

EU Internal Market Law Lecture No

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FREE MOVEMENT OF COMPANIES WITHIN THE EU

Harmonisation of company law
and European companies

Free movement of companies within the EU: different tools

- A. Freedom of establishment of companies:
Arts. 49 and 54 TFEU
- B. Case-law of the CJEU on Arts. 49 and 54 TFEU
- C. EU secondary law
 - Art. 50, para. 2, *lit. g*), TFEU: harmonisation of company law
 - Art. 352 TFEU (ex Art. 308 ECT): creation of European companies (supranational types of companies)

HARMONISATION OF COMPANY LAW

Directives harmonising company law

A bunch of directives enacted from 1968 on concerning several aspects:

- Disclosure obligations, validity of obligations entered into by a company and nullity of companies (*I directive 68/151/EEC*, lastly repealed by dir. 2009/101/EC)
- Protection of capital (*II dir. 77/91/EEC*, recently repealed by dir. 2012/30/EU),
- Mergers of public limited liability companies (*III dir. 78/855/EEC*, recently repealed by dir. 2011/35/EU)
- Domestic divisions of public limited liability companies (*VI dir. 82/891/EEC* and its amendments)

- Accounts, i.e. annual accounts of companies with limited liability, consolidated accounts of companies with limited liability, statutory audits of annual accounts and consolidated accounts (*IV dir. 78/660/EEC*, *VII dir. 83/349/EEC* and *VIII dir. 84/253/EEC*, lastly repealed by dir. 2006/43/EC)
- Disclosure requirements in respect of branches (*XI dir. 89/666/EEC*, amended several times and partially repealed by dir. 2013/34/EU)
- Single-member private limited liability companies (*XII dir. 89/667/EEC*, lastly repealed by dir. 2009/102/EC)
- Takeover bids (*XIII dir. 2004/25/EC*)
- Cross-border mergers of limited liability companies (*X dir. 2005/56/EC*)
- Rights of shareholders in listed companies (dir. 2007/36/EC)

Pending proposals

Some pending proposals:

- *Fifth directive* concerning the structure of public limited liability companies and the powers and obligations of their organs, 1972-1990
- *Ninth directive* concerning groups of companies, 1997
- *Fourteenth directive* on the cross-border transfer of seat of companies (informal draft in 1997, abandoned in 2007, public consultation in 2012)

What's the role for harmonisation in relation Arts. 49 and 54 TFEU?

- What's the role for the harmonised rules of company law?

EU harmonisation rules are **useful for facilitating** the exercise of the right of establishment (settled case-law)

- What are **NOT** harmonised rules of company law?
Harmonisation rules **cannot be made a precondition for the implementation of the freedom of establishment** laid down by Articles 43 EC and 48 EC»

Pros and cons of the harmonisation in the field of company law

Pro

- setting of EU common rules in relation to many issues of company law

Cons

- Different and narrow (personal) scopes of application (limited liability companies; public liability companies), esp. when compared to that of the right of establishment
- Use of a two-level legislative technique (directives)
- Setting of minimum standards

«EUROPEAN» COMPANIES

The idea of creating truly «European» companies

- Origins of the idea
 - 1949-1954, Council of Europe
 - 1965, EEC (proposal by France, Sanders committee)
- Underlying purposes
 - Remove barriers to the restructuring and cooperation operations involving companies from different MS and, thus, adapt the structures of production to the EU dimension as a means for completing the internal market

- Alternative models
 - a) Free-standing genuine European company type (governed only by EU rules, completely separate from national legal orders) → 1 European company
 - b) Supranational company types rooted in EU law but integrated by national laws → 28 European companies
- Legal bases: Art. 352 TFEU (former Art. 308 ECT and 235 EEC) → so called «flexibility clause»

What has been done?

Already existing European companies

- **European Economic Interest Grouping (EEIG)**: Council Regulation (EC) n. 2137/1985
- **European Company or *Societas Europaea* (SE)**: Council Regulation (EC) n. 2157/2001
- **European Cooperative Company (SCE)**: Council Regulation (EC) n. 1435/2 + Directive 2001/86/CE concerning the involvement of employees

Pending proposals

- Proposal for a **European Private Company (SPE)** – COM(2009) 665 final of 2/12/2009

What is a «European» company?

Most important common features of the European companies:

- Supranational structure/framework **rooted in EU law** but **not completely independent** from national laws of the MS
- A complex mix of sources of regulation
 - EU law + company statute + national law of the MS of incorporation
- Common rules relating in particular to
 - i) the company structure,
 - ii) its functioning and
 - iii) the transfer of its seat and iv) the winding up/liquidation/insolvency
 - iv) the participation of workers (specific directives)

The model: the European Company or *Societas Europaea* (SE)

- Regulation 2157/2001/EC of 8 October 2001 on the statute for a European Company (SE)
- Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (Negotiation solution as regards worker co-determination)



A supranational company type designed for public limited-liability companies (large enterprises) governed both by EU common rules **and** national company laws

→ 28 different SEs

Sources of regulation

Pursuant to Art. 9 of Reg. 2157/2001 an SE shall be governed by

- a) the Regulation
- b) the provisions of its statutes, where expressly authorised by the Reg.
- c) in the case of matters not regulated/of aspects not covered in matters only partially regulated by the Reg.
 - i. national rules specifically adopted by the MSs for implementing EU rules on the SE
 - ii. national provisions applicable to public limited liability company formed in accordance with the law of the MS in which the SE has its registered office
 - iii. the provisions of its statutes, in the same way as for a public limited liability company formed in accordance with with the law of the MS in which the SE has its registered office

Incorporation of an SE

Four ways to create an SE

- **cross-border merger** between two/more public limited-liability companies, formed under the law of a MS and having their registered offices and head offices within the EU (at least two of them governed by the law of different MS)
- **formation of a holding SE** by two/more public limited-liability companies, formed under the law of a MS and having their registered offices and head offices within the EU

provided that each of at least two of them

(a) is governed by the law of a different Member State, or

(b) has for at least two years had a subsidiary company governed by the law of another MS or a branch situated in another MS

- **formation of a subsidiary SE** by companies and firms within the meaning of the Art. 54(2) TFEU and other legal bodies governed by public or private law, formed under the law of a MS, with registered offices and head offices within the EU may

provided that each of at least two of them

(a) is governed by the law of a different Member State, or

(b) has for at least two years had a subsidiary company governed by the law of another MS or a branch situated in another MS

- **transformation into an SE** of a public limited-liability company, formed under the law of a MS, which has its registered office and head office within the EU, provided that for at least two years it has had a subsidiary company governed by the law of another MS

→ Once created every SE shall be **registered in the MS in which it has its registered office** in a register designated by the law of that MS (Art. 12)

Required coincidence of seats

The **registered office of an SE** shall be located

- **within the EU**
- **in the same MS** as its **head office** (Art. 7, Reg. 2157/2001)

↳ In addition each MS may impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place.

The transfer of seat of an SE

The **transfer of the registered office of an SE** to another MS is **expressly regulated** by Reg. 2157/2001 under Art. 8.

- **Conditions:** the transfer must comply with **the specific procedures set** by paras 2 to 13 of Art. 8 Reg. 2157/2001 (transfer proposal, publicity, lapse of time, certificate attesting to the completion of the acts and formalities to be accomplished before the transfer...)
- **Exclusions:** the transfer is **excluded** where proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against the SE

- **Effects:** the transfer shall **not result** in the winding up of the SE or in the creation of a new legal person

How and from when does the transfer take effect?

- The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect **on the date on which the SE is registered in the register for its new registered office**
- When the SE's new registration has been effected, the registry for its new registration shall notify the registry for its old registration. Deletion of the old registration shall be effected on receipt of that notification
- On publication of an SE's new registration, the new registered office may be relied on as against third parties

Cross-border mergers involving SEs

- Creation of an SE by cross-border merger
 - according to Arts. 17-31 Reg.
 - the laws of all the MSs involved in the merger applied cumulatively to certain aspects (e.g. Art. 24, para. 1, and Art. 31, para. 1)
 - and separately to others (Art. 25, para. 1)
- Excluded from the Reg. the mergers
 - carried out for different purposes
 - between companies

Pros and cons of European companies

ADVANTAGES

- Common European cooperation instruments
- Great degree of flexibility
- Possibility to transfer the seat without liquidation provided for by the statute

DISADVANTAGES

- Complexity: statute deriving from both EU law, national laws and private parties' autonomy
- Coincidence of registered office and administrative seat prescribed by the statute (simultaneous transfer of seats)
- Transfer of seat necessarily entailing a change of the applicable law

From theory to reality: How many SE have already been incorporated?

- No central European registry → no official data
- The **European Business Register (EBR)** is only a network of National Business Registers and Information providers from currently 28 MSs

- Some **unofficial** data, which have been gathered from national registries and the Supplement to the OJUE (TED) dedicated to European public procurement, can be found in the European Company (SE) Database at <http://ecdb.worker-participation.eu>














