EUROPEAN LEGISLATION AND THE EUROPEAN COURT OF JUSTICE – IMPACTS ON WORKER PARTICIPATION IN EUROPE

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Worker participation at the supervisory board has always been subject to controversial debate. It is not the aim of this paper to examine worker participation as to its advantages and disadvantages, but moreover to give the reader an overview of how companies can determine the depth, form and level of worker participation by choosing between different legal structures within the EU.

Generally speaking, three alternatives can be identified. First of all, companies that do business across boarders in the EU/EEA and are organised as joint-stock companies can establish a European Company (Societas Europaea = SE) from October 8th, 2004 on. The Council of Ministers agreed on the European Company Statute during the Nice Summit in December 2000 after more than 30 years of controversial debate. In this context two legal instruments were enacted, the council regulation (No. 2157/2001) on the Statute for a European company, which rules the internal corporate governance structure of the SE, and the council directive (2001/86/EC) supplementing the Statute for a European company with regard to the involvement of employees on the company level, which emphasises voluntary negotiations between employees' representatives, a so-called special negotiating body, and the management. The negotiation's outcome primarily depends on the negotiating skills of the parties involved. If no agreement is achieved, but the management still wants to establish a SE, standard rules are applied that are specified in the Annex of the Directive.

Secondly, companies organise continuously their activities by choosing a legal form that is provided by national law. According to rulings as to freedom of establishment by the ECJ, Member States have to recognise companies that have been established according to legal provisions in another Member State as long as this Member State follows incorporation theory. For the management this means, for instance, that it can establish a British private limited. Then, the ltd. can even transfer its administrative centre to Germany. In order to do business there, the ltd. must be registered in the German commercial register. Consequently, German legislation regarding worker participation at the company level cannot be applied.

As final point, the proposal for a EU directive on cross-border mergers of companies with share capital is mentioned in this context. The proposal provides two alternatives concerning worker participation in the case of a merger. On the one hand, one ore more companies participating are subject to any form of worker participation so far and there are no national provisions on worker participation in the Member State, where the new company is incorporated. Then, a procedure like it is provided by the SE Directive has to be established. On the other hand, the Member State, in which the new company is incorporated, offers national provisions regarding worker participation. Then, those have to be applied.

In sum, the above mentioned organisational alternatives might put considerable pressure on the different industrial relations systems persistent in the EU. In the long run, this pressure might result in a convergence not only of the industrial relations systems but also of the corporate governance systems.

Mag. Sandra Schwimbersky
University of Bamberg
Research Training Group (Graduiertenkolleg) "Markets and Social Systems in Europe"
Lichtenhaidestrasse 11
D-96052 Bamberg
Germany
Phone: +49/951/863-3134
Email: sandra.schwimbersky@sowi.uni-bamberg.de

Worker participation and the company's choice of its legal structure

The legal structure[1] of a company is considered as the institutional frame, respectively the legal constitution, of a company (Werder, 1986) that lies the basis for its internal and external - legal - relationships (Buchheim, 2001). Companies are free to chose between legal forms offered by national legislators in accordance with their specific needs. The issue arises especially in the event of incorporation and reorganisation of a company, but the legal status quo might also be subject to examination when environmental conditions change (Wöhe, 2000). When examining various forms of enterprise, companies seek to identify the legal structure that supports their economic objectives best and ensures their survival not only today but also in the future (Buchheim, 2001). Due to this fact and the long-term impacts of this decision, it is seen as one of the fundamental management decisions comparable with the decision on the location (Wenz, 1993).

In order to take a profound decision, management requires information about the alternatives, respectively, the specific characteristics of the various forms of enterprise. The organic structure, liability of the partners/shareholders, reporting and publication duties, financing, profit- and loss-sharing, non-recurring and recurring taxes, expenses relating to the legal form as well as co-determination[2] are considered as relevant characteristics (Albach/Albach, 1989; Wöhe, 2000).

1 The terms form of enterprise, legal form, and legal structure are used interchangeably.
2 The terms co-determination, worker participation, and employee involvement are used interchangeably.

Considering German literature on the subject, it strikes that the focus has been on taxation or company law aspects so far (for instance, Lanz, 1978; Lühn, 2004). Even though various authors (for instance, Albach/Albach, 1989; Wöhe, 2000) have recognised worker participation as one of the decisive aspects in this context, there are no comprehensive managerial contributions on the issue. Consequently, the focus of this paper is how companies can determine the depth, form and level of worker participation by deciding in favour of a certain legal structure. However, it is not the aim of this paper to examine national forms of enterprise or to compare them in detail regarding worker participation, but moreover to present some alternatives provided by European legislation: the European company, the rulings of the European Court of Justice regarding the freedom of establishment, and finally the proposal of the Directive on cross-boarder mergers.

The European Company – Societas Europaea

The roots of the SE might be seen in the proposals of a transnational form of enterprise that were discussed between 1926 and the late 1950ies by several institutions, for instance the drafts of the Council of Europe (Theisen/Wenz, 2002). However, the idea of the European company (Societas Europaea = SE) came into being after the agreement on the Treaties of Rome due to uprising demands for such a legal form. As starting point can be seen two events in France: first of all the presentation of the French notary Tibièrge who suggested the introduction of a European public limited company during the French Notary Convention in 1959 and the Convention of the Parisian Law Society in 1960 (Bärmann, 1970). Additionally, the Dutch

Professor Sanders pleaded for the creation of a European company related with a uniform company law in his first lecture in Rotterdam (Sanders, 1960). By that, he stimulated the discussion resulting in the Commission's first proposal for a regulation (European Commission, 1970). In comparison to the company law in most Member States at that time, the proposal was groundbreaking by creating a comprehensive European group law which was supplemented by a Work's Constitution Act (Blanquet, 2002). However – or rather because of that - the Member States were not about to accept it.

In 1987, after the Council of Ministers urged the Community institutions to push for the adaptation of company law, Jacques Delors, who was President of the Commission, resumed the idea of a European company. In 1989 and 1991, the Commission presented a completely revised proposal which 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 (European Commission, 1989a and 1989b; European Commission, 1991a and 1991b). Additionally, the SE became a hybrid form. This means that the institutional frame is governed by Community law, while certain aspects, such as tax law, are subject to national provisions. 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 disagreement between Member States[3] on employee involvement, the matter was

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

let to rest again. That is how it happened that the Single European Market came into force without a common European form of enterprise.

In the middle/end of the 1990ies, the matter started moving again. In June 1995, the group of experts on competitiveness presided over by Carlo Ciampi published a report (CAG, 1995), in which they claimed that the Single European Market is completed as recently as companies are able to do business in the European Union in a more efficient and less costly way, for example by the implementation of a European form of enterprise. In sum, the group of experts expected a saving of ECU 30 millions, an estimation that was widely criticised as being too high (Buchheim, 2001).

Shortly after, the Commission invited Etienne Davignon to preside a group of high-ranking experts on European systems of worker involvement that presented their results in the so-called Davignon Report (European Commission, 1997). Actually, the group wanted to resume the debate about the European company by focusing "on clearly identified avenues of approach which it felt could be useful" and not by preparing a comprehensive legal text. Eventually, the group made clear that the great diversity of national models of employee involvement is a major obstacle for further harmonisation. Thus, they supported "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

2001).

solution in each case, without imposing minimum requirements." (European Commission, 1997, paragraph 94c and 95)

Although the Davignon Report succeeded in resuming discussion between the Member States, 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. During the Nice Summit in 2000, the Council agreed on an opting out clause that was added due to Spain's urging (Köstler, 2001; Pluskat, 2001). That 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).

On October 8th, 2001, after more than 30 years of discussion, 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. Consequently, the SE can be found by joint-stock

companies on October 8th, 2004 for the first time. Both legal instruments are specified in more detail below.

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[4]. Moreover, companies concerned must be subject to law in at least two Member States (article 2 SE/Re). In this context, the SE, which has a separate legal personality, must be seen as another legal alternative for joint stock companies doing business in Europe. The SE/Re contains provisions regarding the SE's internal corporate governance structure (see for example, Jahn/Herfs-Röttgen, 2001; Heinze, 2002; Lutter 2002; Mävers, 2002). In contrast to prior drafts the approved regulation does not constitute a European company act, but provides companies with an institutional frame that is filled by national law. Consequently, it cannot be spoken about one uniform European company but moreover 28[5] different ones (Jahn/Herfs-Röttgen, 2001; Schwarz, 2001).

As the minimum capital, which, in general, must be divided in shares, amounts to € 120.000,--[6], its application seems reasonably only for large groups (Hommelhoff, 2001). However, Blanquet (2002) sees it as moderate and refers to recital 13 of the SE/Re in which is said " a minimum amount of capital should be set so that they have sufficient

4 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.

5 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.

6 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.

assets without making it difficult for small and medium-sized undertakings to form SEs". 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 statutes is specified that the SE must have a general meeting of shareholders and either a management board and a supervisory board, so-called two-tier system, or an administrative board, so-called single-tier system, as governing bodies (SE/Re Articles 38 to 45 and 52 to 59). The companies are free to choose between the one-tier-system and the two-tier-system.

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[7]. 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 EU or EEA 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

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

transformation takes place (SE/Re Article 37 paragraph 3) and is not allowed to reduce the intensity 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.

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 contribute considerably to the completion of the SE's freedom of establishment and will increase 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[8] and consultation[9] across boarders on the one hand and participation[10] 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 voluntary negotiations. These negotiations on worker involvement are conducted by the management and the special negotiating body (SNB), which consists of employees' 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).

8 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).

9 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).

10 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).

The task of the SNB is to negotiate with the management of the companies concerned about an agreement on the arrangements for the involvement of the employees within the SE (SE/Di Article 4). The duration of negotiations is fixed by the SE/Di to six months, but may be extended up to one year from the establishment of the SNB by agreement of the parties involved (SE/Di Article 5). 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.

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 agree so, then standard rules are applicable (SE/Di Article 7 and part three of the annex). In the annex of the SE/Di, three parts of the standard rules are distinguished. 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 intensity 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.

For an overview of the course of negotiations and its outcomes the reader is referred to Figure 1.

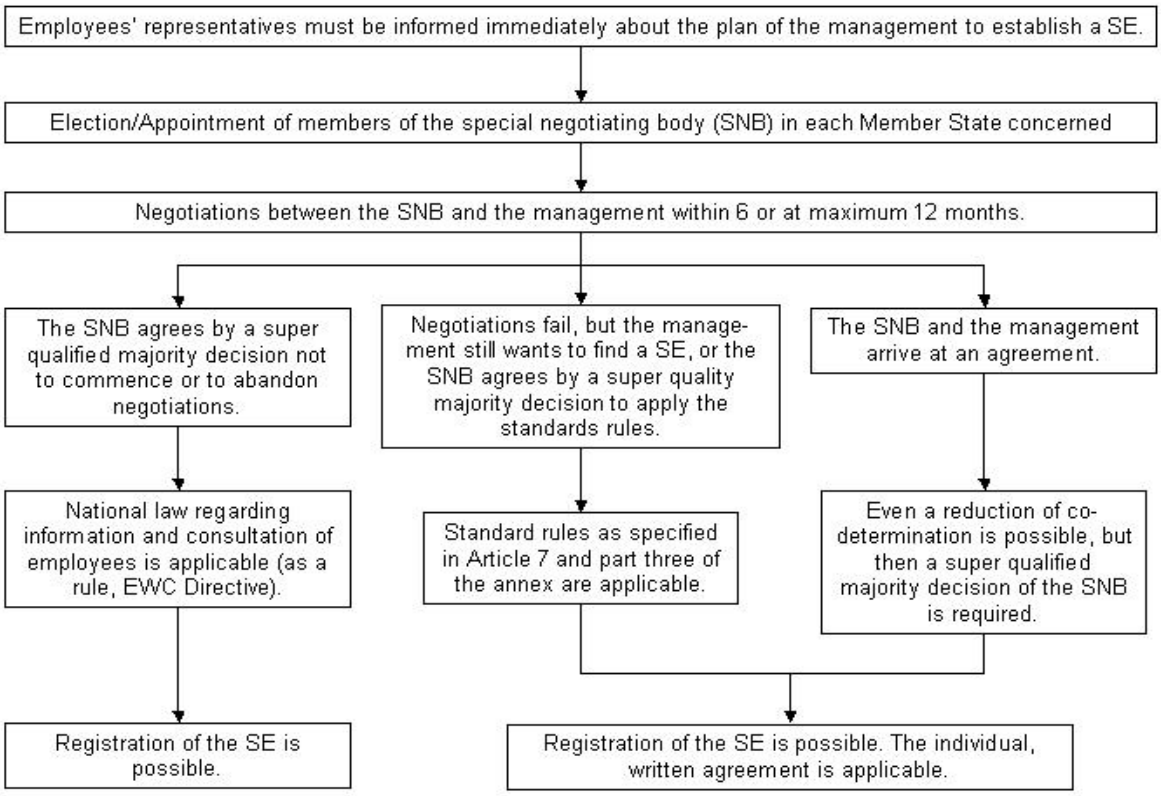

Figure 1: Employee participation in the SE
(Adapting Blanquet, 2002; Keller, 2002; Heinze, 2002; Röthig, 2002)

As presented in this chapter, the SE/Re contains fundamental provisions regarding the internal corporate governance structure and the transfer of registered office. Though, Member States still determine a great deal of applicable law such as tax law (Hommelhoff, 2001; Schulz/Geismar, 2001), reporting standards, liability, and even rule amendment of the articles as well as capital

raising and maintenance of capital (Theisen/Wenz, 2002). Consequently, it can be expected that there will be considerable differences in the SE's design in the EU and the EEA. This diversity in design and the simplified opportunity of transfer of registered office might challenge the different corporate governance systems persistent in the EU.

In this context, Grundmann (2001) argues that this competition of European legislators should not be rejected but is even desirable as far as this competition minimises state and market failure. If it results in a climb to the top or a race to the bottom concerning company law as well as tax law standards in Europe, which is a controversially discussed issue, cannot be predicted (Charny, 1991; Wymeersch, 2001). At the same time the SE must be seen as mandatory minimum standard for doing business cross-boarders in Europe in order to restrain unlimited, ruinous competition on establishments of companies (Theisen/Wenz, 2002). By and large, the SE as an alternative legal structure increases pressure on the national legislators in order to further harmonise company and tax law.

Besides competition between the legal systems of countries, 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. While the management of 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 might negotiate on worker participation, national joint-stock companies do not have this kind of choice. They

must comply with national provisions. Hence, this can be seen as another aspect that increases pressure on national legislators, in order to eliminate differences - or even discrimination - between national forms of enterprise and those created by European law (Theisen/Wenz, 2002).

Worker participation is also subject to those pressures for harmonisation. It remains to be seen to what extent the SE introduction contributes or even causes erosion of co-determination in Germany and other countries highly-regulated in this instance. Although these pressures are considerable, some other aspects are remarkably, too. Indeed, it is important to stress the paradigm shift made by the European legislator. The Community refrained from providing models of co-determination and rather provides comprehensive rules regarding the negotiation procedure. Moreover, the Community does not longer try to establish a specific institutional pattern of worker participation, but rather pushes procedures that promote the idea of worker participation in management's decisions (Weiss, 2003).

Another point of interest in this context is that board-level representation is europeanised. So far, employees' representatives in the competent organ represented only employees from the home country of the company. In German joint stock companies, for instance, with subsidiaries all over Europe only German employees' representatives have been involved in board-level representation. With the SE, this situation changes. Now, employees' representatives from all countries, in which the SE operates, might be involved in

board-level representation. The composition of the competent organ might prejudice those representatives in countries that had strong positions so far, such as Germany or Austria, and might lead to different coalitions due to different preferences and, thus, to different decisions. As a result, it is very difficult to predict the outcomes of the negotiations.

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

On September 30th, 2003 the European Court of Justice (ECJ) took the decision on the Inspire Art case (C-167/01). It is another decision in a row of decisions regarding the freedom of establishment. 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. With this regard, primary and secondary freedom of establishment can be distinguished. Primary freedom of establishment is understand as the right to establish the headquarters, while secondary freedom of establishments concerns the setting-up of agencies, branches, or subsidiaries (ECT Articles 43 and 48). 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.

In the Daily-Mail-Case (Case 81/87 from September 27th, 1988), the Daily Mail and General Trust PLC 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 says 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.

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. Then, they wanted to register a branch in Denmark, which was rejected, because the Centros ltd. did not keep Danish minimum requirements and, thus, by forming a British ltd. intentionally evaded Danish company law. According to Roth (2000) the issue 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. In this case, the ECJ decided that registration cannot be refused 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" (marginal note 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 paragraph 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).

In this context, the ECJ argues that the requirement of reincorporation of the same company in Germany is considered even as the negation of freedom of establishment (paragraph 81). "The refusal by a Member State to recognise the legal capacity of a company formed in accordance with the law of another Member State to bring legal proceedings before a German court amount to a restriction of freedom of establishment that is, in principle, incompatible with Articles 43 and 48 EC" (Roth, 2003:206; paragraph 82). However, certain conditions and certain circumstances might justify restrictions relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities (paragraph 92). Nevertheless, these objectives cannot justify refusal of the company's legal capacity and, hence, of the company's capacity to be a part to legal proceedings (paragraph 93). Therefore, the ECJ decides 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. 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 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 foreign companies (Bayer, 2003).

In sum, the ECJ has developed step by step a consistent case law regarding companies' freedom of establishment. 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. 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. Thus, taking advantage of freedom of establishment might be considered as a real alternative with respect to the legal structure of companies and especially board-level representation arrangements.

What does this mean for board-level representation? According to the

aforementioned ECJ rulings, companies can determine the applicable company law by choosing the country of incorporation with respect to its specific needs and wishes. These legal provisions do not only concern the organisational structure, liability or minimum capital requirements but also board-level representation. In Europe, the intensity of board-level representation varies from no compulsory provisions at all in the UK to equal numbers of employees' representatives and shareholders' representatives in the supervisory board in Germany. It might be in the interest of the companies to bypass these board-level representation (Heumann, 2003). Consequently, those companies would incorporate rather in the UK than in Germany or Austria.

Other European initiatives

In this context, two other European legislative initiatives should be mentioned. First the Council Directive on the common system of taxation applicabel to merger, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (90/434/EEC), the so-called 14th company law directive. The principle aim of this directive is to eliminate obstacles to cross-boarder activities, in particular the elimination of hidden reserves' taxation, in order to provide European enterprises with the possibility to reorganise their activities in accordance with their needs, respectively, to adjust to the requirements of the Common Market and, consequently, improve their competitive position. However, some Member States, such as Germany, considered this directive as another possibility for companies to bypass national requirements regarding worker participation. Thus, they insisted on a clause that guaranteed retention of worker participation. In Article 11 paragraph

1 lit b, Member States are empowered to refuse tax reliefs granted by this directive, when " the merger, division, transfer of assets or exchange of shares results in a company [..] no longer fulfilling the necessary conditions for the representation of employees on company organs according to arrangements which were in force prior to that operation". As a result, the 14th company law directives was not considered anymore as threat for worker participation. Unfortunately, it has not been transformed into national law by all Member States, for instance Germany (Maul et al, 2003).

Finally, the proposal for a directive on cross-border mergers of companies with share capital (European Commission, 2003), the so-called 10th company law directive, is presented. Although the first proposal was presented by the Commission in 1984, unfortunately, this directive has not been enacted so far. One of the main reason for that is the issue of worker involvement (Mävers, 2002). While Member States in which worker involvement is highly regulated were afraid of companies bypassing national requirements by cross-boarder mergers, Member States in which worker involvement does not play any role feared that their companies could be forced to introduce some form of worker participation resulting in a deadlock. When Member States agreed on the SE in December 2000, discussion on the 10th company law directive revived and resulted in the aforementioned proposal.

The present proposal differs from the original proposal mainly in two instances. First, the proposal originally covered only public limited companies. Now it covers all joint-stock-companies, i.e. companies that have legal personality and that possess separate assets which

alone serve to cover its debts (Article 1). In its explanatory memorandum, the Commission states that it is provided mainly for companies that are not interested in establishing a SE, "for the most part small and medium-sized enterprises" (SME) (European Commission, 2003:3). Joint-stock-companies concerned must be incorporated under the law of a Member State and must have their registered office within the EU. Additionally, two of the companies concerned are governed by the law of different Member States. Generally speaking, when talking about cross-boarder mergers two types are distinguished (Article 1). On the one hand, cross-boarder merger means that one or more companies transfer their assets and liabilities to another existing company. On the other hand, it means that two or more companies transfer all their assets and liabilities to a new company. Additionally, the proposal of the directive provides a third possibility: a company transfers all its assets and liabilities to the company holding all the securities or shares representing its capital. Regarding details on the course of the merger, the reader is referred to Maul et al (2003).

The second difference to the original proposal is seen in the provisions concerning worker participation, meaning board-level representation. Actually, three cases can be distinguished. Case 1: The companies concerned are not covered by board-level-representation and the country where the merger has is registered office does neither. Then nothing changes. The merger does not have board-level representation. Case 2: The companies concerned are not covered by compulsory board-level representation or one or more companies concerned are covered by board-level representation and the country where the merger has its registered office does impose a

certain form of board-level representation. In this case, worker participation in the merger is ruled by the provisions of the member state, where the merger has its registered office. This means, that if a French SA acquires a German AG. They merge cross-boarders with their registered office in France. Thus, worker participation is governed by French provisions. Case 3: One or more companies concerned are covered by board-level representation, but the country where the merger has its registered office does not impose board-level representation. In this respect, the directive directly refers in Article 14 to relevant articles of the SE/Re as well as the SE/Di. In fact, the management has to negotiate with employees' representatives on the matter. If they come to an agreement, it is applicable. If they cannot come to an agreement, the most intensive form of worker participation in one of the companies concerned is applicable.

In sum, it can be said that worker participation in the company created by merger depends first of all on national compulsory provisions. Only in the case that one of the companies concerned is already subject to compulsory or voluntary worker participation and the domestic law does not provide any provisions regarding board-level representation, then Article 14 applies resulting in negotiations on worker participation closely related to those in a SE.

Resume

In conclusion, it can be said that currently companies have numerous choices regarding their legal structure. The variety is even so great that it might be confusing for companies to find the appropriate legal arrangement (Maul et al, 2003). Regarding the choices discussed in

this paper, it appears that the SE satisfies the needs of large groups probably best (Hommelhoff, 2001). Large groups from outside the EU/EEA will even have the possibility of structuring their European business in a uniform manner for the first time. The other two alternatives, freedom of establishment and the proposal of the merger-directive, seems to fit best the needs of SMEs (European Commission, 2003) and might be of great interest for groups when restructuring their European business (Maul et al, 2003).

The danger of the erosion of board-level representation, as promulgated especially in countries that have high levels of board-representation, appears as being averted for the moment at least as far as the SE and the proposed merger-directive is concerned. Currently, it seems that the only possibility to bypass board-level representation is provided by the freedom of establishment. However, the question remains if, for example, German or Austrian companies, which are subject to compulsory board-level representation, would consider establishment of, for example, a joint-stock company under British or Spanish law only in order to bypass board-level representation, which remains only one of several criteria, interalia the tax burden and liability or disclosure requirements, that is relevant for the decision on the legal structure.

Overall, one can look upon the mentioned initiatives favourably. Even though pressures on the national corporate governance systems will continue to increase, these initiatives must be advanced in order to provide European enterprises with appropriate legal arrangements and, in consequence, increases their competitiveness. Eventually,

these initiatives might contribute to a further convergence of the corporate governance systems within the EU and might result in a European system of corporate governance in the long-term.

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