineate the place of business, especially where the activity is shared among different countries.

The 'principal place of business' as a connecting factor itself entails many problems. Notably, it is unclear under which parameters to delineate the 'principal place of business'. This imprecise language gives rise to many questions. For example: Is the 'principal place of business' the place where the company's operations are carried out; the place where the company derives more revenue; where most of the company's property and employees are located; the place where

[37] See Paschalidis (2012), pp 9–11. Actually, according to ibid., p 10, Italy has adopted a *sui generis* regarding the choice of law for corporations.

[38] The same goes for Communities' companies according to Art. 49 of the SAA.

[39] For example, the ACL recognizes the two-tier structure of joint stock companies under the Italian model where the general assembly of shareholders elects and dismisses the directors. Art. 135(2)(c) of the ACL.

[40] Valente and Cardone (2015), pp 5–6.

[41] Barel and Armellini (2012), p 122.

[42] Valente and Cardone (2015), pp 5–6.

[43] See Paschalidis (2012), pp 10–11.

contracts are executed or entered into; or does it refer to the place where the effective direction and control of the company is exercised? This factor may mislead Albanian courts as they will be uncertain as to where to look for guidance on the meaning of 'principal place of business'. How does one for instance determine the head office of a company incorporated in Italy which conducts equal amounts of its business in the place of incorporation and Albania? If we were to complicate the matter even more, we can suppose that the management is situated in France and Germany. Is the head office of this company situated in Albania? In such settings, it is difficult to locate the place where business is carried out. The provision itself uses an imprecise language and lacks any orienting criteria to help determine the meaning of 'principal place of business'.[44] Normally, the jurisprudence should fill these legislative gaps, but it is currently missing.

Given the influence of the European Union law in shaping the current Albanian legal framework, maybe a reference to the jurisprudence of the CJEU (and other national courts) will help to find a proper construction of the 'principal place of business'. Worth noting however, is that no autonomous understanding of the 'principal place of business' exists in the EU as this issue remains within the domain of Member States.[45] In *Planzer*, the CJEU introduced a myriad of factors as delineating a company's place of business[46] for company law purposes, while for

[44] For example, the US Court of Appeals, Ninth Circuit further elaborated the principal place of business doctrine by fixing two tests to determine it. In *Tosco v. Communities for a Better Environment* the court held that there were two tests in determining the place of business. First, is the 'place of operations test' that locates a corporation's principal place of business in the state which 'contains a substantial predominance of corporate operations'. The second one refers to 'nerve centre test' which locates a corporation's principal place of business in the state where the principality of its executive and administrative functions are performed. The tests are not complementary, but on the contrary they are applied *in seriatim*, which means that, the second test is applied only when the first fails to determine the business location. The court goes further and clarifies that 'the substantial predominance' does mean '[…] that the amount of corporation's business activity in one state be significantly larger than any other state in which the corporation conducts business'. The factors that determine the 'substantial predominance' according to the court ruling are especially 'the location of employees, tangible property, production activities, sources of income, and where sales take place'. US Court of Appeals, Ninth Circuit, *Tosco Corporation v. Communities for a Better Environment*, No. 99-55400, 236 F.3d 495 (9th Cir. 2001) (decided: January 2, 2001), http://caselaw.findlaw.com/us-9th-circuit/1120618.html. This decision was later overruled by the US Supreme Court. See below n. 54.

[45] For example in the following CJEU case, Germany denied tax refund to Planzer (a company established in Luxembourg) under the argument that its real seat, the place where the company was managed, was Switzerland rather than Luxembourg. See Case C-73/06, *Planzer Luxembourg*, ECLI:EU:C:2007:397, para 25. See also, Opinion of Advocate General Trstenjak in *Planzer*, 19 April 2007, para. 61, [1979] OJ 1979 L 331/11. The Advocate General Trstenjak refers to the notion of registered seat, but the same can be said with regard to the principal place of business that is one of the connecting factors defining the proper law of the company just like registered seat for some countries. Also, in *Überseering*, Germany applied its own understanding of the 'principal place of business', i.e. the place where the company is managed. Likewise, in EU law there is no autonomous understanding of the seat of the company. Therefore, Art. 54 of the Treaty of the Functioning of the EU ([2008] OJ C 115/49) does not distinguish the registered seat, the central administration and the principal place of business as connecting factors as it has taken account of the variety of the national legislation. (See also Case C-81/87, *Daily Mail*, ECLI:EU:C:1988:456).

[46] In Case C-73/06, *Planzer Luxembourg*, ECLI:EU:C:2007:397, para. 61, the court held that: 'Determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the

the purposes of the EU tax legislation, the court ruled that the place of business should be understood as the place where the management of the company is conducted.[47]

Yet, with regard to our purpose, finding the meaning of 'principal place of business' under the ACL seems a difficult task if we refer to the multitude of factors mentioned therein.[48] The question of where the principal place of business is under Albanian law remains unanswered. These blended factors altogether, do nothing but add confusion to the ambiguous wording of the Albanian law.[49]

The national courts of some EU Member States, for example, French,[50] German[51] and Greek[52] courts have previously decided that the decisive factor regarding the definition of the principal place of business is the place where the central management is effectively performed regardless of where the actual factory or working plant is situated.[53] Considering the impact the German law has had in drafting the Albanian Company Law, maybe the proper meaning of the principal place of business should be defined within a German legal perspective.[54]

Footnote 46 continued
place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account'.

[47] Case C-73/06, *Planzer Luxembourg*, ECLI:EU:C:2007:397, para. 60.

[48] Case C-73/06, *Planzer Luxembourg*, ECLI:EU:C:2007:397, para. 61.

[49] Other authors have emphasized that the determination of the (real) seat is subject to a cumulative criteria such as: the place where management exercises its duties, and the place where the guideline for the size and the source of production and personal policy is formulated. See Myszke-Nowakowska (2014), p 57 (citing O. Sandrock, 'EWG Vertrag betrachtet die Unterschiede', *RIW* (1989), p 505).

[50] Rammeloo (2001), p 203.

[51] Ibid., pp 178–179, citing BGH 11 July 1957, BGHZ 25, 134; BGH 17 October 1968, BGHZ 51, 27 etc.

[52] Metallinos (2016), p 558.

[53] Rammeloo (2001), pp 178–179, citing BGH 11 July 1957, BGHZ 25, 134; BGH 17 October 1968, BGHZ 51, 27 etc. and p 203.

[54] As parenthesis, the following case has no influence in Albanian law, but is referred as an illustrating exampled for the sake of the complexity of the determination of 'the principal place of business'. In the same vein with the court rulings of the European countries, from a comparative perspective, the US Supreme Court, reasoning that the principal place of business was somehow an ambiguous factor to determine, in *Hertz Corp. v. Friend et al* (559 US 77 (2010) Certiorari to the US Court of Appeals for the Ninth Circuit no. 08-1107), replaced the previous two step test with the 'nerve centre' test (see above n. 44). This case referred to diversity of jurisdiction dispute, where Hertz was sued by Californian citizens to a California state court for claimed state-law violation.

Hertz sought removal to the Federal District Court claiming that because it and respondents were citizens of different States, as it claimed that it was not a citizen of California as its principal place of business was located in New Jersey where the core executive management was conducted. Basically, the core of the dispute was to determine the principal place of business. The Supreme Court ruled that the principal place of business is the place where the actual direction and control of the corporation is performed. ('"[P]rincipal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. In practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center", and not simply an office where the

Basically, due to the difficulties that may arise with the application of the 'principal place of business' test, it is advisable for Albanian courts to consider more precise factors such as the place where the company is directed and controlled, and where its main administrative and executive functions are performed (or, in other words, where its 'nerve center' is located).[55] This interpretation aligns with the definition of seat provided by the Albanian Civil Code (ACC). Article 28 of ACC unambiguously states that the seat of a legal person is situated where the management body is located.[56]

Yet, this factor is imperfect, especially for companies that are being directed and controlled by different managers, located in several states and are communicating via internet, but despite its imperfections, this seems a clearer rule as compared to the 'principal place of business' test.[57]

2.3 The Incorporation Theory Facet of Article 8 of the ACL

As declared by the drafters of the ACL, the latter reflects the real seat theory, but considering the criticism addressed to this philosophy, the law offers, although not explicitly (and maybe not intentionally), a more flexible option dealing with *lex societatis.*

Despite the aforementioned analysis (the real seat facet of Article 8) there is another standpoint that the Albanian Company Law introduced the incorporation doctrine as well.[58] This article should be interpreted as granting a combined system, which allows both doctrines to coexist: the real seat doctrine being the default rule and the incorporation doctrine an optional one. This interpretation is based on a close reading of the first part of Article 8(1) of the ACL which states that 'Unless the statute provides otherwise, a company's head office shall be the place where the principal part of its business is carried out […]'. Clearly, 'unless the statute provides

Footnote 54 continued
corporation holds its board meetings.' *Hertz Corp. v. Friend et al*, 559 US 77 (2010) Certiorari to the US Court of Appeals for the Ninth Circuit No. 08–1107, p 16).

The nerve centre test was deemed appropriate by the US Supreme Court as '[t]he metaphor of a corporate "brain" while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place' (*Hertz Corp. v. Friend et al*, 559 US 77 (2010) Certiorari to the US Court of Appeals for the Ninth Circuit no. 08-1107). Essentially, the Supreme Court says that, the principal place of business should not be understood literally, i.e. where the actual production plants are situated, but where the effective decisions are made by the management.

[55] This is the factor that Germany uses to identify the seat. The decisive element for determining the seat is not the place where the main production plants are situated, but in the place/country where the management and control resides. Under the German case law, 'the place where the management office and organs representing the company are engaged in business is the place where fundamental decisions of the management and control office are taken and *effectively carried out*'. See Rammeloo (2001), pp 178–179, citing BGH 11 July 1957, BGHZ 25, 134; BGH 17 October 1968, BGHZ 51, 27 etc.

[56] Art. 28, Albanian Civil Code, Law No. 7850, 29 July 1994, as amended.

[57] See *Hertz Corp. v. Friend et al*, 559 US 77 (2010) Certiorari to the US Court of Appeals for the Ninth Circuit no. 08–1107, p 18.

[58] According to Bachner et al. (2009), p 22, Art. 8 of the ACL has introduced the incorporation theory into Albanian Law.

otherwise' gives founders the autonomy to freely choose in the statute (i.e. articles of association) another location (e.g. the registered seat) as the head office for the company irrespective of the place where business is conducted. In this way, the registered seat, under the articles of incorporation, will determine the applicable law, that is the law of the place of incorporation. This freedom allows founders to liberate the company from the imprecise connecting factor, the principal place of business, as the link between the company and the legal system.

This interpretation is only academically supported, and hopefully any future case law from Albanian courts may support such construction.

3 The Albanian Private International Law[59] Perspective on the Law Applicable to Companies

The determination of the connecting factor regarding the law applicable to companies (*lex societatis)* overlaps with the law 'On Private International Law' (hereinafter referred to as the PIL Act). This law, promulgated in 2011, repealed the first act regulating private international law issues enacted in 1964.[60] The regulation provided by the latter was chaotic and did not provide a solid solution for the connecting factor. The law stipulated in its Article 4 that the capacity of the legal persons was determined by the law of the state where the centre of the legal person is situated. This wording was confusing as it did not provide any definition of the centre of the legal person. Therefore, it was unclear whether the centre was the location of the central administration of the legal person, the place of business conduction or the registered office. This question never got an answer due to the absence of case law.

Contrary to the regulation by the ACL and to the regulation by its predecessor, the PIL Act (now in force) takes another approach. In a clear and simple language it follows the incorporation theory which designates the place of incorporation as the place regulating the internal affairs of the company. Accordingly, the connecting factor defining the applicable law for legal persons is the place of registration. More specifically, Article 15 of the PIL Act sets forth that the law applicable for juridical person is the law of the place of registration.[61] The scope of application of the applicable law is set forth in Article 15(2), and includes the legal nature, the aspects related to incorporation, transformation, governing structure, the competences and functioning of the legal person, representation, shareholders' rights, limited liability and responsibility of shareholders and directors towards third parties, etc.[62] The latter has probably been influenced by the developments in the EU, thus reflecting a more flexible approach regarding the connecting factor.

[59] In Albania, the law 'On Private International Law' is a recent legislative product, enacted in 2011 after the previous was outdated (enacted in 1964) and not aligned with the European standards.

[60] Law No. 3920, 21 November 1964.

[61] Art. 15(1) of Law No. 10428, 2 June 2011, 'On Private International Law', published in the Official Gazette No. 82 (PIL Act).

[62] Art. 15(2) of the PIL Act.

Also, it is worth mentioning that the Albanian law does not apply the *renvoi* doctrine for the status of legal persons.[63] The *renvoi* doctrine is normally applied in the Albanian PIL, but the status of the legal persons is explicitly excluded.[64] That means that if a foreign company moves its seat to Albania then, under the Albanian PIL rules, the applicable *lex societatis* will be the substantive law of the country of incorporation. Therefore, Albanian PIL rules do not refer to the PIL rules of the foreign country.

Obviously, this new regulation creates confusion as to which is the piece of legislation that should be applied when defining the proper law of the (foreign) company that carries out business in Albania. Therefore, it is not clear whether the connecting factor is the place of incorporation or the place where the principal part of its business is conducted. Thus, this perplexing situation deserves much scholarly attention because to date there is neither case law nor authoritative interpretation which brings these acts into consistency and makes them fully compatible with the evolution of this notion in the EU.

One can argue that, given the overlapping provisions, the PIL Act solution should prevail based on the principle *lex specialis derogat legi generali*. In such a case, it is very difficult to distinguish which constitutes the *lex specialis* and which *legi generali*. However, in the US the courts have classified the internal affairs doctrine (corresponding to the European incorporation theory) as a conflict of law principle.[65] Thus, when defining the applicable law, the PIL Act should take precedence as it is the specific instrument that regulates these peculiar relations. Therefore, based on this argument, the PIL Act should take prevalence as a specific law. Yet, such an argument is difficult to defend because company law is a specific law as well. This issue becomes harder to resolve absent an authoritative say.

One even stronger argument is based on the principle of interpretation *lex posterior derogat (legi) priori*. The PIL Act (June 2011), promulgated three years after the enactment of the ACL (April 2008), should prevail and a proper interpretation should consider the provisions of the ACL (which conflict with the PIL Act) as repealed. This is based on Article 88 of the PIL Act, which provides for the abrogation of the first law regulating private international law issues (enacted in 1964), and it also extends its effects to any provision contradicting this law, as well.[66] In this vein, this article should be interpreted as declaring 'the death' of the real seat doctrine established by Article 8 of the ACL. Albanian courts should take into consideration this method of interpretation when dealing with the proper law of companies. Hopefully, the court will read and interpret the law properly and understand the relevance of each solution.

Undoubtedly, the approach taken by the PIL Act is more favourable in terms of corporate mobility as it provides more legal certainty and offers the opportunity to foreign companies to transfer their real seat to Albania without being subject to the

[63] Art. 3(2)(a) of the PIL Act.

[64] Art. 3 of the PIL Act.

[65] Beveridge (1989), p 693, citing the court in *Edgar v. MITE Corp*. 457 US 624, 645-46 (1982).

[66] Art. 88 of the PIL Act.

ACL.[67] Albanian PIL rules will apply the substantive law of the state of incorporation. Also, this legal rule offers Albanian companies the possibility to incorporate in Albania and do business elsewhere without losing their legal personality gained in the country of incorporation. That means that these companies will still be recognized as a company in Albania, notwithstanding the transfer abroad of its real seat or principal place of business.

4 Corporate Mobility in the Context of the Stabilization and Association Agreement with the EU

Corporate mobility is undeniably a crucial pillar of the European structure.[68] Due to this importance the EU has exported a glimpse of this idea to the aspiring countries through the legislative instruments regulating their relationships. For example, this freedom is embodied in the Stabilization and Association Agreement between Albania and the EU, which serves as an instrument leading Albania's path towards the EU.

As noted above, the Stabilization and Association Agreement established the foundations of the new era of cooperation between the Union and Albania. This Agreement was signed in June 2006 and integrated into the Albanian domestic legal framework through the law No. 9590, of 27 July 2006, 'On the ratification of the Stabilization and Association Agreement with the European Communities and their Member State'. It entered into force in April 2009, after the signature of all the Member States. Under the Constitution of the Republic of Albania, this international agreement, after ratification and publication in the Official Journal, is part of the Albanian internal legal system.[69] Furthermore, the Constitution grants the international agreements a favourable position because they are ranked higher in the hierarchy of norms as compared to laws enacted by the Parliament. That means that they have priority over the laws of the country that are incompatible with it.[70] The Stabilization and Association Agreement sets mutual commitment of the parties on a wide range of topics, such as political, economic and law approximation, among which company law.

As per this document, Albania has undertaken the obligation to facilitate the setting-up of operations in its territory by (then) Community companies and nationals.[71] To that end, Albania should grant, as regards establishment, Community companies 'a no less favourable treatment than that accorded to its own companies

[67] This theory has its drawbacks, but better promotes corporate mobility overall. See Wouters (2001), p 109.

[68] European Added Value Assessment EAVA 3/2012, p 11.

[69] Art. 122(1) of the Constitution of the Republic of Albania: 'Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.'.

[70] Art. 122(2) of the Constitution of the Republic of Albania.

[71] Art. 50 of the SAA.

or to any third country company, whichever is the better […]'.[72] Therefore, Albania should not discriminate between its own and Communities' companies and should not impede the entrance, in the form of establishment of companies, subsidiaries and branches, of EU companies in its territory.

This obligation is reciprocal as the Community and its Member States shall offer to Albanian companies[73] a 'treatment no less favourable than that accorded by Member States to their own companies or to any company of any third country, whichever is the better'.[74] This non-discrimination treatment refers to the establishment of companies[75] and operations of subsidiaries and branches by Albanian nationals and companies in the Community, and vice versa Community nationals and companies in Albania.

Hence, Community nationals and companies can set up companies, subsidiaries and branches throughout Albania (and vice versa). This process is carried on easily, except for a few bureaucratic steps which are required for the sake of creditors' and third parties' protection.[76] This added paperwork obligation is necessary in order for the branch to provide pertinent documents that prove the proper registration of the company within the EU.[77]

Essentially, this non-discrimination commitment of EU companies is proudly honoured by Albania. Firstly, because as explained above, the SAA takes precedence over the laws of the countries in case of noncompliance, which means that anyone can challenge the Albanian law infringing the SAA provisions as regards corporate mobility. Secondly, in a practical vein, corporate mobility in the form of primary establishment (setting-up of companies) and secondary establishment (subsidiaries, and branches) are guaranteed by the spirit and the words of the regulating framework (as mentioned above).

Notwithstanding this '(limited) free movement of companies' between the EU and Albania, the real seat facet of Article 8 of the ACL creates an unnecessary burden for EU companies to transfer their central administration, head office or place of business to Albania. Likewise, it hinders (under its conservative approach) Albanian companies to transfer their head office in the EU Member States. The PIL Act, by contrast, aligns with the developments in the EU and facilitates transfer of head offices of European companies to Albania and vice versa.[78]

Under the aforementioned provisions on *reciprocity* and *most favourable nation treatment*, the (now) Union and its Member States should grant Albanian companies

[72] Art. 50(1) of the SAA.

[73] Art. 50(3) of the SAA.

[74] Art. 50(3)(i) of the SAA.

[75] The concept of 'establishment' within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin (Case C-55/94, *Gebhard*, [1995] ECR I-4165, para. 25).

[76] Which is excused by Art. 53 of the SAA.

[77] See Art. 53(2) of the SAA.

[78] This approach offers security to Albanian companies that can exercise business elsewhere and still be subject to their home state company law and can at the same time be appealing for companies established in real seat states for example like Germany which allows companies to transfer their head office, if the law of the host states redirects to German law. See Paschalidis (2012), p 10; Szabados (2012), p 130.

the same treatment offered to the companies of Member States in terms of corporate mobility and the most favourable treatment advanced to any third country. This argument has been rejected by Member States' courts for example in the *Trabrennbahn* judgment of the BGH (*Bundesgerichtshof*, The German Federal Court of Justice).[79] The BGH found that the incorporation doctrine was inapplicable to countries outside the EU/European Economic Area (EEA); instead it was a benefit for EU Member States and EEA countries.[80] Consequently, according to this standpoint, EU Member States should apply their private international law rules towards third countries' companies with regard to corporate mobility. One can argue that this stance is valid with third countries with which the EU has no links, but what about countries with which it has concluded SAAs setting mutual obligations and commitments based on a reciprocity and non-discrimination principle? If reference is made to the SAA, it clearly says that the (now) Union should grant Albanian companies 'a treatment no less favourable than that accorded by Member States to their own companies'.

On the other hand, the aforementioned provision of the SAA is also based on the most favourable nation treatment which should be examined in the relationships of EU Member States and third countries. For example, if a Member State applies the incorporation doctrine to a third country, then this treatment should be advanced to Albanian companies (as a party to the SAA). This case becomes more confusing if we consider the several friendship treaties concluded between the EU Member States and e.g. the United States, where corporations are regulated by the incorporation doctrine.[81] In this context, one can ask whether the Union (and the Member States) is infringing the most favourable nation treatment towards Albania under the SAA?

Bearing these issues in mind, one can question the legal position of the SAA in the EU context. Does it have any legal effect when it grants third countries certain rights, and can third countries' companies claim rights based on the SAA?

Under the Treaty on the Functioning of the European Union, 'Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'.[82] Furthermore, under the established jurisprudence of the CJEU provisions of international agreements are directly applicable upon fulfilment[83] of the direct effect test provided by the court in *Van Gend and Loos*[84] and later in the *Demirel* case.[85] The Court ruled that:

[79] Szabados (2012), p 136.

[80] Ibid., pp 136–137.

[81] Metallinos (2016), p 556. See also, Szabados (2012), p 182. See also, Art. XXVI(5) Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America, German BGBl. II 1956 providing that: 'Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party'.

[82] Art. 216(2) of the Treaty on the Functioning of the European Union.

[83] See Kellermann (2008), pp 339–382.

[84] CJEU 5 February 1963, C-26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* [Netherlands Inland Revenue Administration], ECLI:EU:C:1963:1.

[85] CJEU 30 September 1987, C-12/86, *Demirel v. Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400.

> A provision in an international agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[86]

Basically, under this stance any national/company of third countries can invoke provisions contained in the SAA in a Member State court if he/she/it claims infringement. For example, any Albanian company claiming that the application of private international law rules by the Member States constitutes an infringement of the SAA, given the disregard of such rules for companies of other Member States, can challenge this action in the court of that Member State.

Within the EU, companies of the Member States enjoy much more freedom of establishment. The jurisprudence of the CJEU, in the trilogy *Centros*,[87] *Überseering*[88] and *Inspire Art*,[89] provides for the right of Member State companies to transfer head office from one state to another without losing their legal capacity. However, this freedom is subject to restrictions. Notably, the court made a shift in its judgments in *Cartesio* and *Vale*[90] where it reaffirmed, as it did in *Daily Mail*, the power of Member States to determine the connecting factor regarding the applicable law and to bar domestic companies from transferring their seat to another Member State while retaining their status as companies governed by the law of the Member State of incorporation.[91] In this fashion, the Court seems reluctant to give full power to cross-border corporate mobility. Thus, it acknowledges that this power remains exclusively with Member States. Despite these changes in the jurisprudence of the CJEU, European companies still have more freedom to move their (real) seat within the Union.

As noted above, the advancements of freedom of establishment furthered by the CJEU do not extend their effect to third countries' companies.[92] In such circumstances, each Member State may apply the adopted private international rules as regard transfer of seat. Hence, the lenient and liberal approach by Albanian law mitigates mutual exchanges between companies form Member States of the EU. The only way the Albanian market can take advantage of the benefits of corporate mobility is to stick to the incorporation theory.

[86] CJEU 30 September 1987, C-12/86, *Demirel v. Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

[87] CJEU 9 March 1999, C-212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, EU:C:1999:126.

[88] CJEU 5 November 2002, C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NOC)*, EU:C:2002:632.

[89] CJEU 15 November 2003, C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, ECLI:EU:C:2003:512.

[90] CJEU 12 July 2012, C-378/10, *VALE Epitési kft*, ECLI:EU:C:2012:440.

[91] CJEU 16 December 2008, C-210/06, *Cartesio Oktatoés Szolgàltato bt*, ECLI:EU:C:2008:723, para. 110.

[92] See, for example, a case from the German BGH where a Swiss company that had its real seat in Germany was deprived of its legal personality based on the real seat doctrine. Szabados (2012), pp 136–137.

5 Conclusions

The thrust of this article is to shed light on the perplexing case of the law applicable to companies in Albania and its implications in the context of the EU. Therefore, I tried to give a picture of corporate mobility issues in Albania focusing on two main regulatory documents. I first dealt with the approach of the Albanian Company Law which is somehow conservative and less flexible and does not fully fit with the trends in the EU. Against this background, the PIL Act liberalizes this stance by acknowledging the incorporation theory as the one deciding the proper law of the company.

By emphasizing the different approaches of two separate pieces of legislation, I argue that based on the methods of interpretation and given the fashion in the EU, the most favourable regulation is the one that leads to the incorporation theory. Therefore, Albanian courts should read the law properly and further a sustainable solution by establishing more lenient rules with the aim to boost company mobility. The real seat theory and its connecting factor, the 'principal place of business', although legally acceptable, lacks clarity and flexibility for the free movement of companies.

With regard to the determination of the applicable law, in order to eradicate any confusion brought by the collision of norms, legislative intervention may be one solution, by amending the ACL in light of supporting incorporation theory and aligning it with the PIL Act and the jurisprudence of the CJEU. This approach would grant Albania a competitive advantage towards its neighbouring countries which follow the real seat theory and consequently, would make it more attractive to foreign investors.[93]

Also, for future legal interventions, in order to avoid clashes of different pieces of legislation, the pertinent authorities, should take into consideration the following.

First, that the Albanian legislator should consider the jurisprudence that CJEU has produced so far. This stance would help to have a sound understanding of the concepts enshrined in the EU legal instruments. Clearly, this jurisprudence is not obligatory for Albania (not being a Member State), but it helps in understanding the core of EU legal instruments and how they should be applied. In this perspective, the incorporation theory is the optimal way to accomplish corporate mobility.

Second, given the necessity to approximate the legislation with the *acquis*, a more prudent process is recommended with an emphasis not only to the compliance with the EU legislation, but also to the domestic approximation of the legal framework. In view of novelties in the jurisprudence and theoretical treatises in the EU, the conflicting provisions in the Albanian legal framework should be construed properly to ensure the free movement of companies. This approach would, first, align our legislation with the spirit of the developments in the EU and second,

[93] This also coupled with other reforms, such as the reform in the judiciary which might create a friendlier environment for investors. See Paschalidis (2012), p 12, 'The Netherlands are a good example of civilian jurisdictions that adopted the incorporation theory in order to encourage foreign investment' (citing Charny, 'Competition among jurisdiction in formulating corporate law rules: an American perspective on the "race to the bottom" in the European communities', *Harv. Int'l Law Journal* (1991), pp 423, 429).

would give Albania a competitive advantage[94] and contribute to fostering economic growth.[95]

Last but not least, in the European perspective, third country companies, with which the EU has concluded SAAs, can, based on the jurisprudence of the CJEU and the wording of the agreements, invoke rights derived therein especially with regard to corporate mobility within the Union. So far, there have been no cases from Albanian companies or other companies (from countries in the stabilization and association process) claiming infringement of the right of establishment, but the CJEU will have the final say.

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[94] This would be considered a competitive advantage because the countries of the region follow the real seat doctrine. See Dine and Blecher (2016), Art. 8, pp 40–43.

[95] Authors have put emphasis on a positive link between corporate mobility and boosting the confidence in economic growth. McCahery and Vermeulen (2007), p 1.

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