Corporations in European Private International Law – From Case-Law to Codification?

Professor Dr. Jan von Hein, Albert-Ludwigs-University, Freiburg (Germany)

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I. Introduction

Determining the law applicable to companies is one of the most widely debated and practically important challenges for private international law as a tool for regional economic integration. Any federal or semi-federal system is confronted with the question as to whether the legal existence and capacity of a company are determined by the place of its incorporation (incorporation theory) or by the location of its actual administrative office (real seat theory). While the legal systems of common law countries traditionally follow the incorporation theory, particularly in the United States of America (USA), the majority of continental European countries prefer the connection to the real seat.[1] Under the pressure of the case law of the Court of Justice of the European Union (CJEU, before the Treaty of Lisbon known as the European Court of Justice, ECJ), however, even EU Member States which traditionally adhered to the real seat theory found themselves compelled to switch to the incorporation

[1] Germany, France, Italy; but not Switzerland, Denmark or the Netherlands, for a comprehensive survey, see *Behrens*, Connecting Factors for the determination of the proper law of companies, Festschrift für Ulrich Magnus (2014) 353, 362–366.

theory at the beginning of the 21st century, at least with regard to companies registered in other Member States of the EU or the European Economic Area (EEA) (see infra III). This shift from the real seat theory to the theory of incorporation must be seen in the wider context of a proper allocation of legislative competences in the field of company law. Allowing the founders of a company to select the law applicable to their company without the requirement of any real economic activity in the chosen state has the potential to trigger a competition for corporate charters between legal orders, a phenomenon that is well-known in the USA – the so-called "Delaware effect" – and that has been debated intensely in Europe as well (see infra II).

Since the Member States conferred upon the European Union a specific competence as regards private international law (PIL) in 1997,[2] no less than sixteen regulations have been passed in many legal fields, such as choice of law on contracts, torts, divorce and successions.[3] Despite this growing Europeanization of PIL, however, a general regulation concerning the law applicable to companies is so far missing. Scattered provisions concerning particular questions can only be found in sectorally limited directives[4] and in regulations on supranational types of companies, such as the Societas Europaea, the European Stock Corporation.[5] The resulting lack of clear conflicts rules may lead to legal uncertainty and higher transaction costs in cross-border cases, thus impeding the achievement of full regional economic integration. Hence, the idea of codifying the law applicable to companies in the EU has gained considerable support in recent years. Already in 2006, the German Council for Private International Law, a select group of law professors advising the Federal Ministry of Justice, presented a proposal for European legislation in the field of international company law.[6] At the EU level, the European Council stressed, in its 2010 Stockholm Programme, that

[2] Art. 61(c) in conjunction with Art. 65(b) of the Treaty of Amsterdam (today: Art. 81(1) and (2)(c) of the Treaty of Lisbon).

[3] For a current survey, see *Jan von Hein/Giesela Rühl*, Towards a European Code on Private International Law?, in: European Parliament: Directorate-General for Internal Policies, Policy Department C (Hrsg.), Cross-Border Activities in the EU – Making Life Easier for Citizens, Brüssel 2015, S. 8–53 (available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510003/IPOL_STU(2015)510003_EN.pdf); also forthcoming as: *Giesela Rühl/Jan von Hein*, Towards a European Code on Private International Law?, RabelsZ 79 (2015).

[4] E.g. the Merger Directive, Dir 2005/56 O.J. L 310/1, or the Takeover Directive, Dir 2004/25 O.J. L 142/12.

[5] Reg 2157/2001 O.J. L 294/10.

[6] *Sonnenberger/Bauer*, RIW Supplement 1 to journal No. 4/2006, pp. 1–24: published in English translation in: *Sonnenberger* (ed.), Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts, 2007, pp. 65–76, with an explanatory memorandum by *Sonnenberger* and *Bauer*; for a detailed analysis of the proposal, see *Kieninger*, The Law Applicable to Corporations in the EC, RabelsZ 73 (2009), 607 ff.; *Sonnenberger*, Etat de droit, construction européenne et droit des sociétés, Rev. crit. dr. int. pr. 102 (2013), 101 ff.; *Zimmer*, The Proposal of the Deutscher Rat für Internationales Privatrecht, in: *Basedow/Baum/Nishitani* (Hrsg.), Japanese and European Private International Law in Comparative Perspective, 2008, S. 209 ff.; see also *Borg-Barthet*, A New Approach to the Governing Law of Companies in the EU: A

“[t]here is a need to explore whether common rules determining the law applicable to matters of company law […] could be devised” and invited the Commission to “consider whether there is a need to take measures in these areas, and, where appropriate, to put forward proposals in this respect”.[7] In its response to the Stockholm Programme, the Commission announced to present a Green Paper on the applicable law relating to companies, associations and other legal persons before the end of 2014,[8] which so far, however, has not seen the light of day. Finally, the European Parliament, in a Resolution of 2012, has taken „the view that conflict-of-law issues also need to be tackled in the field of company law and that an academic proposal in this field [i.e. the proposal made by the German Council for Private International Law] could serve as a starting point for further work on conflict-of-law rules with regard to companies' cross-border operations”.[9] This European development is in stark contrast with the current situation in the USA: Although there have been occasional calls for federal legislation on corporate law, American conflict of laws in this area is still a matter governed almost exclusively by state law.[10]

In this paper, I will first give a very concise survey on the question as to whether, seen in comparison with the United States, a competition of legal orders is a realistic perspective in the European Union; moreover, I will distinguish between various types of competition that are of importance for devising adequate conflicts rules in this area (see infra II). I will then give an overview on the ECJ’s case-law that gave rise to the legislative proposal presented by the German Council (see infra III). After a brief sketch of this proposal’s main features (see infra IV), I will analyse the subsequent jurisprudence of the CJEU and evaluate the proposal in the light of these recent developments (see infra V). Finally, I will give an outlook on the current prospects for codifying international company law in the EU (see infra VI).

Legislative Proposal, J. Priv. Int. L. 6 (2010) 589, 611. The Federal Ministry of Justice prepared a legislative draft on the basis of this proposal (2008; available at http://www.rwi.uzh.ch/oe/stiftungsrecht/rechtsentwicklungen/Referentenentwurf-IGR_120417.pdf), which was, however, shelved because of trade union’s fears that it might have a negative impact on workers‘ co-determination, see further *Bollacher* RIW 2008, 200; *Clausnitzer* NZG 2008, 321; *Kindler* Status: Recht 2/2008, 68; *Köster* ZRP 2008, 214; *Leuering* NZG 2008, 73; *Rotheimer* NZG 2008, 181; *C. Schneider* BB 2008, 566; *R. Wagner/B. Timm* IPRax 2008, 81.

7 European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ 2010 C 115/1, 16.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM (2010) 171 final, p. 26.

9 European Parliament, Resolution of 14 June 2012 on the future of European company law (2012/2669(RSP)).

10 See *Hay/Borchers/Symeonides*, Conflict of Laws, 5th ed., 2010, pp. 1394–1400.

II. The Competition of Legal Orders in the European Union

1. The US Model

Firstly, I will turn to the question as to whether the ECJ's famous *Centros* decision[11] and its progeny[12] have sparked an American-style competition for corporate charters within the EU and whether this may lead to the so-called "Delaware" effect that is familiar from the US experience, i.e. a quasi-monopolistic position of one member state of the Union as an offeror of corporate charters.[13] This type of competition may be called *"horizontal" competition.*[14] In so far, the doctrinal dispute between the incorporation and the real seat theories reflects the general tension between party autonomy, which leads to the free choice of the place of incorporation, on the one hand, and the protection of third parties (e.g. creditors, minority shareholders), which the real seat theory emphasizes, on the other.[15] Under the real seat theory, the connection to the actual place of the head office allows the application of domestic company law and its underlying social values to so-called pseudo-foreign or letterbox companies. Thus, corporations immigrating into a country by transferring their real seat without registering there have traditionally been punished by the loss of their legal capacity. At a more technical level, the conflict between the incorporation and the real seat theories mirrors the functional complementarity between a liberal approach to international (or interlocal) company law, on the one hand, and a supplemental control of companies by a liquid capital market and the accompanying regulation by supervisory and stock exchange law on the other. The United States and the United Kingdom developed liquid capital markets at a comparatively early stage in history, i.e. the late 19th and early 20th century; in the light of the market as an efficient mechanism for corporate control, these countries have traditionally been liberal towards questions of organizational law. In Germany, on the contrary, a basically mandatory protection of shareholders, creditors (minimum capital) and employees has been favoured, which has been secured, in terms of conflict of laws, against the dangers of emigration and circumvention by the real seat theory. To a certain degree, this strong

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[11] ECJ 9 March 1999 – C-212/97 (Centros Ltd v. Erhvervs- og Selskabsstyrelsen), [1999] ECR I-1459.

[12] ECJ 5 November 2001 – C-208/00 (Überseering BV v. Nordic Construction Company Baumanagement GmbH), [2002] ECR I-9919; 30 September 2003 – C-167/01 (Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.), [2003] ECR I-10155.

[13] See *infra* III.

[14] See, e.g., *Roe*, 21 Ox. Rev. Econ. Pol'y 232, 241 (2005).

[15] Cf. *Marc-Philippe Weller*, Companies in Private International Law – A German and European Perspective, in: Jürgen Basedow/Knut Benjamin Pißler (eds.) Private International Law in Mainland China, Taiwand and Europe, Tübingen 2014, p. 363, 370 et seq.

emphasis on organizational safeguards reflected the less developed state of German capital markets during the 20th century which resulted in a lack of external corporate control.

In the USA, the regulation of the internal affairs of a corporation has traditionally been left to the laws of the various States. Until the beginning of the 21st century, federal legislation concentrated upon securities regulation and mainly resorted to disclosure as the preferred mode of intervention into corporate affairs, leaving substantive regulation of corporate governance to a horizontal competition among the states, a competition that Delaware has won by a decisive margin.[16] The reasons for Delaware's competitive edge are well-known and mainly attributed to its juridical and administrative infrastructure.[17] Delaware is the only American state which still adheres to a strict separation between common law courts in the narrow sense and courts of equity, on the other hand.[18] The Delaware court of chancery is a highly specialized court in corporate matters which provides lawyers with an unrivalled wealth of legal precedents and which has the important advantage of sitting without a jury that might be prone to succumbing to populist anti-business sentiments.[19] The selection of judges as well as the procedures of corporate legislation in Delaware are mainly determined by the local bar association, an influence which ensures a regulatory climate friendly to corporations and, above all, their management which is, for practical purposes, the relevant decision-maker with regard to reincorporations.[20] Apart from that, the tiny state's heavy economic dependence on franchise taxes acts as a de facto insurance that the legislation will not stray far from business interests.[21] Moreover, Delaware's long-standing preeminent role in the race for corporate charters gives rise to important network effects: Delaware law is taught in corporations courses in all American universities, the pertinent literature is abundant, and lawyers in New York or Washington may give advice not only on their own law, but frequently on that of Delaware as well.[22]

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[16] See the up-to-date figures given by *Veasey/Di Guglielmo*, 158 U. Pa. L. Rev. 1399, 1403 (2005); cf. also *Bebchuk/Hamdani*, 112 Yale L.J. 553, 567 (2002).

[17] See, e.g., *Gilson*, Regulatory Competition and Subsidiarity in Corporate Governance in a Transatlantic Perspective, presentation, 12th July 2004, http://www.ecgi.org/tcgd/launch/gilson_speech.php: "At least for the last twenty years or so, the critical advantage of Delaware has been the quality of its Chancery Court […]."

[18] See *Quillen/Hanrahan*, 18 Del. J. Corp. L. 819 (1993).

[19] Art. IV § 10 Del. Const.: "The Chancellor and the Vice-Chancellor or Vice-Chancellors shall hold the Court of Chancery. One of them, respectively, shall sit alone in that court. […]"; on this advantage, see, e.g., *Fisch*, 68 U. Cin. L. Rev. 1061, 1077 (2000); *Massey*, 17 Del. J. Corp. L. 683, 704 (1992).

[20] The classic analysis is *Macey/Miller*, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469 (1987); see also *Coffee*, 8 Cardozo L. Rev. 759, 762–764 (1987).

[21] *Romano*, The Genius of American Corporate Law (Washington D.C. 1993) 37 et seq.

[22] On network effects in particular see *Bebchuk/Hamdani*, 112 Yale L.J. 553, 586–88 (2002); *Kamar*, 98 Colum. L. Rev. 1908, 1911, 1923 et seq. (2002).

Nevertheless, the debate is not settled whether this result is benign or malignant from a public policy perspective: Does competition lead to a race to the top or rather a race to the bottom? A general consensus on the pertinent data and their proper interpretation is still lacking.[23] Moreover, when one takes a closer look at recent developments in American legislation, one finds that there is a second dimension of competition that is increasingly gaining attention, namely the competition between Delaware and the federal regulatory authorities for establishing the rules of corporate governance,[24] a type of competition that has been called *"vertical competition"* in the American literature.[25] This paradigm shift has been inspired by the Sarbanes-Oxley Act of 2002 ("SOX") which has led to a hitherto unprecedented federalization of American corporate governance.[26] The spectacular bankruptcies of big American corporations such as Enron and WorldCom in the years 2001 and 2002 led to the enactment of "the most far-reaching reform of American business practices since the time of Franklin Roosevelt".[27] The Sarbanes-Oxley Act cut deep into regulatory terrain previously occupied by the American states.[28] Among other things, the Act made the establishment of audit committees mandatory and tightened the necessary degree of independence that members of such a committee had to possess, irrespective of the fact that board committees and their composition had traditionally been regarded as a matter of state law.[29] In short, the Sarbanes-Oxley Act led to a federalization of key features of American corporate governance, a development that has continued under the Dodd-Frank-Act passed in 2010, which, inter alia,

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[23] For a comprehensive overview of the literature on this subject see *Bebchuk/Cohen/Ferrell*, Does the Evidence Favor State Competition in Corporate Law?, 90 Cal. L. Rev. 1775 (2002); see also the controversy between *Daines*, Does Delaware law improve firm value? 62 J. Fin. Econ 525 (2001) (answering the question in the affirmative) and *Subramanian*, The Disappearing Delaware Effect, 20 J. L. Econ. & Org. 32 (2004) (partly rejecting, partly qualifying the aforementioned study's results).

[24] See *infra* V.

[25] See, e.g., *Jones*, 29 J. Corp. L. 625, 634 et seq. (2004)

[26] Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act, Pub. L. No. 107-294, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15, 18 U.S.C.); see *infra* IV.

[27] President *George W. Bush*, "President Nominates Congressman Chris Cox as SEC Chairman", June 2, 2005, http://www.whitehouse.gov/news/releases/2005/06/20050602-4.html.

[28] See *Bainbridge*, REGULATION (Spring 2003) 26 (warning against a "creeping federalization of corporate law"); *Johnson/Sides*, 30 Wm. Mitchell L. Rev. 1149, 1150 (2004) ("unprecedented federal inroads into the area of corporate governance"); *Loewenstein*, 57 SMU L. Rev. 353 (2004) (diagnosing a "quiet transformation of corporate law […] characterized by a significant and continuing shift of lawmaking prerogative from state legislatures to the federal government"); *Veasey/Di Guglielmo*, 153 U. Pa. L. Rev. 1399, 1504 (2005) ("significant intrusion into internal corporate affairs"); similarly, but with qualifications, *Seligman*, 80 Notre Dame L. Rev. 1159 (2005) ("modest revolution in corporate governance").

[29] Sect. 301 SOX, codified in sect. 10A(m)(2) Securities and Exchange Act and the accompanying SEC Rules; on this point, see *Branson*, 48 Vill. L. Rev. 989, 1006 (2003): "Boards and board committees including their appointment and composition, are matters of state corporate law"; *Thompson*, Del. J. Corp. L. 29 (2004) 779, 791 (same); on the historical development *Seligman*, 80 Notre Dame L. Rev. 1159, 1167 et seq. (2005); *Romano*, 114 Yale L. J. 1521, 1551 (2005) (criticizing that Congress did not discuss the aspect of legislative authority).

codified the so-called “say-on-pay” rule on the remuneration of board members.[30] Thus, the traditional model of a "horizontal" competition between Delaware and other American states must be regarded as oversimplified today. As the Sarbanes-Oxley and the Dodd-Frank Act have shown, Delaware's main rivals in the field of corporate regulation are not the other states, but the federal legislature and the SEC.

2. Horizontal Competition among the EU Member States

In the EU, the Court of Justice's turn to the theory of incorporation (*Centros*) has allowed founders of a company to select the applicable law without the need to establish a head office ("real seat") in the chosen jurisdiction. Although this has opened up the possibility of a horizontal competition between the Member States, various institutional and economic reasons prevent the emergence of a European Delaware.[31] From a political and social point of view, Europeans are more inclined to favour stakeholder interests. France and Germany, however, modernised their laws concerning limited companies because the legislators feared that more and more founders of companies would rather opt for the English equivalent, the Limited, which is much cheaper to set up than its continental counterparts. In German law, for example, a simplified model of the traditional German limited (the “GmbH”) was introduced, the so-called “Unternehmergesellschaft” or “entrepreneurial company”. Its most attractive feature is that it dispenses with the requirement of having to put down 25.000 € of minimum capital that is characteristic of the GmbH. Recent empirical data even point to a considerable decline in the cross-border establishment of pseudo-foreign corporations as a result of such reforms.[32]

3. Vertical Competition: European Corporations vis-à-vis Domestic Types

In the EU as well, “vertical competition” between regulations (and regulators) at the European level, on the one hand, and the domestic level, on the other, plays an increasingly important role. In so far, two different dimensions of vertical competition must be distinguished: Until recently, the central pressure exerted by the EU on corporate regulation has been weaker than in the US because there was no single regulator of European capital markets comparable to the American SEC. Under the impression of the financial crisis of 2008, however, the EU

[30] Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173); cf. *Tobias Siefer*, Zwei Jahre nach Dodd-Frank – Erfahrungen mit dem Aktionärsvotum über die Vorstandsvergütung in den USA, NZG 2013, 691.

[31] See *Luca Enriques*, EC Company Law and the Fears of a European Delaware, EBLR 2004, 1259–1274; *Tobias Tröger*, Choice of Jurisdiction in European Corporate Law – Perspectives of European Corporate Governance, EBOR 6 (2005) 3–64;

[32] *Wolf-Georg Ringe*, Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition, ECFR 2013, 230–267.

created the European Securities and Markets Authority (ESMA), which aims to strengthen the supervision of European Capital Markets and to foster convergence between the approaches pursued by national regulators. Although ESMA is still a less powerful authority than the SEC, one may argue that a stronger European framework for financial supervision makes a liberal attitude towards party autonomy in international company law more acceptable, leading to a convergence with the US model in this regard.

Apart from that, there is another form of "vertical" competition in the EU that is less common in the US.[33] Supranational forms of companies such as the *Societas Europaea* (SE)[34] create the possibility of choosing between European and domestic types of companies, such the German *Aktiengesellschaft* (AG). The SE is a European public limited company and was thus created for big enterprises; its minimum capital amounts to 120.000 €. The SE is a success particularly in Germany mainly for three reasons:[35]

(1) the possibility to freeze workers' co-determination at a *status quo* level,[36]

(2) the facilitation of cross-border restructuring such as mergers or transfers of seat, and

(3) the reputational gains associated with a European corporate "label". It seems that mergers between companies from different Member States face less psychological obstacles if the resulting new company is not regarded as a "French" or "German" company, for example, but rather as a genuinely supranational, European "corporate citizen".[37]

In addition, German stock corporations transforming themselves into an SE may opt for the one-tier system of corporate governance known in the US rather than for the traditional two-tier system peculiar of German law. Thus, the European variant of the stock corporation offers significant competitve advantages over its German counterpart.

With regard to smaller, private companies, several proposals have been presented and discussed at the European level in recent years as well, such as the Societas Privata Europea

[33] See *Lars Klöhn*, Supranationale Rechtsformen und vertikaler Wettbewerb der Gesetzgeber im europäischen Gesellschaftsrecht, RabelsZ 76 (2012) 276–315.

[34] Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21.

[35] See *Oechsler*, in: Goette/Habersack (eds.), Münchener Kommentar zum Aktiengesetz, 3rd. ed 2012, Vorbemerkung zu Art. 1 SE-VO, paras. 7-10.

[36] See *von Hein*, Between a Rock and a Hard Place – German Codetermination under Pressure, Kyoto Journal of Law and Politics vol. 3(2), May 2007, p. 1, 9.

[37] MüKo-AktG/*Oechsler* (supra note 35), Vorbemerkung zu Art. 1 SE-VO, para. 7.

(SPE),[38] a kind of European limited private limited liability company, and the Societas Unius Personae, a special type of single-member private limited liability company.[39] So far, however, these legislative actions have not been completed.

It should be noted that the choice of law rules found in current EU regulations and legislative proposals on supranational companies differ considerably: Whereas the SE Statute is still based on the real seat theory (Article 7 of this Statute), demanding that the registered office of an SE shall be located in the same Member State as its central administration, the SUP Proposal deliberately omits such a requirement. Recital 12 of the said proposal emphasizes that "[t]o enable business to enjoy the full benefits of the internal market, Member States should not require the registered office of an SUP and its central administration to be in the same Member State".[40] This divergence illustrates that European legislative policy still seems to lack a coherent approach to this vital question of international company law.

4. Transatlantic Competition between the EU and the USA

Finally, one may look at competition between legal orders from a transatlantic perspective. As long as a significant number of European companies were listed on American stock exchanges (NYSE, Nasdaq), it was a rational regulatory strategy for the EU to impose American-style stringent requirements on the corporate governance of EU corporations in order to dissuade US regulators from applying their own laws extraterritorially.[41] Currently, however, a listing in the US has become largely unattractive for European companies, thus alleviating the pressure for additional EU regulation in this regard.[42]

[38] The Commission presented a proposal for a Council Regulation on the Statute for a European private company in 2008, COM(2008) 396; on the subsequent developments, see *Astrid Roesener*, Das Warten auf Aktion: Der Aktionsplan zum Europäischen Gesellschaftsrecht und die Societas Privata Europaea, NZG 2013, 241.

[39] SUP Proposal, COM(2014) 212 final.

[40] This has been criticized by *Hartmut Wicke*, Societas Unius Personae – SUP: eine äußerst wacklige Angelegenheit, ZIP 2014, 1414, 1416 et seq.

[41] On the extraterritorial application of US capital markets law see *von Hein*, Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland, 2008, pp. 313–354.

[42] At the moment, only three German stock corporations are listed on the NYSE (SAP, Fresenius Medical Care and the Deutsche Bank), see *Désiree Backhaus*, Siemens US-Delisting: Nur noch drei Dax-Firmen an NYSE notiert, http://www.finance-magazin.de (30 January 2014).

III. The ECJ's turn to the Theory of Incorporation at the End of the 20th Century

1. Daily Mail

The starting point of the ECJ's jurisprudence on international company law was the "*Daily Mail*" case of 1988.[43] The Daily Mail and General Trust PLC wanted to move its central administration from England to the Netherlands with the intention to avoid British taxation. From a choice of law perspective, transferring Daily Mail's seat did not cause a threat to the company's existence because both England and the Netherlands follow the theory of incorporation. Nevertheless, Daily Mail required the British tax authorities' consent in order to cease to be resident in the United Kingdom. When that consent was denied, Daily Mail claimed that its freedom of establishment had been infringed. The ECJ, however, ruled that freedom of establishment does not confer on a company the right – against its state of incorporation – to transfer its real seat to another Member State. In this regard, the Court emphasized that "it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning."[44]

2. Centros, Überseering and Inspire Art

In first reactions to the *Daily Mail* decision, most academic commentators took the view that the ECJ had endorsed the freedom of domestic legislators and courts to follow either the real seat theory or the incorporation theory.[45] In this regard, it was frequently overlooked that *Daily Mail* solely concerned the question which rights a company had against the state under whose laws it had been founded (the "home state"), but not the question whether the *host state* could refuse to recognize a foreign company as being legally existent. From 1999, the jurisprudence of the ECJ clarified the latter point in three decisions, *Centros*, *Überseering* and *Inspire Art*.[46]

The Centros Ltd. was a private limited company registered in England and Wales, without pursuing any real economic activity there. The founders of this typical letterbox company applied to the Danish Trade and Companies Board to register a branch in Denmark. The

[43] ECJ, 27.9.1988, Case C-81/87 (The Queen ./. Daily Mail), E.C.R. 1988, 5483.

[44] ECJ, 27.9.1988, Case C-81/87 (The Queen ./. Daily Mail), E.C.R. 1988, 5483, para. 19.

[45] *Halbhuber*, C. M. L. Rev. 38 (2001), 1385, 1390–1395.

[46] ECJ Case C-212/97 – *Centros* [1999] ECR I-1459; ECJ Case C-208/00 –*Überseering* [2002] ECR I-9919; ECJ Case C-167/01 – *Inspire Art* [2003] ECR I-10159.

Board refused, arguing that Centros was in fact seeking to establish a principal establishment in Denmark, thus trying to circumvent Danish minimum capital requirements. The ECJ, however, classified the founders' legal tactics not as an abuse of rights, but as a realization of the freedom of establishment. In this regard, the Court argued that denying a registration of a letterbox company's branch "is not such as to attain the objective of protecting creditors [...]. [I]f the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk."[47] Moreover, the Court pointed out that under European legislation on disclosure requirements, creditors would have to be informed of the fact that they were dealing with an English rather than a Danish company.[48] The registration of a branch could only be denied if it could be established that the company's founders were actually trying to defraud creditors in Denmark.[49]

After *Centros*, it was controversial whether, in cases involving the transfer of a company's center of administration, the ECJ's judgment merely forced Member States to recognize migrating companies as having legal capacity, but allowed them to apply the host state's law on other matters, or whether the host state was actually required to apply the law of the state of incorporation to the company as a whole. At first, the 2nd Senate of the German Federal Court of Justice tried to maintain the real seat theory, with the result that a foreign corporation transferring its real seat to Germany was re-characterized under German law as a partnership with the capacity to sue and be sued.[50] However, this modified real seat theory took away the privilege of limited liability from the migrating company and therefore still significantly restricted its freedom of establishment. In the *Überseering* case, the ECJ clarified that "[w]here 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)*."[51] Moreover, the Court distinguished *Centros* and *Überseering* from the earlier precedent of *Daily Mail*: Whereas *Daily Mail* concerned the legal relationship between a company and its *home* state, the state of incorporation, *Centros*

47 ECJ Case C-212/97 – *Centros* [1999] ECR I-1459, para. 35.
48 ECJ Case C-212/97 – *Centros* [1999] ECR I-1459, para. 36.
49 ECJ Case C-212/97 – *Centros* [1999] ECR I-1459, para. 38
50 BGH 1 July 2002, BGHZ 151, 204.
51 ECJ, 5.11.2002, Case C-208/00, –*Überseering* [2002] ECR I-9919 (emphasis added)

and *Überseering* dealt with the recognition by the *host* Member State of a company incorporated under the law of another Member State.[52]

Finally, the ECJ made clear, in the *Inspire Art* case, that a special connection of mandatory provisions in order to protect minority shareholders, creditors and stakeholders (employees) is not absolutely excluded in the individual case, but that comprehensive defence laws against 'pseudo-foreign' companies are not compatible with the freedom of establishment.[53] In this regard, the ECJ again heavily relied on the argument that potential creditors of a letterbox company "are put on sufficient notice that it is covered by legislation other than that regulating the formation […] of limited liability companies [...]" in the host state.[54]

IV. The German Council's Proposal for codifying a European PIL of Corporations

As the German Council's Proposal of 2006 (in the following: German Council's Proposal – GCP) was a direct response to the *Centros* trilogy of cases, it comes as no surprise that, as a general rule, it subjects companies to the law of the state in whose public register they are entered (Article 2(1) GCP). It is not possible to examine all the details of the GCP here. Nevertheless, three features of the GCP deserve to be highlighted: Firstly, the clear preference for a traditional, multilateral conflicts rule instead of a mere principle of recognition; secondly, the deliberate omission of any requirement of real economic activity in the state where the registered office is located; thirdly, the universal application of the proposed conflicts rules also vis-à-vis third states.

From a doctrinal point of view, it was – and still is – controversial whether the *Centros* trilogy had to be interpreted within a unilateralist framework, leaving choice of law issues to the law of the state of incorporation, but forcing other Member States to accept the results of applying this law under a European principle of recognition or whether the ECJ had derived a multilateral "hidden conflicts rule" from the EC Treaty.[55] The practical implications of this distinction are important: Under the recognition approach as outlined in the *Überseering* case, the new jurisprudence merely created legal obligations for the host Member State of a

[52] ECJ, 5.11.2002, Case C-208/00, – *Überseering* [2002] ECR I-9919 paras. 61–73.

[53] ECJ, 30.9.2003, Case C-167/01 – *Inspire Art*, E.C.R. 2003, I-10155.

[54] ECJ, 30.9.2003, Case C-167/01 – *Inspire Art*, E.C.R. 2003, I-10155, para. 135.

[55] See *von Hein*, in: Säcker/Rixecker/Oetker (eds.), Münchener Kommentar zum BGB, 6th ed. 2015, Art. 3 EGBGB para. 110, with further references; *Weller* (supra note 15), pp. 373–378, who argues in favour of a „hidden conflicts rule" which should, however, be limited to inbound situations and to EU/EEA-companies.

migrating company, whereas the state of incorporation remained free to adopt either the real seat theory or the theory of incorporation for companies created under its own laws. Thus, European international company law would be characterized by the distinction between "inbound" and "outbound" cases. Under the assumption of a multilateral "hidden conflicts rule", on the contrary, the new case-law would also have ramifications for the state of incorporation itself, limiting its powers to dissolve a company if it transfers its centre of administration to another Member State. In its legislative proposal of 2006, the German Council did not decide this issue under primary EU law, but recommended a traditional, multilateral conflicts rule based on the theory of incorporation (Article 2(1) GCP). Pursuant to this rule, even the home Member State of a company would have to tolerate a company's transfer of seat.[56] In so far, the GCP is in line with other EU secondary legislation which has refrained from adopting the principle of recognition as a new choice-of-law approach.

Secondly, the GCP – in contrast, for example, with the SE statute (see supra II. 3) – does not require a coincidence between the actual seat and the place of registration.[57] The drafters point out explicitly that "it is irrelevant whether this [the place of registration] is actually the principal place of business or whether that place is in fact located in the state in which the (second) registration of a branch was entered."[58] Moreover, Article 7(1) 1st sentence GCP would allow companies to relocate their place of registration to another Member State without having to transfer their actual seat as well. This is remarkable because similar attempts at secondary EU legislation (14th Directive) have so far not been successful.[59] The protection of fundamental political, social and economic values of the host state are left to provisions on mandatory rules (Article 9 GCP) and public policy (Article 10 GCP).

Finally, the GCP is framed as a *loi uniforme*, i.e, that it is not limited to intra-EU cases.[60] Under the current case-law, the transition to the incorporation theory also affects companies registered in contracting states of the European Economic Area (EEA), which have to be treated in the same way as companies registered in Member States of the EU.[61] Likewise, the incorporation theory applies by virtue of bilateral conventions concluded with important trade

[56] See *Kieninger*, RabelsZ 73 (2009) 606, 620 et seq.

[57] *Sonnenberger/Bauer* (supra note 6), p. 83.

[58] *Sonnenberger/Bauer* (supra note 6), p. 82.

[59] See *Zimmer* (supra note 6), p. 215; on the proposal for a 14th directive, see *von Hein*, in: Säcker/Rixecker/Oetker (eds.), Münchener Kommentar zum BGB, 6th ed. 2015, Art. 3 EGBGB para. 113, with further references.

[60] See *Kieninger*, RabelsZ 73 (2009) 606, 621 et seq.; *Zimmer* (supra note 6), p. 211.

[61] BGH 19 September 2005, BGHZ 164, 148 concerning Liechtenstein.

partners, particularly the United States.[62] However, at least in Germany, the real seat theory is still applied to companies registered in third countries such as Switzerland which have not entered into bilateral conventions on this matter.[63] In contrast, the GCP provides for a comprehensive codification of the incorporation theory also in relations with third states. This approach is in line with existing EU legislation in other fields, such as contracts or torts, because both the Rome I and II Regulations claim universal application (Article 2 Rome I, Article 3 Rome II).[64] Moreover, a coherent and unified approach to international company law facilitates decision-making.[65]

In the following, I will briefly present the case-law of the ECJ after 2006 and evaluate the GCP in light of these subsequent developments.

V. The Recent Case-Law of the Court of Justice

1. Cartesio

As I have already stated, one of the most hotly debated issues in European international company law was the question how *Centros* could be reconciled with *Daily Mail*, i.e. whether a migrating company could also rely on the freedom of establishment against the state where it is registered or whether the case-law of the ECJ merely created obligations of recognition for the host Member State. This question has been answered by the Court in another trilogy of cases, *Cartesio*, *National Grid Indus* and *Vale*.[66]

In the *Cartesio* decision, the ECJ essentially reaffirms – contrary to the opinion of the Advocate General[67] and wide-spread expectations of practitioners and academics[68] – the decision in *Daily Mail*. Cartesio was a company registered in Hungary. It applied to the Regional Court in Hungary for registering the transfer of its actual seat to Italy in the commercial register. This application was rejected because Hungarian law did not allow a company incorporated in Hungary to transfer its centre of administration to another Member States while continuing to be subject to Hungarian law. In its judgment, the Court reaffirmed

[62] BGH 29 January 2003, BGHZ 153, 353 regarding Art XXV(5) of the German-American Treaty of Friendship.

[63] BGH 27 October 2008, BGHZ 178, 192, 'Horse Racing Track'

[64] See *von Hein*, in Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, 2011, Article 2 Rome I paras. 1 et seq.

[65] *Zimmer* (supra note 6), p. 211.

[66] ECJ Case C-210/06 – *Cartesio* [2009] ECR I-9641; CJEU Case C-371/10 , National Grid Indus, [2011] ECR I-12273; CJEU Case 378/10 – *VALE*, ECLI:EU:C:2012:440.

[67] GA *Poiares Maduro*, Opinion of 22. 3. 2008 – Case C-210/06 – *Cartesio*.

[68] Cf. *Kieninger*, RabelsZ 73 (2009) 606, 616: „quite unexpectedly".

the basic argument of *Daily Mail* that companies are creatures which derive their existence from the laws of the Member State in which they are registered and that, accordingly, this state has the power to define the connecting factor required of a company, even if this means that the legal existence of a company is terminated because of a transfer of its actual seat.[69] In so far, the Court argued that "the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law".[70] Yet it is submitted that drawing a normative parallel between the law governing a company's existence and the nationality of a natural person in this respect is flawed.[71] A Member State that deprived natural persons of their citizenship merely because they have moved to another Member State would evidently violate their freedom of establishment.[72]

The Court emphasized, however, that it did not intend to confer any kind of "immunity from the rules of the EC Treaty on freedom of establishment" on the state of incorporation.[73] In particular, the Member State of incorporation must not prevent a "company from converting itself into a company governed by the law of the other [host] Member State, to the extent that it is permitted under that law to do so".[74] This caveat gave rise to new legal uncertainties: First, it was questionable which degree of freedom the state of incorporation actually enjoyed with regard to preventing a transfer of a company's actual seat to another Member State. Secondly, the *Cartesio* judgment threw up the question as to whether it obliges the host Member State to accept a foreign company's transformation into a new legal person incorporated under the laws of the latter state.

2. National Grid Indus

The first of these questions was answered in the Case *National Grid Indus,*[75] which involved problems of cross-border taxation and was based on almost the reverse fact pattern that had given rise to the earlier *Daily Mail* decision. *National Grid*, a Dutch company registered in the

[69] ECJ Case C-210/06 – *Cartesio* [2009] ECR I-9641, paras. 109–110.
[70] ECJ Case C-210/06 – *Cartesio* [2009] ECR I-9641, para. 109.
[71] *Behrens*, Festschrift Ulrich Magnus (2014) 353, 356: „[T]he ‚nationality' […] of a company is not in itself an indication of the law governing the company. It is rather the other way round: The ‚nationality' […] of a company depends on the proper law of the company as determined by the relevant determinate connecting factor used in conflict of laws (choice of law) rules."
[72] *Zimmer/Naendrup*, NJW 2009, 545, 546.
[73] ECJ Case C-210/06 – *Cartesio* [2009] ECR I-9641, para. 112.
[74] ECJ Case C-210/06 – *Cartesio* [2009] ECR I-9641, para. 112.
[75] CJEU Case C-371/10 – National Grid Indus, [2011] ECR I-12273.

Netherlands, wanted to transfer its actual seat to the United Kingdom. As both countries follow the theory of incorporation, this would have been perfectly fine from a choice of law point of view. The Netherlands, however, insisted on the company paying taxes on currency gains made in the Netherlands before allowing a transfer of seat. Contrary to *Daily Mail*, the Court decided that the company's home state had violated its freedom of establishment in this case. "[S]ince the transfer by *National Grid Indus* of its place of effective management to the United Kingdom did not affect its status of a company incorporated under Netherlands law," the Court argued, "the transfer did not affect that company's possibility of relying on Article 49 TFEU" even against the state of its incorporation.[76] Thus, distinguishing *Daily Mail* from *National Grid* seems to turn on a subtle technicality: A Member State that strikes a company off the register in case of a transfer of seat may do so without violating its freedom of establishment; the state, may, so to speak, kill its own creature of law. If, however, the state of incorporation considers the migrating company as being still legally existent, it must refrain from erecting financial obstacles to the company's freedom of establishment. It is doubtful whether this line of reasoning is compatible with the principle of proportionality because, metaphorically speaking, it favours a kind of corporate "death penalty" over the mere payment of a fine under applicable tax laws.[77]

3. Vale

After *Cartesio*, there had been further uncertainty as to whether a company incorporated under the law of Member State (A) that wished to transfer its registered office to Member State (B) and to reincorporate there as a company governed by the host state's law could rely on the freedom of establishment against the designated host state in order to allow such a conversion. The CJEU had the opportunity to clarify the issue in a case concerning an Italian company, VALE, which wanted to transfer its registered office to Hungary and thereby to convert itself into a Hungarian company.[78] It had been argued that such a conversion of an existing company under the host state's law should be treated in the same way as an original incorporation of a newly founded company in the host state, i.e. that Member States remained free to accept or deny such an inbound conversion under their domestic international company law.[79] The CJEU, however, pointed out that "the expression 'to the extent that it is permitted under that law to do so', in paragraph 112 of *Cartesio*, cannot be understood as seeking to

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[76] CJEU Case C-371/10 , National Grid Indus, [2011] ECR I-12273, para. 32.

[77] Cf. *Jung*, Festschrift Ivo Schwander (2011) 463, 570 et seq.

[78] CJEU Case 378/10 – *VALE.*, ECLI:EU:C:2012:440.

[79] Thus the Hungarian, German, British and Irish governments in CJEU Case C-378/10 – *VALE*, ECLI:EU:C:2012:440, para. 25.

remove, from the outset, the legislation of the host Member State on company conversions from the scope of the provisions of the [TFEU] governing the freedom of establishment, but as reflecting the mere consideration that a company established in accordance with national law exists only on the basis of the national legislation which 'permits' the incorporation of the company, provided the conditions laid down to that effect are satisfied".[80] This means that the host Member State is entitled to determine the national law applicable to cross-border conversions and thus to apply the provisions of its national law to such operations, but remains subject to the principles of equivalence and effectiveness in this regard.[81]

Moreover, the CJEU denied that a company enjoyed a right to transfer its registered office to another Member State if it did not intend to pursue any real economic activity in the host state. The court emphasized "that the concept of establishment within the meaning of the Treaty provisions on the freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that State and the pursuit of genuine economic activity there."[82] This restriction is all the more remarkable as the Court refused to require a genuine economic activity as a precondition for a valid incorporation in the *Centros* case (see supra III.2); Centros was a typical letterbox company that did not pursue any economic activity in the UK. The two cases may be reconciled only if one is prepared to adopt a strictly formal distinction between the setting up of a company ("primary" freedom of establishment) and the subsequent transfer of its statutory seat or the registration of a branch ("secondary" freedom of establishment").[83] Whereas the CJEU requires a genuine economic link between the company's branch and its host state in the second scenario, it dispenses with such a requirement in a case involving "primary" freedom of establishment, leaving the question to the international company law of the state of incorporation. Again, it is possible to make such a formal distinction, but from a normative point of view, it is highly debatable whether cases that are very similar from a functional and economic point of view should be treated differently.[84] If one conceives of the theory of incorporation as a functional equivalent to party autonomy, it should be noted that neither

[80] CJEU Case C-378/10 – *VALE*, ECLI:EU:C:2012:440, para. 32..

[81] CJEU Case C-378/10 – *VALE*, ECLI:EU:C:2012:440, para. 62.

[82] CJEU Case C-378/10 – *VALE*, ECLI:EU:C:2012:440, para. 34, relying on Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, para. 54.

[83] BGH NZG 2011, 1114 para. 20 et seq.; *Karsten Engsig Sørensen*, The Fight against Letterbox Companies in the Internal Market, C.M.L. Rev. 52 (2015) 85, 89–94.

[84] See *Jung*, Festschrift Ivo Schwander (2011) 563, 567; *Thomale*, EuZW 2011, 1290, 1292; MüKo/*von Hein* Art. 3 EGBGB para. 112.

Article 3 of the Rome I Regulation on contracts nor Article 14 of the Rome II Regulation on torts distinguish between *ex ante* and *ex post* party autonomy in this regard; in both scenarios, no genuine link to the chosen law is required.

4. Conclusion

The CJEU's doctrinal basis for the theory of incorporation is a normative parallel between the law governing a company's existence and the nationality of a natural person. This reasoning is flawed because it results in a unilateralist approach to the conflict of laws that is out of step with existing Regulations on European private international law (e.g. Rome I and II) that favour a multilateral approach. Although the Court's unilateralist method is tempered by a principle of recognition imposed on host Member States, it leads to problematic consequences in cases involving an emigration of companies from the state under whose law they have been established (*Cartesio* and *VALE*). Instead, the theory of incorporation should rather be conceived as a specific expression of the general principle of party autonomy that is one of the cornerstones of EU private international law, in particular Rome I and II. Moreover, the increased Europeanization of capital market supervision in the EU contributes to an efficient corporate governance and thus leaves more room for party autonomy in international company law.

Currently, the CJEU only allows for a transfer of a company's statutory seat if a genuine link can be established between the company's activities and its new state of residence (*VALE*), whereas such a requirement is not imposed if a company is newly founded in a state with which there is no significant economic connection. Following the model of the Rome I and II Regulations on *ex-ante* and *ex-post* party autonomy, however, such a requirement ought to be dispensed with in both scenarios. The protection of fundamental political, social and economic values of the host state should rather be left to provisions on mandatory rules and public policy.

At the moment, the theory of incorporation is limited to companies incorporated under the law of a Member State of the EU or the European Economic Area (EEA). In line with the concept of universal application commonly adopted by EU private international law, this restriction should be abolished as well.

Thus, on all three points, the German Council's Proposal on the law applicable to companies goes well beyond the current case-law of the CJEU. The Proposal would establish multilateral conflicts rules in international company law, enshrine party autonomy as a general principle in this legal field without any requirement of a “genuine link” and have universal application to companies registered in third states as well. Thus, the enactment of the German Council’s Proposal at the EU level would not only be an important contribution to re-integrating international company law into the normative framework of existing EU legislation on private international law, it would also bring about real benefits for legal practice.

VI. Outlook: The Current Prospects for Codifying the PIL of Corporations in the EU

In sum, adopting the German Council's proposal for an EU Regulation on the law applicable to companies would be a major step forward for European private international law. The European Commission has already taken first steps for further legislation. In order to fulfil the promises set out in the 2010 action plan to implement the Stockholm Programme (see supra I) – and to implement the European Parliament Resolution of 2012 (see supra I), the Commission released a call for tenders relating to a study on the law applicable to companies in 2014.[85] It is to be expected that the resulting study will form the basis for a long envisioned Green Paper, which in turn will lay the foundation for a European Regulation on the law applicable to companies.

[85] Open call for Tender of 6 August 2014 JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonization of conflict of law rules on the matter, 2014/S 149-267126, JUST/A/4/MB/ARES(2014)2599553