THE EUROPEAN COMPANY AND CURRENT EUROPEAN COURT OF JUSTICE RULINGS ON THE FREEDOM OF ESTABLISHMENT – CONSISTENT EUROPEAN REGULATIONS?

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Abstract

Companies doing business cross-boarders in Europe can choose between several national and European legal alternatives. In the centre of this paper, are two of them: alternatives provided by the freedom of establishment and the European company statute. The focus of this paper is not on the practical implications of these two action alternatives for enterprises, but on the judicial issues arising in this context.

After presenting the current rulings of the European Court of Justice regarding the freedom of establishment and the basic contents of the legal acts, council regulation No. 2157/2001 and council directive No. 2001/86/EC, regarding the European company (SE), two issues of great importance are examined in this context: the issue of the governing law and the issue of harmonisation. Finally it is presented to the reader to what extent those European provisions are consistent, respectively, constrain one another.

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Developments of European company law

The European Union (EU) continuously grows. Member States move together politically as well as economically. Stability and moreover predictability of the law is vital for European companies in order to assert their position in a globalised competition. Consequently, the importance of European company law initiatives has increased constantly. The field of company law is seen as one of the most dynamic in the European dimension (Bayer, 2004), even though legal initiatives concerned mostly public limited companies and ignored private limited companies in the past. In this context, the various company law directives and the creation of the European Economic Interest Grouping (EEIG) are of great importance[1].

After a period in the 1990s in which hardly any advancement was made in this field, the debate revived recently. Especially, current rulings of the European Court of Justice (ECJ) regarding the freedom of establishment and the freedom of capital, the Council's agreement on the European company (Societas Europaea = SE), and the Commission's action plan of modernising company law and enhancing corporate governance in the EU[2] stimulated discussion and accelerated progress in this area. However, it would go far beyond the scope of this paper to discuss all of these initiatives in detail.

The focus of this paper is on the effects of two initiatives and their interaction: the ECJ rulings on the freedom of establishment and the SE. After presenting the fundamental statements of the ECJ and the fundamental provisions regarding the SE, it is examined in what way these two legal initiatives are consistent, respectively, constrain each other. For that reason, two aspects are distinguished and are examined below: first of all the connecting factor for the governing law, meaning the issue of incorporation versus real seat theory; and secondly, harmonisation, meaning the issue of regime competition versus approximation.

The Freedom of Establishment – Recent Rulings of the European Court of Justice

The freedom of establishment is one of the principle freedoms granted by the EC Treaty. It grants all EU citizens the establishment in any Member State and the practice of self-employment in that Member State. This is not only applicable to natural persons but also to legal persons. For the latter one, primary and

1 For details see http://europa.eu.int/comm/internal_market/en/company/company/official/index.htm

2 For details see http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf

secondary freedom of establishment can be distinguished. Primary freedom of establishment is understood as the right to establish the headquarters, while secondary freedom of establishment concerns the setting-up of agencies, branches, or subsidiaries (ECT Articles 43 and 48). Generally speaking, any limitation of freedom of establishment or movement of capital must be justified by imperative requirements in the general interest that must be suitable to attain the objective and must be reasonable.

Since 1988, the ECJ took four fundamental decisions on the freedom of establishment of legal persons, namely the Daily Mail Case, the Centros Case, the Überseering Case, and the Inspire Art Case, which are presented in more detail below. The Daily Mail and General Trust PLC (Case 81/87 from September 27th, 1988) wanted to transfer its head office from the UK to the Netherlands, because high hidden reserves should have been sold under more favourable Dutch tax law. From a company law perspective there is no issue, because both countries follow incorporation theory resulting in unlimited legal capacity of the company. However, the transfer of the head office was subject to the Inland Revenue's agreement due to tax law provisions. As the Inland Revenue wanted to keep its tax claim on the hidden reserves, it rejected the transfer. The ECJ argued in this case that the limitation of transfer of head office is not considered as a violation of the freedom of establishment, for the reason that the freedom of establishment is granted by the possibility to set-up agencies, branches, or subsidiaries. The ECJ even said that a right to transfer the head office from one Member State to another is not indicated by Articles 43 and 48 ECT due to the status-quo of community law. Consequently, the Inland Revenue could refuse moving out.

In Centros (Case C-212/97 from March 9th, 1999), the ECJ had to take a decision on the secondary freedom of establishment. A Danish couple found a private limited company (ltd.) in the UK, where it did not commence operations at all. Then, they wanted to register a branch in Denmark, which was rejected, because the Centros ltd. did not keep Danish minimum capital requirements and, thus, by forming a British ltd. intentionally evaded Danish company law. The issue in this case is not the freedom of establishment, but which precautionary restrictions can be taken by Member States against companies that do business in its country but are subject to foreign law in order to protect domestic stakeholders, such as creditors, employees, or minority shareholders (Roth, 2000).

In this case, the ECJ decided that registration cannot be refused by Member States due to the fact that companies that were formed in accordance with the

law of another Member State intentionally evaded national provisions. "That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud" (paragraph 39). However, these measures must fulfil the four conditions test: "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it" (paragraph 34). In Centros, these conditions were not fulfilled (see paragraphs 35, 37 and 38).

In Überseering (Case C-208/00 from November 5th, 2001), the ECJ dealt with the questions if it is in the spirit of Articles 43 and 48 ECT to recognise the legal capacity and the capacity to be a party to legal proceedings of companies that are incorporated in accordance with the law of another Member State, even if this company has transferred its head office to this second Member State. The subsequent issue is if Member States should evaluate the legal capacity and the capacity to be a party to legal proceedings of companies by the law of their countries of incorporation (paragraph 21). Überseering BV, incorporated and registered in the Netherlands, was owner of a property in Düsseldorf and engaged a company for the refurbishment of a hotel and a garage on the site. The contractual obligations were fulfilled, but Überseering BV claimed that the paint work was performed poorly. During the argument out of court, two Germans took over most of the business share, resulting de facto in a transfer of the administrative centre from the Netherlands to Germany. In 1996, Überseering BV brought the action before the court and claimed compensation of expenses incurred in remedying the defects. The Landesgericht and later the Oberlandesgericht dismissed the case, because a company incorporated under Dutch law, but with its head office in Germany, does not have legal capacity in Germany and, thus, could not bring legal proceedings there (paragraph 9). Actually, a company validly incorporated under the law of another Member State and with its registered office there does not have an alternative to reincorporation in Germany, if it wished to enforce its rights before a German court (paragraph 79).

Here the ECJ argued that the requirement of reincorporation of the same company in Germany even must be considered as the negation of freedom of establishment (paragraph 81) and consequently is incompatible with Articles 43 and 48 ECT (paragraph 82). The ECJ decided that "where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity

and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A')" (paragraph 95).

The last case presented is the Inspire Art Case (Case C-167/01 from September 30th, 2003). In this case, the ECJ had to decide, whether Member States are allowed to put limitations on foreign companies incorporated under the law of another Member State that have been recognised already. Thus, the Inspire Art case starts up where the Überseering decision ends. Inspire Art was formed under British law as a private limited company and registered in the UK. It had a branch in the Netherlands, which was registered in the commercial register without any indication that it was a formally foreign company within the meaning of Article one of the WFBV (Wet op de Formeel Buitenlandse Vennootschappen = Law on Formally Foreign Companies). Due to the fact that Inspire Art dealt exclusively in the Netherlands, the Chamber of Commerce applied to the Kantongerecht te Amsterdam that it should be added to the registration that Inspire Art is a formally foreign company resulting in the application of stricter provisions regarding disclosure, accounting, and minimum capital requirements. Inspire Art denied that its registration was incomplete. In the following legal conflict, the Kantongerecht asked the ECJ to decide if Articles 43 and 48 preclude the Netherlands from attaching additional conditions to companies correctly formed under the law of another Member State but dealing exclusively in the Netherlands and, furthermore, if the WFBV contravenes Community law (paragraph 39).

The ECJ decided that only those requirements of the WFBV comply with Community law that correspond to the disclosure requirements set out in the 11th Council Directive (89/666/EEC). The other requirements - going beyond Community law - are not permissible, respectively, do not comply with the freedom of establishment (Schanze/Jüttner, 2003). In Inspire Art, the ECJ again stresses that the fact alone that a company choses the least restrictive company law "is not sufficient to prove the existence of abuse or fraudulent conduct" (paragraph 139) which could justify national restrictions on the freedom of establishment (Triebel/Hase, 2003). Overall, the essence of the Inspire Art decision can be seen in that Member States must recognise and respect companies formed in accordance with the law of another Member State and that Member States are not allowed to impose special procedural or liability provisions on them (Bayer, 2003).

In sum, the ECJ has developed step by step a consistent case law regarding companies' freedom of establishment (Eidenmüller/Rehm, 2004). First, it decided

on the question as to limitations on the moving out of companies (Daily Mail), then, on the issue of moving in (Centros) and on the recognition of companies' legal capacity (Überseering). Lately, the ECJ decided on the question as to additional limitations to foreign companies, incorporated correctly in another Member State but doing business solely in this Member State (Inspire Art). By that consistent jurisprudence, the ECJ did not only begin to clarify the scope of the freedom of establishment but also provided companies with predictability of law (Lutter, 2003; Maul/Schmidt, 2004). Thus, taking advantage of freedom of establishment can be considered as a "real" alternative with respect to the decision on the legal structure of a company.

The European Company Statute

On October 8th, 2001, after more than 30 years of discussion[3], the Council of Ministers enacted two legal instruments: the council regulation (No. 2157/2001) on the Statute for a European company (SE), subsequently referred to as SE/Re, and the council directive (2001/86/EC) supplementing the Statute for a European company with regard to the involvement of employees, subsequently referred to as SE/Di. But why did it take the Member States more than 30 years to agree on the SE? In this context, two major obstacles can be identified: the scope of an European group law and employee involvement.

The first obstacle was overcome with the Commission's proposals in 1989 and 1991 (European Commission, 1989a and 1989b; European Commission, 1991a and 1991b), a complete revision of the 1970 proposal which would have created a comprehensive European group law (European Commission, 1970). In this proposal the SE became a hybrid form. This means that the institutional frame of the European company is governed by Community law, while certain aspects, such as tax law or capital maintenance requirements, are subject to national provisions. At the same time, the proposal was divided into two parts: a regulation on the statute of the European company and a directive supplementing this regulation with regard to the standing – explicitly not participation - of employees. Regarding employee participation, the directive would have put companies in the position to choose between three equivalent models of employee involvement – equivalent in the view of the Commission. Due to Member States' disagreement[4] on employee involvement, the matter was

3 The roots of the European company even go back to the French Notary Convention in 1959 where the French notary Tibièrge suggested the introduction of a European public limited company (Bärmann, 1970).

4 Especially Germany, Ireland, and the UK disagreed with the European Commission that the models and their impacts would be equivalent (Buchheim, 2001).

let to rest again.

Eventually, the obstacle of employee involvement was overcome by the suggestions of the so-called Davignon Report (European Commission, 1997), which was prepared by a group of high-ranking experts on European systems of worker involvement presided by Etienne Davignon. Due to the great diversity of national models of employee involvement, the group pleaded for "negotiated solution(s) tailored to cultural differences and taking account of the diversity of situations. […] The path we are opening up is therefore that of negotiations in good faith between the parties concerned, with a view to identifying the best solution in each case, without imposing minimum requirements" (European Commission, 1997, paragraphs 94c and 95). However, it needed another two compromises before it could come to the "miracle of Nice" (Hirte, 2002:1).

The first compromise is the so-called "before and after" principle and was made in 1998 (Herfs-Röttgen, 2001; Blanquet 2002). It specifies that employees' acquired rights regarding worker participation must be secured, meaning that "rights in force before the establishment of the SE should provide the basis for employee rights of involvement in the SE" (Directive 2001/86/EC, Recital 18). After this agreement, only one Member State, namely Spain, still impeded the deal. This anew standstill was overcome during the Nice Summit in December 2000 by the agreement on the opting-out clause, which was added due to Spain's urging (Köstler, 2001; Pluskat, 2001) and means that Member States have the opportunity to make it possible for an SE to register without an agreement on the involvement of employees in case of a merger between companies that were not subject to worker participation so far (Directive 2001/86/EC, Recital 9). Eventually, the SE/Re and the SE/Di, which are specified in more detail below, were enacted on October 8th, 2001. Consequently, the SE could have been found by joint-stock companies on October 8th, 2004 for the first time[5].

The SE is available only for companies with certain legal forms, namely joint-stock companies such as the British plc. or ltd. or the German AG or GmbH[6]. Moreover, companies concerned must be subject to law in at least two Member States (article 2 SE/Re). The SE, which has a separate legal personality, must be seen as another legal alternative for joint stock companies doing business in

5 The first SE has been established on October 12th, 2004 by Strabag Bauholding and is registered in Klagenfurt, Austria (Gagawczuk, 2004; Zeiner, 2004).

6 For a comprehensive list of all legal forms concerned at least for the EU-15 the reader is referred to the Annex of the SE/Re.

Europe. In contrast to the 1970ies draft the SE/Re does not constitute a comprehensive European group law, but provides companies with an institutional frame that is filled by national law. Consequently, it cannot be spoken about one uniform SE but moreover it must be spoken of 28[7] different ones (Hommelhoff, 2001; Schwarz, 2001; Wiesner, 2001).

The minimum capital, which, in general, must be divided in shares, amounts to € 120.000,--[8]. Additionally the abbreviation "SE", which is provided exclusively for European companies, must be put in front of or behind the company name (SE/Re Article 11). For the internal corporate governance structure is specified that the SE must have a general meeting of shareholders and either an administrative board, so-called one-tier system, or a management board and a supervisory board, so-called two-tier system, as governing bodies (SE/Re Articles 38 to 45 and 52 to 59). The companies are free to choose between the two systems.

Generally speaking, there are four ways of establishing a SE. First of all, an SE can be established by a merger, which is only available to public limited companies from at least two different Member States[9]. Secondly, a SE can be found by the formation of a holding company, which is available to public and private limited companies that have their registered offices in at least two different EU or EEA Member States or have subsidiaries or branches in Member States other than that of their registered office. Thirdly, a SE can be established by the formation of a joint subsidiary, which is available under the same circumstances applicable to the formation of a holding company to any legal entities governed by public or private law. Finally, the SE can be found by the conversion of a public limited company that was previously formed under national law and had a subsidiary in at least one other Member State for at least two years. Even though a (national) public limited company converted into a SE is not allowed to move its registered office at the same time as the transformation takes place (SE/Re Article 37 paragraph 3) and is not allowed to reduce the form of board-level representation (SE/Di Article 4 paragraph 4), companies might benefit from a transformation, because then they can choose freely between the one-tier and the two-tier system of corporate governance. According to Wenz (2003) this aspect increases undoubtedly the interest of companies in the SE.

7 An SE can be established not only by companies registered in the EU but also by companies registered in the European Economic Area (EEA) due to the decision by the EEA joint committee (No 93/2002) to accept the SE/Re and the SE/Di.

8 Countries that are not members of the European Monetary Union are free to rule that the capital and the annual reports are kept and presented in the currency of that country.

9 In this context, Member States refers to EU Member States and to EEA Member States.

In addition, Wenz (2003) identifies another application of the European company statute, the cross-border-SE that means the transfer of registered office (SE/Re Article 7). According to the SE/Re the transfer of registered office does not require liquidation and new foundation of the company anymore. Rather companies are able to transfer their registered office by preserving their legal identity resulting in a higher degree of mobility of the SE. Even though the possibility to transfer the registered office is not completely unlimited, as aforementioned, the provisions increase considerably the mobility of European companies.

As mentioned above worker involvement is governed by the SE/Di (see for instance Pluskat, 2001; Teichmann, 2002). The crucial link between the SE/Re and the SE/Di is that the SE may not be registered unless an agreement on arrangements for employee involvement has been concluded (Article 12 paragraph 2 SE/Re; see also Blanquet, 2002). By that, it is guaranteed that these provisions are respected (Weiss, 2003). In this context, it is stressed that the SE/Di does not affect national provisions with respect to worker involvement at the plant level meaning that, for instance, the German Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) is still applicable (Köstler, 2002).

According to the SE/Di involvement of employees is understood as any mechanism through which employees or their representatives might influence decision making within the company (Article 2 lit. h SE/Di). In this regard, the SE/Di draws a clear distinction between information[10] and consultation[11] across boarders on the one hand and participation[12] on the other (Heinze, 2002; Teichmann, 2002; Weiss, 2003). While a proceeding for information and consultation must be established in every SE by creating a representative body, the form of participation or co-determination in the SE is subject to negotiations. These negotiations on worker involvement are conducted by the management and the special negotiating body (SNB), which consists of employees'

10 Information means that the competent organ of the SE informs the representative body about any issues that concern the SE itself, its subsidiaries or its establishments in another Member State so that the representative body is able to assess in depth the possible impacts (Se/Di Article 2 lit. i).

11 Consultation means the establishment of dialogue and exchange of views between the representative body and the competent organ of the SE. The opinion expressed by the representative body might be considered in the decision making within the SE (SE/Di Article 2 lit. j).

12 Participation means the influence of the representative body on the decision making within the SE by the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ (SE/Di Article 2 lit k).

representatives that are elected or appointed in proportion to the number of employees employed in each Member State by the companies concerned (for details see SE/Di Article 3). Generally speaking, the representative body and the administrative or supervisory body of the SE "shall work together in a spirit of cooperation" (SE/Di Article 9).

The task of the SNB is to negotiate an agreement on the arrangements for the involvement of the employees within the SE with the management of the companies concerned (SE/Di Article 4). The agreement shall specify the scope of the agreement, the composition, the functions, the procedure for information and consultation, and the frequency of meetings of the representative body as well as the financial and material resources to be allocated to the representative body. If the SNB and the management agree on board-level representation, the number of members and the procedure of their election, appointment, recommendation or opposition by employees and their rights shall be specified in the agreement, too. Additionally, it shall specify the date of entry into force, its duration, cases were the agreement should be renegotiated and the procedure for renegotiation. The duration of negotiations is fixed to six months from the establishment of the SNB, but may be extended up to twelve months by agreement of the parties involved (SE/Di Article 5).

If the parties do not arrive at an agreement within the prescribed time and the management still wants to form a SE, or the parties involved agree so, then standard rules apply (SE/Di Article 7 and part three of the annex), which are distinguished into three parts in the annex of the SE/Di. The standard rules for the composition of the representative body (SE/Di Annex part 1) as well as the standard rules for information and consultation (SE/Di Annex part 2) are similar to those that are set out in the Directive on European Works Councils (Council Directive 94/45/EC; Weiss, 2003). In the following paragraph, the standard rules for participation (SE/Di Annex part 3) are presented in more detail, because they are seen as being crucial in this context (Weiss, 2003).

Which standard rules are applicable depends heavily on the form of foundation, the board-level representation that was prevalent so far, and on the proportion of all employees of the companies concerned who were covered by a certain form of co-determination (SE/Di Article 7). Regarding the establishment by transformation, the standard rules apply, when the company concerned was subject to board-level representation so far meaning that the same form shall continue to apply to the SE. Regarding establishment by merger, the standard rules apply, when 25 percent of the total number of employees of the companies

concerned were covered by some form of co-determination or even less than 25 percent if the negotiating parties agree on its application. Regarding the establishment by formation of a holding/subsidiary, the standard rules apply, if 50 percent of the total number of employees of the companies concerned were covered by some form of co-determination or even less than 50 percent if the parties involved agree so.

Besides provisions on the negotiation procedure and the standard rules, the content of the agreement and the standard rules, the SE/Di contains miscellaneous provisions as well. In section III of the SE/Di provisions regarding the reservation and confidentiality (SE/Di Article 8), the operation of the representative body and procedure for the information and consultation of employees (SE/Di Article 9), the protection of employees' representatives (SE/Di Article 10), and the misuse of procedure (SE/Di Article 11) can be found, but are not presented here in detail.

Issues

After having presented the current rulings of the ECJ regarding freedom of establishment and the European company, the paper now turns to the issues arising in this context: the issue of companies' governing law, and the issue of harmonisation. The aim of this paper is not to plead for one or another approach, but moreover to give the reader an impression of the concepts available and to demonstrate how the two action alternatives fit into these concepts.

First of all the issue of the governing law of an enterprise is discussed. Two major approaches can be identified: real seat theory and incorporation theory. In the literature, arguments in favour as well as against both theories can be found (see for example Geiger, 2003). According to real seat theory[13], which is seen as a protection theory, the application of the governing law depends on the location of the registered office of a company. The logic of real seat theory is seen in the argument that companies should be governed by the law of the State where they do most of their business, or how Kern (2004:97) expresses it where the company actually "lives" and whose people are concerned of these activities (Geiger, 2003). In other words, it is argued that the control of these organisations should be given to that state whose economic and political interests are concerned mostly (Staudinger/Grossfeld, 1998). Thus, the State, where the company has its registered office, determines the law applicable to the

13 European countries following real seat theory are, inter alia, Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal, and Spain (Staudinger/Grossfeld, 1998).

company's internal and external relations. This means that all questions arising from the "birth" to "death" of a company are evaluated according to the law, in which the company is registered, resulting in the dissolution of the company when the registered office is transferred to another country (Kern, 2004).

According to incorporation theory[14], the application of the governing law is connected with the company's location of incorporation which is usually provided in the statutes. Consequently, the country where the company was incorporated determines the governing law. The location of the registered office is of no importance in this context. Meaning the transfer of the registered office from one country to another does not have any impact on the governing law. In contrast to real seat theory, protection of various interests is given up in favour of founders' freedom to decide which regime offers the most favourable conditions for their purposes (Trefil, 2003; Kern, 2004). However, the weakness of incorporation theory is seen in exactly this argument of regime competition meaning that companies tend to incorporate in those countries where the least protective respectively most liberal company law is in place (Kern, 2004) possibly resulting in the so-called Delaware effect or race to the bottom (Cary, 1974; Fischel, 1982)[15].

Regulatory competition can also be examined from the harmonisation perspective that in general distinguishes between approximation and reciprocal recognition of the laws of the Member States. Simply put, incorporation theory is based on reciprocal recognition of the laws. Before going in more detail on that, approximation of the laws is examined below. According to article 3 paragraph 1h ECT, the approximation of the laws is seen as a useful instrument for the realisation of the common market. It is aimed to reduce transaction costs and make the common market functioning without friction. Eventually the complete approximation of the laws of the Member States would result in one European legal order meaning, from an economic view, that cross-boarder transactions would not cause transaction costs anymore and, thus, would be an efficient solution. However, it must be kept in mind that this is true only from a static point of view (Kern, 2004). Additionally, it is pointed out that the process of approximation of the laws might be sedately and cumbersomely especially with an ever increasing number of Member States and, eventually, might freeze the

14 European countries following incorporation theory are, inter alia, Denmark, Finland, Ireland, Liechtenstein, the Netherlands, Norway, Sweden, and the United Kingdom (Staudinger/Grossfeld, 1998).

15 In order to overcome the Delaware effect, incorporation theory has been subject to several modifications resulting in numerous mixed approaches, which are not examined here in detail (for an overview see Halen, 2001).

status-quo. If one considers the continuous struggle for adjustment to changing environmental conditions as the main issue, then other legal solutions are required.

Following economics, it is suggested that competitive markets generate optimal results. In this context Kern (2004) equates centrally planned economies with the approximation of the laws, which is outdated, and market economies with the reciprocal recognition of the laws, which is viewed as an alternative solution in the legal context. Even though regulatory competition might not be the panacea, overall it might create more efficient results than approximation. In his analysis Kern (2004:50) argues that "especially the great variety of legal ideas, which are related with the huge differences in legal orders in Europe, improve enterprises' abilities to adjust to changing environmental conditions". As a result of this regime competition, agreeing with Kern (2004) it can be said that it is not the least restrictive company law that will persist, but the company law that is able to balance best the interests of all stakeholders. In other words, those company law standards will persist that are in line with the market needs meaning standards that give enterprises the opportunity to achieve competitive results and moreover to survive in a fast-changing environment in the long run.

At this point, the question arises as to the extent to which the ECJ rulings on the freedom of establishment and the SE are concerned by these issues. As earlier in this paper, the analysis starts with the ECJ rulings on the freedom of establishment. Overall, the ECJ developed a consistent argumentation regarding reciprocal recognition of companies established in accordance with the law of Member States that follow incorporation theory and gave free rein to regime competition by that (Maul/Schmidt, 2003; Spindler/Berner, 2004). If these rulings really mean the end of real seat theory is still an open question (for example Borges, 2000; Fock, 2000; Schindler, 2002; Schanze/Jüttner, 2003), even though proclaimed by some authors (for example Forsthoff, 2002; Lutter, 2003; Sandrock, 2004).

In fact, the ECJ took decisions on the moving out of an enterprise from a Member State following incorporation theory to a Member State following incorporation theory (Daily Mail, Centros), on the recognition of the legal capacity of a company established in a Member State following incorporation theory then moving to a Member State following real seat theory (Überseering), and recently on the question of additional limitations on foreign companies incorporated in a Member State following incorporation theory and asking for registration in a Member State that also follows incorporation theory (Inspire Art). However, it

was not concerned with the question of a company's moving out from a Member State that follows real seat theory until today (Roth, 2003; Zimmer, 2003). Such a case could clarify the question as to the continuing validity of real seat theory, but is not in sight at the moment.

Regarding the SE, the case is not so clear. With respect to the enacted legal acts, the SE might be viewed as an accumulation of various compromises, but not as a uniform legal frame for companies doing business across boarders in Europe. It is even hard to believe that the agreement on the SE was celebrated for its extent of approximation, when looking at the manifold choices and the great extent of national law applicable supplementarily. For that reason, some authors argue (for example Schulz/Geismar, 2001; Lutter, 2002) that the SE cannot be seen as a means to approximate the company law in the Member States, but might be seen as a means to increase regulatory competition. In this context, Grundmann (2001) argues that this regulatory competition should not be rejected but is even desirable as far as this competition minimises state and market failure.

Besides regime competition, the introduction of the SE might lead to an enhancement of competition between joint-stock companies governed by national legislation and those governed by European legislation as well (Theisen/Wenz, 2002) due to comprehensive scope for design given to the management. While the management of a SE is free to choose between the one-tier and the two-tier structure, can transfer its registered office without the SE losing its legal personality at any time, and even is allowed to negotiate on the form of employee involvement, national joint-stock companies do not have this kind of choices. Consequently, regarding the issue of harmonisation, it can be concluded that the finally agreed SE, originally planned as a comprehensive European company law, increases pressures on the national legislators by the manifold choices provided. If this all results eventually in a climb to the top or a race to the bottom concerning company and tax law as well employee involvement practices in Europe will be subject to controversial debate further on (Charny, 1991; Wymeersch, 2001) and might advance formation of European best practices.

Regarding the issue of the governing law, the answer is not simply, too. Generally speaking, a SE must have its registered office – as fixed in its articles of association – in the same Member State as its head office (Article 7, SE/Re). Even though they must not necessarily be in the same place, this provision might be interpreted as evidence in favour of real seat theory (Torggler, 2001). Additionally, the fact that the governing law changes, when the registered and

the statutory seat are transferred to another Member State, might allow the conclusion that the Council decided in favour of real seat theory. However, in recital 27 of the SE/Re, in which it is said that the "real seat arrangement adopted by this Regulation (…) is without prejudice to Member States' laws and does not pre-empt any choices to be made for other Community texts on company law", the Council of Ministers puts the issue in relative terms. Hence, agreeing with Schwarz (2001), it appears that the Council of Ministers shied away from taking a decision either in favour of real seat theory or in favour of incorporation theory.

After having separately examined these two action alternatives with respect to the two issues, finally the reader's attention is drawn at the question as to the extent the ECJ's rulings regarding the freedom of establishment and the SE are consistent, respectively, constrain one another. For the comparison with respect to the governing law, it is distinguished between the foundation of an enterprise and the transfer of registered office. Regarding the foundation of an enterprise, both action alternatives provide enterprises with the opportunity to establish in that country that offers the most favourable conditions and to do business in any other Member State without restrictions.

However, regarding transfer of registered office the situation is differently. While the registered office of a SE can be transferred without cessation, liquidation and new foundation of the SE, the freedom of establishment does not grant such right of moving out, which was even explicitly stated by the ECJ in Überseering. In this context, Schindler (2003) argues that the principal constraint between the SE and the freedom of establishment might be seen in the fact that the registered and the statutory office of the SE must be in the same country (Article 7 SE/Re). Another obstacle in this instance might be seen in the fact that when a SE transfers its seats, then the governing law of the company chances, while the governing law of company incorporated in a Member State following incorporation doctrine is still subject to that law. It is quite obvious that the two initiatives constrain each other as to the issue of the governing law. However, maybe the question should be asked differently. Does the SE limit or increase the freedom of establishment? The answer to that question can only be that all in all the SE increases the mobility of companies. It even appears that the SE provides companies with opportunities that go beyond the granted rights of the freedom of establishment.

Regarding the harmonisation issue, it is even more difficult to come to a conclusion. At first glance, it seems that the two initiatives constrain one another.

The ECJ's rulings on the freedom of establishment certainly militate in favour of reciprocal recognition, while the SE appears being rather pro approximation of the Member States' company law. Though, at closer inspection the situation might be interpreted differently. As above-mentioned, the SE is characterised by manifold choices and a great extent of national law that is applicable supplementarily. For that reason, the SE can hardly be understood as a means of approximation. Although the two initiatives did not have the same aim originally, it appears that they both increase or even start regulatory competition between Member States. By and large, inconsistency could not be detected concerning the aspect of harmonisation.

Resume

This paper dealt with the interaction of the ECJ rulings on the freedom of establishment and the European company Statute. In this context, two principal issues, applicable law and harmonisation, were identified and discussed. The aim of the paper however was not only to analyse the two legal initiatives with respect to the issues, but moreover to examine their consistency. After the above examination, the answer must be yes and no depending on the issue. However, with regarding to the impact of the SE and the ECJ rulings on the freedom of establishment the answer definitely must be in favour of consistency, because both increase regulatory competition and consequently increase pressures on the national company laws. Overall, it seems that the ECJ did not want to wait anymore until the Council of Ministers enacts relevant company law directives or regulations, but pushes advancement in the field of company law by case law recently. The SE might be viewed as an indicator that the Council of Ministers has recognised the signs of time and has accepted the challenge. However, future developments in this field must be awaited, before final conclusions can be drawn and before it can be said indubitably where the journey goes to.

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