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Virtual Corporate Seat: The Lithuanian Perspective¹

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The article focuses on current developments in substantive company law by exploring an innovative concept of the virtual corporate seat which could be introduced as an alternative to the physical corporate seat, in its traditional understating, through the Lithuanian legislative initiative. Following the analysis on how the proposed concept of the virtual corporate seat is aligned with the concept of the real seat of a domestic company under substantive company law, the article argues that the proposed virtual seat of a company incorporated under national law has to be approached under the formalistic understanding of the corporate seat instead. It concludes that the concept of the virtual corporate seat should be essentially based on the concept of the registered office. The article supports the progressive idea on the virtual corporate seat and addresses the major drawbacks of the proposed legislative initiative on virtual corporate seat to improve it.

Keywords: virtual corporate seat, registered office, incorporation theory, real seat theory, domestic business address.

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Introduction

Article 49 in conjunction with Article 54 of the Treaty on the Functioning of the European Union² entitles companies that are products of national law of Member States to exercise the freedom of establishment as long as the criteria listed in Article 54 of the TFEU are fulfilled. While in the absence of harmonization of substantive company law requirements for establishment of a domestic company, each Member State determines its own conditions regulating incorporation of a company under national law and maintenance of its legal status over the course of its functioning and existence.³

To improve a notion of the corporate seat that should be registered in the business register once a new company is incorporated under national law and be maintained as long as the company continues to exist, by making it more business-friendly, the Lithuanian lawmakers have proposed an innovative concept of the virtual corporate seat which could be introduced as an alternative to the physical corporate seat through the Lithuanian legislative initiative.⁴ The proposed legislative initiative could be potentially attractive for small and medium-size enterprises (hereafter – SMEs) to reduce some administrative and financial costs, and in particular, for SMEs engaging in online business.

The proposed innovation has inspired the author of the article to analyse how this concept fits under the traditional company law framework, making an inquiry on the example of a private limited liability company legal form.⁵ For this purpose, the first part of the article outlines the currently prevailing requirements for corporate seat of a domestic company under the Lithuanian substantive company law as well as describes the Lithuanian legislative initiative on virtual corporate seat. The second part of the article proceeds with the analysis on whether the currently applied real seat approach under substantive company law, which requires a domestic company to maintain its real seat in Lithuania, in general, is up-to-date and whether the proposed concept of the virtual corporate seat is aligned with the concept of the real seat of a domestic company. Then the article evaluates the meaning of the concept of the virtual corporate seat of a domestic company under the formalistic understating with the problematic issues that accompany the concept of the formal corporate seat. The article provides conclusions in the Summary section by supporting the progressive idea on the virtual corporate seat and highlighting the major drawbacks of the Lithuanian legislative initiative, as it currently stands.

² Treaty on the Functioning of the European Union (Consolidated version 2016), Treaty on the Functioning of the European Union (Consolidated version 2016). OJ C 202, 07.06.2016 (hereafter – the TFEU).

³ Kurcz, B., Paizis, A. Company Law, Connecting Factors and the Digital Age – A New Outlook. European Company and Financial Law Review, No. 16 (4), 2019, pp. 437–442.

⁴ Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIIP-2833 of 2018 with Explanatory Note No. XIIIIP-2833. Available: <https://e-seimas.lrs.lt> [last viewed 20.04.2022]. The legislative initiative was an outcome of the project “Create Lithuania” conducted by Raminta Olbutaitė and Adelė Jaškūnaitė that endorsed the concept of the virtual registered office (see: Strategic action plan on establishing virtual registered office (LT) as of February 2018, etc. Available: http://kurklt.lt/wp-content/uploads/2017/10/Virtualios-buvein%C4%97s-%C4%AFgyvendinimo-alternatyv%C5%B3-planas_su-priedais.pdf [last viewed 12.09.2021]).

⁵ Legal entities for profit making activities and established under Lithuanian law (including a private limited liability company (*uždaroji akcinė bendrovė*, UAB) which is the most popular company form in Lithuania), have to be entered in the Register of Legal Entities.

1. Corporate seat of a domestic company in Lithuania

1.1. The state of play

In Lithuania, a limited liability company established under Lithuanian law has to be entered in the Register of Legal Entities (hereafter – a domestic company⁶). To set up a domestic company, founders have to fulfil certain requirements, including a prerequisite for a domestic company to have the corporate seat situated in Lithuania.⁷

A corporate seat of a domestic company should be situated at the place of a permanent managing organ of the company, and it should be defined as the address of the premises in which the corporate seat is located.⁸

Data on corporate seat are one of the particulars that have to be specified in the company's incorporation document.⁹ Incorporation document and company's statutes are executed as separate documents, and it is not required that the statutes specify information about the corporate seat.¹⁰ A subsequent change of the corporate seat does not thus entail amending the company's statutes,¹¹ even though shareholders' general meeting has an exclusive authority to decide on a change of the corporate seat.¹² Consent of the owner of the premises to register the corporate seat at the premises owned by persons other than founders and a company as well as a consent of the co-owner of the premises has to be delivered when incorporating a company or upon a subsequent change of the corporate seat.¹³

In any case – either during the incorporation process or upon a subsequent change of a corporate seat, information about the corporate seat (address) forms part of the essential data about the company, that have to be compulsory disclosed in

⁶ Para. 1 of Art. 1, para. 1 of Art. 11 of the Law on Stock Companies of the Republic of Lithuania No. VIII-1835 of 2000 (State News, 2000, No. 64-1914, with further amendments and supplements; hereafter – the LSC); Art. 2.59, para. 1 of Art. 2.62, para. 1 of Art. 2.63 of the Civil Code of the Republic of Lithuania No. VIII-1864 of 2000 (State News, 2000, No. 74-2262, with further amendments and supplements; hereafter – the CC).

⁷ Para. 7 of Art. 2 of the LSC. The article analysis the concept of the virtual corporate seat under Lithuanian law as of 1 April 2022.

⁸ Para. 1 of Art. 2.49 of the CC. The Supreme Court of Lithuania ruled that a business place of the company is presumed to be at the location of its corporate seat, simultaneously emphasizing that the law does not oblige the company to carry out business at the place of its corporate seat (e.g., the rulings of the Supreme Court of Lithuania in civil cases: 13 February 2012 No. 3K-3-24/2012, 25 November 2008, No. 3K-3-558/2008). A similar view was earlier shared by the Lithuanian scholars (see: *Bartkus, G.* In: *Mikelėnas, V., Bartkus, G., Mizaras V., Keserauskas, Š.* Lietuvos Respublikos civilinio kodekso komentaras [Commentary on the Civil Code of the Republic of Lithuania]. Antroji knyga. Asmenys. Pirmasis leidimas. Vilnius: Justitia, 2002, pp. 125–126). However, Article 2.49 of the CC does not presume that business should take place at the location of the corporate seat. The requirements concerning a location of the principal place of business and the permanent managing organ of a company are different, the legal underpinning of such a presumption is not sufficiently clear.

⁹ Item 2 of para. 2 of Art. 7 of the LSC.

¹⁰ Para. 1 of Art. 2.47 of the CC; para. 2 of Art. 4 of the LSC.

¹¹ Pursuant to Explanatory Note No. XIP-908 of 2009. Available: <https://e-seimas.lrs.lt> [last viewed 14.05.2021]. Before the change in the law, data about the corporate seat have had to be compulsory stated in the company's articles of association. By amending the law, lawmakers attempted to reduce administrative burden and related costs since a change of the corporate seat was often the case in practice.

¹² Item 2 of para. 1 of Art. 20 of the LSC.

¹³ Resolution of the Government of the Republic of Lithuania No. 1407 concerning approval of the Regulations of the Register of Legal Entities of 2003 (State News, 2003, No. 107-4810, with further amendments and supplements), para. 61, 148.

the Register of Legal Entities.¹⁴ Address of the premises (municipality, city, street, exact number of the premises) and the unique number of the premises issued by another public register – the Register of Real Estate have to be submitted to the Register of Legal Entities.¹⁵ It follows that the corporate seat is linked to the physical address. In addition, a domestic company has an obligation to disclose its corporate seat in the correspondence with third parties (both written and those signed with electronic signature and transmitted by electronic means) and on the company website (in cases when the company has it).¹⁶

If the permanent managing organ of the company is situated at the place other than its registered office, third parties may rely on the actual place where the permanent managing organ of a company is located; although, a company may indicate another address for correspondence.¹⁷

A special role of the registered office for enabling third parties to contact with the legal entity as well as ensuring predictability and legal certainty for participants in legal relations, including those with the creditors, was highlighted by the Supreme Court of Lithuania. The Court ruled that a legal entity should both disclose particulars to the Register of Legal Entities and ensure that procedural documents and other correspondence can be actually served at the registered office of a legal entity.¹⁸ From a procedural perspective, judicial documents in civil proceedings have to be served at the registered office of a company, unless the company indicates another address for service of procedural documents or when service is effected by electronic means.¹⁹ To ensure a fair hearing in civil proceedings, a company as a party to the proceedings may incur adverse consequences of not being informed and heard in the proceedings if the company cannot demonstrate necessary diligence in complying with the disclosure requirements about the corporate seat, and the court treats such conduct of the company as a waiver of its rights.²⁰

Given that the mechanism of a public disclosure of information about the corporate seat has to enable third parties contacting the Lithuanian company, the Constitutional Court has emphasized that there should not be a situation when a legal entity maintains no corporate seat and data about the corporate seat are not entered in the Register of Legal Entities.²¹ In its jurisprudence, the Supreme Court of Lithuania has upheld that a legal person cannot function without maintaining a corporate seat (registered office) with its data not being compulsorily disclosed in the Register of Legal Entities.²²

¹⁴ Item 4 of para. 1 of Art. 2.66 of the CC; the ruling of the Supreme Court of Lithuania of 22 May 2019 in civil case No. e3K-3-80-403/2019, para. 19.

¹⁵ Regulations of the Register of Legal Entities No. 1407, para. 18.4; Application form JAR-1: Request to register a legal entity in the Register approved by the decision of the General Manager of the State Enterprise Centre of Registers No.VE-293 (1.3 E) of 2020 (TAR, 2020, No. 8922, with further amendments and supplements).

¹⁶ Item 3 of para. 1 of Art. 2.44 of the CC; para. 6 of Art. 2 of the LSC.

¹⁷ Para. 2 & 3 of Art. 2.49 of the CC.

¹⁸ The rulings of the Supreme Court of Lithuania in civil cases: 22 May 2019 No. e3K-3-80-403/2019, para. 21; 3 January 2018 No. 3K-3-14-1075/2018, para. 24.

¹⁹ Para. 2 of Art. 122 of Code of Civil Procedure of the Republic of Lithuania No. IX-743 of 2002 (State News, 2002, No. 36-1340, with further amendments and supplements).

²⁰ The rulings of the Supreme Court of Lithuania in civil cases: 22 May 2019 No. e3K-3-80-403/2019, para. 21; 3 January 2018 No. 3K-3-14-1075/2018, para. 24.

²¹ The ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017, para. 6.5, 11.5, 16.1.

²² Ruling of the Supreme Court of Lithuania in civil case No. 3K-3-14-1075/2018 of 3 January 2018, para. 23.

To sum up, the Lithuanian substantive company law follows the real seat approach by defining the concept of a corporate seat as a place at which the permanent managing organ of a domestic company is situated, and it also implies that a place of the real seat of the company and a place of its registered office (physical address) both have to coincide and should properly be disclosed at the business register.

1.2. Legislative initiative on virtual corporate seat

In 2018, the Lithuanian Government together with the Ministry of the Economy and Innovation submitted the legislative proposal to introduce a virtual seat for a legal entity.²³ Even though at that time the legislative initiative proved to be unsuccessful, the Lithuanian Parliament is currently considering it revisiting.²⁴

The proposed legislative initiative in Lithuania entitles founders (shareholders) of a legal entity to choose between the traditional (physical) and innovative (virtual) corporate seat. Definition of the physical corporate seat intends to remain the same as under the current regime, i.e. the registered office of the company incorporated under Lithuanian law is identified by the address of the premises in Lithuania where the permanent managing organ of the company is situated.

While the virtual corporate seat is characterised by the following two cumulative attributes. These are: the municipality in Lithuania and the digital address of a legal entity (hereafter – address of eDelivery box) in the Lithuanian state-owned information system that provides electronic delivery services – the National information system for delivery of electronic messages and electronic documents to individuals and legal entities, using the post network (hereafter – the eDelivery system). It is also provided that founders (shareholders) may opt for the virtual corporate seat only if other laws governing legal entities, EU law or international treaties do not require maintaining the physical corporate seat of a legal entity.

Therefore, the proposed new law intends introducing the incorporation approach in relation to the virtual corporate seat of a company established under Lithuanian law, and, at the same time, maintaining the real seat approach in relation to the physical corporate seat of a domestic company.

2. Real seat approach in the context of the proposed legislative initiative

Given that the legislative initiative embodies the twofold approach in addressing a “corporate citizenship” of a company established under Lithuanian law, the following questions arise: firstly, whether for the purpose of substantive company law a requirement for a domestic company to have a real seat situated in Lithuania is up-to-date? Secondly, whether the proposed new rule which places the real seat approach in relation to the physical corporate seat and the incorporation approach in relation to the virtual corporate seat on equal footing is conceptually grounded?

A place of the permanent managing organ of a company shall be the place where operational decisions of the company are made by the corporate body on a regular basis.²⁵ The case law has been, however, evidencing that the company’s real seat did not necessarily coincide with its registered office, and on the company website

²³ Draft law amending Article 2.49 of the CC No. XIIP-2833 with Explanatory Note No. XIIP-2833.

²⁴ Resolution of the Parliament of the Republic of Lithuania No. XIV-968 concerning approval of the Work Program of the IV (Spring) Session of the Parliament of the Republic of Lithuania of 2022 (TAR, 2022, No. 5779), Chapter IV, Section Eleven.

²⁵ *Bartkus, G.* In: *Mikelėnas, V. et al.* Lietuvos Respublikos civilinio kodekso, p. 125.

and in the correspondence with third parties (contracts, invoices, correspondence, etc.) companies have been disclosing the real seat, which was located at a different place than the registered office, as well as that in the civil proceedings third parties have experienced difficulties in reaching the company at the address indicated in the Register of Legal Entities.²⁶ It may suggest that, in practice, companies not always have physical presence at the registered office.

Since in Lithuania the seat of a legal entity has to be situated at the place of its permanent managing organ, which implies an actual place at the particular premises, in the early 2000s the Lithuanian scholars shared the view that a mere post box cannot serve as the corporate seat.²⁷ It cannot remain, however, unnoticed that intermediary service providers offer such type of services as provision of the company's registration address, as well as assistance in handling corporate correspondence. The statistical data suggest that there is a market for such services. For example, pursuant to the *travaux préparatoires* of 2018, there were more than eight thousand companies registered at six locations (addresses) in Vilnius City.²⁸

Having said that, the above demonstrates that, in practice, the rule providing that the registered office and the real seat of a domestic company should coincide does not effectively function, it is worth mentioning that even situations when the business register has no any data about the registered office of a domestic company at all should not be excluded.

An example of such unique situation can be a case when the company's right of contract to use the premises ceases, and, following a request of the owner of the premises, the business register has to delete data about the corporate seat (registered office) of the company in that premises.²⁹ With the rationale behind the rule to protect the ownership rights, as well as avoid situations when data about the corporate seat that are disclosed in the business register let mislead honest third parties dealing with the company, particulars concerning the registered office of the company have to be deleted from the Register of Legal Entities, even though the company fails to provide new data about the registered office.³⁰ To balance multiple interests, there is a 6-month notice period to rectify the situation before the corporate seat is deregistered from the premises at the business register. A notification on a forthcoming de-registration of the corporate seat has to be addressed to the members of the managing organs of the company at their addresses indicated in the Register of Legal Entities and

²⁶ See, e.g., the rulings of the courts in civil cases: Court of Appeal of Lithuania of 20 March 2020, No. e2-608-585/2020, para. 13–19; Kaunas district court of 28 January 2021, No. e2S-236-587/2021, Klaipėda district court of 26 November 2020 No. e2S-1358-524/2020, Klaipėda district court of 15 November 2018 No. e2S-1485-613/2018; Klaipėda district court of 26 April 2018 No. e2S-431-730/2018.

²⁷ Bartkus, G. In: Mikelėnas, V. et al. Lietuvos Respublikos civilinio kodekso, p. 126.

²⁸ Explanatory Note No. XIII P-2833.

²⁹ Regulations of the Register of Legal Entities No. 1407, para. 195–197.

³⁰ The legal framework was enacted on the basis of the ruling of the Constitutional Court of 2018. The provisions of the regulations that permitted an owner of the premises to demand for a de-registration of the registered office of the company from that premises only in the circumstances when the company has a special legal status, namely the company is subject to the bankruptcy or liquidation proceedings, were declared unconstitutional on the basis of the violation of ownership rights of the owners of the premises. The Constitutional Court also held that a company could have maintained a fictitious corporate seat if the owner of the premises had no right to demand for a de-registration of the corporate seat from that premises even though contractual relations have already terminated (the ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017, para. 18).

the request of the owner of the premises is announced in the electronic publication issued by the administrator of the Register of Legal Entities.

A notice of the intended de-registration of the corporate seat addressed to the members of the managing organs of the company should also contain information on a possible initiation of the compulsory liquidation of the company in accordance with Article 2.70 of the CC.³¹ However, the analysis of the provisions of Article 2.70 of the CC suggests that the administrator of the Register of Legal Entities has a right to initiate a corporate dissolution as the *ultima ratio* measure, and that a mere fact that the company has not entered data about the registered office in the Register of Legal Entities should not *per se* be a sufficient ground to initiate the compulsory corporate liquidation. There should be other circumstances demonstrated, and the most relevant basis justifying an initiation of a compulsory liquidation of the legal entity should be a situation when for a period lasting more than 6 months the company cannot be contacted at its physical address of the corporate seat, at its digital address (the address of eDelivery box of the company) and at the addresses of members of the managing organs of the company indicated in the Register of Legal Entities.³² To avoid a commencement of the compulsory liquidation of the company, within a 3-month period the members of the managing organs of a company have to produce the evidence that they can actually be contacted or renew data on the registered office.

Although it can be debated whether the mechanism on compulsory corporate liquidation is effectively applied when the company does not indicate particulars of the corporate seat in the business register and it cannot be simultaneously contacted at the above indicated addresses,³³ it is likely that there is no effective mechanism for the Register of Legal Entities to scrutinize whether the real seat of the company coincides with its registered office.³⁴

On comparative basis, there are examples when Member States have shifted from the real seat approach under substantive company law, according to which domestic companies have had to situate the effective management or central administration or the principal place of business in their territory to the formal-based approach of

³¹ Regulations of the Register of Legal Entities No. 1407, para. 187–189, 191; Decision of the General Manager of the State Enterprise Centre of Registers No. VE-639 (1.3 E) on Approval of the Rules for Maintaining the Register of Legal Entities of 18 December 2018 (TAR, 2019, No. 20370, with further amendments and supplements), para. 59–61, 63–64.

³² If there is no possibility contacting the company at the indicated addresses, the notification has to be published in the electronic publication issued by the administrator of the Register of Legal Entities as well as delivered at the e-mail address provided by the company for communication purposes.

³³ Item 3, para. 1 of Art. 2.70 of the CC. According to the data of the State Enterprise Centre of Registers of 21 April 2021, there were 1152 of closed stock companies liquidated at the initiative of the administrator of the Registrar of Legal Entities on the basis of Article 2.70 of the CC in the period of 2007–2021. The data, however, are not exclusively limited to the circumstances where the company and members of the corporate managing bodies cannot be contacted at the corporate seat and their addresses specified in the Register Legal Entities (i.e., Item 3 of para. 1 of Art. 2.70 of the CC). The provided statistics also include other grounds for a compulsory liquidation of a legal entity at the initiative of the administrator the Registrar of Legal Entities as provided by Article 2.70 of the CC, without differentiating the data concerning a concrete ground for a compulsory corporate liquidation.

³⁴ Heemann, F., Gasparke, K. Lithuania. In: Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M. (eds). *The Private International Law of Companies in Europe. The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 528–529.

the corporate seat (e.g., Czech Republic,³⁵ Denmark³⁶, Germany³⁷). For example, in Germany, after a reform, a German company is no longer required maintaining commercial links with the German territory, but it has to have a corporate seat indicated in the statutes of the company which is understood as a place of the registered office in Germany (but which does not refer to an address of the office), and a domestic business address, which has to be disclosed in the business register.³⁸ In addition, German case law has modified its real seat approach under private international company law by following the place of the incorporation as the main connecting factor in determining the applicable company law in relation to foreign companies incorporated under law of an EU and EEA Member State, while retaining the centre of administration as a connecting factor for private international company law purposes concerning third country-foreign companies (unless the bilateral treaties provide for the incorporation theory for mutual recognition of companies).³⁹

Bearing in mind that under national law Lithuania applies the incorporation theory for recognition of foreign companies as a conflict of law rule,⁴⁰ a systematic approach in ensuring a similar level playing for domestic companies should be encouraged, as well. With the liberal approach related to determination of applicable company law, Lithuania supports a party autonomy and contractual freedom towards foreign companies, respect their choice to govern internal organizational matters by company law of the place of incorporation.⁴¹ As a matter of policy, the more liberal legislative approach applying the formal criterion as a connecting factor for the purposes of determining the law applicable to a foreign company when the substantive criterion under more conservative legislative approach for substantive company law purposes is retained towards a domestic company is, however, difficult to support. In theory, an indirect effect of the substantive company law rule, which requires a domestic company to have a real seat in Lithuania, along with other local factors may be that investors that intend to enlarge their business more internationally within several Member States are not sufficiently promoted in establishing themselves through formation of a Lithuanian company.

To contribute to the debate on whether it is appropriate to retain the real seat approach under substantive company law for a domestic company formed under Lithuanian law, it is worth mentioning a role of the corporate seat in determining a national jurisdiction in civil proceedings concerning the company. The above-mentioned substantive company law rule concerning protection of third parties,

³⁵ *Pauknerova, M., Brodec, J.* Czech Republic, In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe. The Private International Law of Companies in Europe.* Munchen: C. H. Beck, 2019, pp. 309–310.

³⁶ *Birkmose, H. D.* Denmark, In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe. The Private International Law of Companies in Europe.* Munchen: C. H. Beck, 2019, pp. 335–336.

³⁷ *Teichmann, C., Knaier, R.* Experiences with the competition of regulators – a German perspective, In: *A. Jorge Viera González, A., Teichmann, C.* (eds). *Private Company Law Reform in Europe: The Race for Flexibility.* Cizur Menor: Thomson Reuters Aranzadi, 2015, pp. 220–221.

³⁸ *Gerner-Beuerle, C., Siems, M.* Germany, In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe. The Private International Law of Companies in Europe.* Munchen: C. H. Beck, 2019, pp. 385–387.

³⁹ *Ibid.*, pp. 387–389.

⁴⁰ Para. 1 of Art. 1.19 of the CC.

⁴¹ For incorporation theory and real seat theory under private international law of companies see, e.g.: *Rammeloo, S.* *Corporations in Private International Law: A European Perspective.* 1 publ. Oxford etc.; Oxford University Press, 2001, pp. 9–86; *Paschalidis, P.* *Freedom of establishment and private international law for corporations.* 1st ed. Oxford: Oxford University Press, 2012, pp. 3–14, 26–32.

permitting them to invoke the real seat of a company, which does not coincide with its registered office, should not apply when a territorial jurisdiction for civil law cases involving a company is determined.⁴² As the case law stands, Article 29 of the Code of Civil Procedure as procedural law, which establishes that a corporate seat of a legal entity indicated in the Register of Legal Entities shall determine the competent court to bring a claim against the legal entity, has to be applied. In that case, the registered office serves to establish which court is competent for the civil proceedings.

Digital transformation also plays a role in mitigating the real seat approach. Virtual corporate meetings that become new normal especially after the Covid-19 pandemic may bring a challenge in identifying a place where the corporate organ meets for a decision-making geographically. Virtual corporate meetings could be deemed to have taken place at the location (address) of the registered office when substantive company law follows the real seat approach and requires a place of the effective management of the company is in the territory of a Member State of incorporation of the company (e.g., in Luxembourg⁴³).

The foregoing demonstrates serious doubts about the effectiveness of the substantive law rule for a domestic company to maintain a real seat in Lithuania, and, in particular, as far as the real seat of the company should coincide with its registered office. The rule is neither effective in practice nor fits the legal framework systematically, therefore, an approach-based change in a substantive company law by shifting from the real seat theory to the incorporation theory should be encouraged. A concept of the formal seat (the registered office), as an objective and formal criterion, *ex ante* providing legal certainty for participants in legal relations concerning a company, should be a sufficient condition to establish a domestic company and maintain the company's legal status.

It should be further stressed that the legislative initiative would enable founders (shareholders) of a domestic company to select between the real seat of a company located at the physical address, on the one hand, and a virtual corporate seat, on another hand, i.e. between the real seat approach and the incorporation approach. The proposed law would enable a domestic company (founders, shareholders) to decide on the "corporate citizenship". Conceptually, this part of the legislative approach is difficult to support.

Furthermore, introduction of the concept of the virtual corporate seat of a company established under Lithuanian law by its essence means a transition to the adherence to the incorporation theory for substantive company law purposes.

3. Virtual corporate seat as a formal seat of a company

Pursuant to the Lithuanian legislative initiative, it can be assumed that a virtual corporate seat of a company established under Lithuanian law would be determined without a physical address and would encompass two elements – the municipality as the location of the company's registered office in Lithuania and the special digital

⁴² E.g., rulings of the courts in civil cases: Court of Appeal of Lithuania of 12 May 2016 No. e2-992-381/2016; Court of Appeal of Lithuania 12 June 2014 No. 2-1063/2014; Klaipėda district court 15 November 2018 No. e2S-1485-613/2018; Šiauliai district court 24 August 2015 No. 2S-777-569/2015.

⁴³ Conac, P. H., Cuniberti, G. Luxembourg. In: Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M. (eds). *The Private International Law of Companies in Europe. The Private International Law of Companies in Europe. Munchen: C. H. Beck, 2019, p. 545; For online board meetings in a public limited liability company.*

address of a company (the address of eDelivery box) as a business address enabling third parties to officially contact the company by electronic means.⁴⁴

A virtual corporate seat of a domestic company should follow the formalistic understanding of the concept of the corporate seat when a connection between company's activities or company's management or company's administration and its registered office or other place in the territory of that Member State is not required, and it should essentially be based on the notion of the registered office. A virtual corporate seat being viewed under the concept of the formal seat should be built on these premises. It follows that the concept of the virtual corporate seat of a domestic company should be developed to serve similar purposes as the ones to the concept of the registered office are designated. Further, the legal framework should tackle similar problematic issues that are traditionally encountered when for communication purposes a domestic company is permitted to have a mere postal address (post box) in the jurisdiction.

Having said that, at this stage, one fundamental aspect should be emphasized as to that the legislative initiative sets for an electronic communication with the company maintaining the virtual corporate seat. Pursuant to the proposed legislative initiative, the company would have to be officially contacted at the address of eDelivery box.⁴⁵ It can be assumed that the special digital address alone would be used as sufficient for communication with the company. The address of eDelivery box, as one of the compulsory particulars of a legal entity, has to be indicated in the Register of Legal Entities and in the correspondence with third parties and on the company website.⁴⁶ A delivery through the eDelivery system by using an address of eDelivery box of a company has a similar legal and evidentiary value as a traditional paper based delivery of the registered postal mail.⁴⁷

Without a physical address, use of the address of eDelivery box as a proper way to contact the company is, however, not without its own problems. It should be, in particular, noted that an electronic communication under the eDelivery system is limited to the domestic context and, generally, does not enable foreigners to become users of the eDelivery system.⁴⁸ Therefore, to achieve the goals related to the proposed concept of the virtual corporate seat of a domestic company, the legislative framework should be suitable for that company to be contacted by third parties.

⁴⁴ Also see *Mikalonienė, L.* Having Company Law Fit More for a Digital Age. *European Company Law*. Editorial, Vol. 19 (1), 2022, pp. 4–5.

⁴⁵ Draft law amending Article 2.49 of the CC No. XIII-P-2833 with Explanatory Note No. XIII-P-2833.

⁴⁶ Effective from 1 January 2022, an address of eDelivery box is compulsory data of a legal entity that have to be entered in the business register. The rule applies to legal entities that after that date are registered at the business register as well as to legal entities that decide to modify relevant corporate particulars in the register (para. 2 of Art. 14 of the Law amending articles 1.73, 1.122, 2.44, 2.49, 2.54, 2.66, 6.166, 6.192, 6.228⁷, 6.228¹⁴, 6.901, 6.991 and 6.993 of the Civil Code of the Republic of Lithuania No. XIV-421 of 2021 (TAR, 2021, No. 14578).

⁴⁷ Law on Public Administration of the Republic of Lithuania No. VIII-1234 (State News, 1999, No. 60-1945, with further amendments and supplements), Art. 9(1).

⁴⁸ Resolution of the Government of the Republic of Lithuania No. 914 concerning approval of Regulations on provision of electronic delivery services by means of the National information system for electronic delivery using the post network of 2015 (TAR, 2015, No. 13240, with further amendments and supplements), para. 4. Pursuant to Conclusion of the Economic Committee of the Lithuanian Parliament No. 108-P-48 of 5 December 2018 regarding the draft law amending Article 2.49 of the CC No. XIII-P-2833 (Available: <https://e-seimas.lrs.lt/> [last viewed 14.05.2021]), the proposed law concerning a virtual seat of the legal entity has had to be improved since foreign nationals could not become users of the eDelivery system.

Furthermore, a threat of potentially undue intervention into a private autonomy of a company electing the virtual corporate seat as a result of the imposed duty to use particular electronic communication means (the eDelivery system) and an uncertainty in whether fair competition is preserved, as long as a particular Lithuanian state-owned service provider has a reserved right to supply the services, as emphasized in the *travaux préparatoires*, should be taken into consideration in the assessment of the proposed legislative initiative as well.⁴⁹

These drawbacks should not, however, lead to withdrawing the innovative idea of the virtual corporate seat, but should rather encourage to further improving and developing the proposed legislative initiative.

Summary

The Lithuanian legislative initiative, which proposes an enabling approach for founders (shareholders) of a domestic company to choose between a virtual corporate seat rather and a physical corporate seat in its traditional meaning, and has a focus on promoting more flexible regulatory approach in substantive company law from an SME and start-up perspectives, should be supported. Yet, at this stage, it fails to address certain significant aspects and should be further improved and developed. Firstly, the proposed innovative concept of the virtual corporate seat of a domestic company by its essence means a transition to the adherence to the incorporation theory for substantive company law purposes, and an overall change from the real seat theory to the incorporation theory under substantive company law should be clearly embodied *ex lege*. Secondly, when proposing a concept of the virtual corporate seat which is essentially to be viewed under the notion of a registered office, the lawmakers should offer solutions on how a domestic company maintaining the virtual corporate seat can be properly contacted by third parties.

Sources

Bibliography

1. Birkmose, H. D. Denmark. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 334–349.
2. Conac, P. H., Cuniberti, G. Luxembourg. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 544–554.
3. Gerner-Beuerle, C., Siems, M. Germany. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 385–414.
4. Heemann, F., Gasparke, K. Lithuania. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 527–543.
5. Kurcz, B., Paizis, A. Company Law, Connecting Factors and the Digital Age – A New Outlook. *European Company and Financial Law Review*, No. 16 (4), 2019, pp. 434–456.
6. Mikalonienė, L. Having Company Law Fit More for a Digital Age. *European Company Law*. Editorial, Vol. 19 (1), 2022, pp. 4–5.
7. Mikelėnas, V., Bartkus, G., Mizaras V., Keserauskas, Š. Lietuvos Respublikos civilinio kodekso komentaras [Commentary on the Civil Code of the Republic of Lithuania]. Antroji knyga. Asmenys. Pirmasis leidimas. Vilnius: Justitia, 2002.

⁴⁹ Conclusion of the Legal Department at the office of the Lithuanian Parliament regarding the Draft law amending Article 2.49 of the CC No. XIIP-2833 of 9 November 2018. Available: <https://e-seimas.lrs.lt/> [last viewed 14.05.2021].

8. *Paschalidis, P.* Freedom of establishment and private international law for corporations. 1st ed. Oxford: Oxford University Press, 2012.
9. *Pauknerova, M., Brodec, J.* Czech Republic. In: *Gerner-Beuerle, C., Mucciarelli, F. M., Schuster, E. P., Siems, M.* (eds). *The Private International Law of Companies in Europe*. Munchen: C. H. Beck, 2019, pp. 308–333.
10. *Rammeloo, S.* *Corporations in Private International Law: A European Perspective*. 1st publ. Oxford, etc.: Oxford University Press, 2001.
11. *Teichmann, C., Knaier, R.* Experiences with the competition of regulators – a German perspective. In: *A. Jorge Viera González, A., Teichmann, C.* (eds). *Private Company Law Reform in Europe: The Race for Flexibility*. Cizur Menor: Thomson Reuters Aranzadi, 2015, pp. 209–241.

Normative acts

1. Treaty on the Functioning of the European Union (Consolidated version 2016). OJ C 202, 07.06.2016.
2. Code of Civil Procedure of the Republic of Lithuania No. IX-743 of 2002 (State News, 2002, No. 36-1340, with further amendments and supplements).
3. Civil Code of the Republic of Lithuania No. VIII-1864 of 2000 (State News, 2000, No. 74-2262, with further amendments and supplements).
4. Law amending articles 1.73, 1.122, 2.44, 2.49, 2.54, 2.66, 6.166, 6.192, 6.228⁷, 6.228¹⁴, 6.901, 6.991 and 6.993 of the Civil Code of the Republic of Lithuania No. XIV-421 of 2021 (TAR, 2021, No. 14578).
5. Law on Stock Companies of the Republic of Lithuania No. VIII-1835 of 2000 (State News, 2000, No. 64-1914, with further amendments and supplements).
6. Resolution of the Parliament of the Republic of Lithuania No. XIV-968 concerning approval of the Work Program of the IV (Spring) Session of the Parliament of the Republic of Lithuania of 2022 (TAR, 2022, No. 5779).
7. Resolution of the Government of the Republic of Lithuania No. 1407 concerning approval of Regulations of the Register of Legal Entities of 2003 (State News, 2003, No. 107-4810, with further amendments and supplements).
8. Resolution of the Government of the Republic of Lithuania No. 914 concerning approval of Regulations on provision of electronic delivery services by means of the National information system for electronic delivery using the post network of 2015 (TAR, 2015, No. 13240, with further amendments and supplements).
9. Decision of the General Manager of the State Enterprise Centre of Registers No.VE-293 (1.3 E) of 2020 approving Application form JAR-1: Request to register a legal entity in the Register (TAR, 2020, No. 8922, with further amendments and supplements).
10. Decision of the General Manager of the State Enterprise Centre of Registers No. VE-639 (1.3 E) on Approval of the Rules for Maintaining the Register of Legal Entities of 18 December 2018 (TAR, 2019, No. 20370, with further amendments and supplements).

Case law

1. Ruling of the Constitutional Court of the Republic of Lithuania No. KT10-N6/2018 of 4 May 2018, case No. 6/2017.
2. Ruling of the Supreme Court of Lithuania No. e3K-3-80-403/2019 of 22 May 2019.
3. Ruling of the Supreme Court of Lithuania No. 3K-3-14-1075/2018 of 3 January 2018.
4. Ruling of the Court of Appeal of Lithuania No. e2-608-585/2020 of 20 March 2020.
5. Ruling of the Court of Appeal of Lithuania No. e2-992-381/2016 of 12 May 2016.
6. Ruling of the Court of Appeal of Lithuania No. 2-1063/2014 of 12 June 2014.
7. Ruling of Kaunas district court No. e2S-236-587/2021 of 28 January 2021.
8. Ruling of Klaipėda district court No. e2S-1358-524/2020 of 26 November 2020.
9. Ruling of Klaipėda district court No. e2S-1485-613/2018 of 15 November 2018.
10. Ruling of Klaipėda district court No. e2S-431-730/2018 of 26 April 2018.
11. Ruling of Šiauliai district court No. 2S-777-569/2015 of 24 August 2015.

Other sources

1. Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania. Available: <https://e-seimas.lrs.lt> [last viewed 20.04.2022].
2. Explanatory Note No. XIIIIP-2833 of 2018. Available: <https://e-seimas.lrs.lt> [last viewed 20.04.2022].

3. Explanatory Note No. XIP-908 of 2009. Available: <https://e-seimas.lrs.lt> [last viewed 14.05.2021].
4. Conclusion of the Economic Committee of the Lithuanian Parliament No. 108-P-48 of 5 December 2018 regarding the draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIIP-2833. Available: <https://e-seimas.lrs.lt/> [last viewed 14.05.2021].
5. Conclusion of the Legal Department at the office of the Lithuanian Parliament regarding the Draft law amending Article 2.49 of the Civil Code of the Republic of Lithuania No. XIIIIP-2833 of 9 November 2018. Available: <https://e-seimas.lrs.lt/> [last viewed 14.05.2021].
6. Project “Create Lithuania” conducted by Raminta Olbutaitė and Adelė Jaškūnaitė. Strategic action plan on establishing virtual registered office (LT) as of February 2018. Available: http://kurkl.lt/wp-content/uploads/2017/10/Virtualios-buvein%C4%97s-%C4%AFgyvendinimo-alternatyv%C5%B3-planas_su-priedais.pdf [last viewed 12.09.2021].
7. Data of the State Enterprise Centre of Registers of 21 April 2021.

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