

Private International Law – Companies

Abstract:

Comparative company law is about taking in the experience of others in a competitive way, and finding a joint solution to the cross-border issues appearing for and from companies that are confronted by global competition. All over the world company law is undergoing fundamental change, particularly in Europe. European countries have committed themselves to and begun extensive reform of their company legislation. In this paper I argue the reasons for such a movement.

The harmonization of national company laws was long the main concern of the European Union. An increasing EU harmonization was taking place through the Company Law Directives, designed mostly to protect stakeholders such as minority shareholders, creditors and employees, and was motivated by the desire to establish a situation in which every competing business from different Member States has a fair and equal chance of succeeding and to prevent Member States from participating in a ‘race to the bottom’ as a means to attract investment. Therefore, mobility of companies was not a priority for the EC at that time. However, this became different with the adoption of the European Company Statute. This regulation is the first European law which enables a cross-border merger as well as the transfer of the company’s seat to another Member State and it was soon followed by the Cross-border Merger Directive. This legislative activity illustrates that the Commission has moved its focus from harmonization of company laws to easing cross-border mobility.

Nevertheless, the biggest push for company mobility did not come from the Commission but from the European Court of Justice. ECJ has decided in favor of the freedom of establishment of EU companies establishing themselves in other Member States in a number of cases since *Centros* in 1999, resulting in a clear and constant line of authority. The ECJ has made explicit that Member States have to permit firms that have been formed in other Member States to enter their territory without restriction or interference, according to the rules under which they have been incorporated. This was an important change for those Member States that used the real seat doctrine to apply their own national laws to companies incorporated in other Member States or worse to refuse to give such companies recognition as a legal person, with serious effects for the investors in such companies.

But the decisions have left other important questions open to doubt. While the ECJ has affirmed that a company formed in a Member State may move freely within the EU without losing its identity, it still has to decide whether the EC Treaty also gives companies the freedom to change their nationality by moving their registered office to another Member State. For the present, the answer is no. Although the *Cartesio* case might have brought a change, the decision confirms the ruling in *Daily Mail*, and thus companies still can not move as they wish within the EU.

The purpose of this paper is to examine the consequences of these judgments, not only for European company law, but also for national company laws. This paper starts with a short introduction and explanation of Comparative Company Law terms followed by an overview of the freedom of establishment under the Treaty Establishing the European Community and

the existing European theories about the transfer of a company's seat. The next section provides an analysis of the European Court of Justice's decisions and their consequences. I argue that the judgments have made national legislators keep European company law attractive to investors and that increased mobility of EU companies is needed if Europe wants to stay competitive on an international level, even though this might lead to the termination of some traditional national legal principles.

EC freedom of establishment; private international law; regulatory competition; transfer of the registered office; limits placed by the country of incorporation.

Svoboda usazování, mezinárodní právo soukromé, soutěž právních řádů, přemístění sídla společnosti, omezení svobody usazování v národních právních řádech