

## Company mobility within the EU, fifty years on From a non-issue to a hot topic

Marie-Louise Lennarts\*

On 20th September 2007, fifty years (and six months) after the signing of the Treaty of Rome, over 120 participants gathered in the Pieterskerk in Utrecht for a conference on Companies Crossing Borders in Europe.<sup>1</sup> This special issue of the Utrecht Law Review contains a collection of some of the lectures held at this conference, where the existing possibilities for companies to move freely throughout the EU were discussed. The conference was not confined to a rendition of the status quo on company mobility, however. Several speakers made valuable suggestions for improvement.

The conference's opening speech was delivered by Philippe Pellé, who is a deputy head of unit at the DG Internal Market and Services with the European Commission. He illustrates that from the birth of the EU in 1957, the European legislator's main concern in the area of company law was to harmonize national company laws – especially with respect to the safeguards these laws contain for stakeholders such as minority shareholders, creditors and employees. The EU legislator's harmonization programme was driven by the desire to create a level playing field for competing businesses from different Member States and to prevent Member States from engaging in a 'race to the bottom' in order to attract investment.<sup>2</sup> The actual facilitation of corporate mobility was not a top priority for the European legislator at that time. This changed when, finally, after a long and hard struggle, the European Company Statute was adopted in 2001.<sup>3</sup> This Regulation is the first piece of Community legislation enabling a cross-border merger as well as the transfer of the company's seat to another Member State. The SE Statute was soon followed by the Cross-border Merger Directive,<sup>4</sup> which was adopted in 2005. This recent legislative activity shows the Commission's shift in focus from harmonization of company laws to facilitating cross-border mobility. The biggest boost for company mobility did not come from the Commission, though, but from that other powerful EU institution, the European Court of Justice. With its judgments in the cases *Centros*,<sup>5</sup> *Überseering*<sup>6</sup> and *Inspire Art*,<sup>7</sup> the ECJ forced

---

\* Professor of Company Law, Molengraaff Institute for Private Law, Utrecht University (the Netherlands).

1 This conference was organized by the Molengraaff Institute for Private Law of Utrecht University under the aegis of the Centre for European Company Law, an academic partnership between the universities of Leiden, Utrecht and Maastricht, which is connected with the Ius Commune academic network.

2 See William W. Bratton, Joseph A. McCahery & Erik P.M. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis*, Amsterdam Center for Law & Economics Working Paper no. 2008-01, p. 6, available online at [www.ssrn.com](http://www.ssrn.com)

3 Council Regulation (EC) no. 2157/2001 on the Statute for a European Company (SE), *OJ L-294*, p. 1, and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for the European company with regard to the involvement of employees.

4 (Tenth) Council Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, *OJ L-310*, p. 1.

5 ECJ 9 March 1999, Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*.

6 ECJ 5 November 2002, Case C-208/00, *Überseering BV v. Nordic Construction Co Baumanagement GmbH*.

7 ECJ 30 September 2003, Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*.

all Member States to accept that companies incorporated in accordance with the law of a Member State may operate freely throughout the EU. This was a major change for those Member States that used the real seat theory to apply their own national laws to companies incorporated in other Member States or even to withhold such companies' recognition as a legal person, with grave consequences for the investors in such companies. One of these Member States is Germany, which has witnessed an exponential growth of the population of English private *Limiteds* operating within its boundaries since the real seat theory was outlawed in the *Inspire Art* case.<sup>8</sup> The German legislator has recently drafted a Bill to reform the law on the German private limited company.<sup>9</sup> One of the changes proposed in this Bill is to allow German companies to have their head office outside Germany.

While the ECJ has confirmed that a company incorporated in a Member State may travel freely within the EU without losing its identity, it still has to decide whether the EC Treaty also affords companies the freedom to change their nationality by moving their registered office to another Member State. Thus Pellé's question whether we have reached a Nirvana, where companies can move as they wish within the EU, must be answered negatively, at least for the time being. A decision of the ECJ in the pending *Cartesio* case,<sup>10</sup> concerning a Hungarian company wishing to transfer its registered office to Italy is expected very soon. Meanwhile, the Commission has decided not to proceed with a proposal for a Directive on transfer of the registered office because it may not be politically feasible, the economic case for such a directive has not been demonstrated and, last but not least, because the ECJ will soon decide on this issue in the *Cartesio* case.<sup>11</sup> It seems that, once more, the decision to promote (or not to promote) company mobility is left to the ECJ.

From the first speaker at the conference, I turn straight to the last speaker, Gert-Jan Vossestein, because of his criticism of the Commission's reasons for not submitting a proposal for a Directive. In his paper, he argues that there *are* economic arguments which may justify legislative intervention by the Commission. I agree with Vossestein that the economic case for a Fourteenth Directive will even be stronger if the ECJ decides in the *Cartesio* case that the transfer of the registered office should be allowed: in that case it will be inevitable for the Commission to take action. The *Sevic* case,<sup>12</sup> in which the ECJ sanctioned the cross-border merger, demonstrates that the ECJ can not provide the legal certainty required by the business community and its advisors. This is a task for the European legislator. Although – as Raaijmakers & Olthoff and Wyckaert & Geens point out in their papers – the Cross-border Merger Directive is far from perfect, it does provide the minimum legal framework required by businesses before they will venture into a cross-border merger.

In his paper, Vossestein points out that the Commission doubts the added value of a Fourteenth Directive because companies already have the legal means to transfer their registered office using the possibilities offered by the European Company Statute and the Cross-border Merger Directive. Vossestein submits that the methods which have to be used (two-step or – in

---

8 See M. Becht, C. Mayer & H.F. Wagner, *Where Do Firms Incorporate?*, ECGI Law Working Paper no.70/2006, August 2007, available online at [www.ssrn.com](http://www.ssrn.com)

9 A press release of the German Ministry of Justice in English, outlining the most important proposed changes, is available at [http://www.bmj.de/enid/743a23cd22e438e3da8e88a6e23cbd6e,0/Partnership\\_and\\_Company\\_Law/The\\_reform\\_of\\_private\\_limited\\_companies\\_1ee.html](http://www.bmj.de/enid/743a23cd22e438e3da8e88a6e23cbd6e,0/Partnership_and_Company_Law/The_reform_of_private_limited_companies_1ee.html) (visited March 2008).

10 ECJ, Case C-210/06.

11 See Charlie McCreevy, European Commissioner for Internal Market and Services, Speech by Commissioner McCreevy at the European Parliament's Legal Affairs Committee, EP Legal Affairs Committee (JURI Ctee), Brussels, 3 October 2007. SPEECH/07/592, available online at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592&format=HTML&aged=0&language=EN&guiLanguage=en> (visited October 2007).

12 ECJ 13 December 2005, Case C-411/03, *Sevic Systems AG*.

the case that an SE is used – three-step transactions) are too cumbersome (and therefore costly). He is right: it would be far better if the registered office could be transferred in a single operation. By allowing this the EU would place itself ahead of the USA, where a transfer of the registered office from one state to another is not possible!<sup>13</sup>

It is time to turn to the remaining topics of the conference. The two speeches immediately following Pellé's opening speech were dedicated to the SE. In her paper, Noëlle Lenoir, who is the author of an extensive report on the SE commissioned by the French Ministry of Justice,<sup>14</sup> mentions two reasons why SE's are used in practice: the wish to express the European identity of the company and the possibility to benefit from real intra-community mobility. Lenoir argues that the latter is the principal advantage of the SE, but there are limits to the mobility of the SE. These limits reflect (some) Member States' fears that the SE would be used to avoid the application of national law. First, an SE can not be created 'from scratch' since a community dimension is required. This means that at least two companies from different Member States must be involved in the formation of an SE. Second, the SE may be able to transfer its registered office, but it cannot leave its head office behind in the state of departure. Art. 7 of the SE Regulation requires the registered office and the head office to be located in the same Member State. One of the amendments to the SE Regulation suggested by Lenoir in her paper is that this requirement be deleted. It seems inevitable, in view of the case law of the ECJ on free movement of companies, that this suggestion will be followed by the Commission. It does not make sense that a Dutch SE cannot have its head office outside the Netherlands where this is perfectly possible for a Dutch NV. This actually means that the Regulation leads to discriminatory treatment of the Dutch SE, which sits uneasily with Article 10 of the SE Regulation, prohibiting discrimination between SEs and equivalent 'national' companies. To be sure, Art. 10 allows for a discriminatory treatment of the SE if this is based on a provision of the Regulation. The question is, however, whether the discriminatory treatment of the SE following from art. 7 of the SE Regulation is allowed, in view of the fact that it violates the fundamental principle of free movement. I take the view that this question should be answered negatively.<sup>15</sup>

In his speech on the SE, Jochem Reichert explains why a relatively large proportion of the existing SEs were incorporated in Germany.<sup>16</sup> He first mentions some motives for the use of the SE which were also mentioned by Lenoir: facilitation of cross-border mergers and easy transfer of the registered office on the one hand and the European image attached to an SE on the other hand. But it seems that the most important motive for the use of the SE in Germany is a very different one. In Germany, the SE is used to achieve a more flexible form of co-determination in large companies than those required by the German co-determination laws. The advantages the SE offers are threefold: 1) it enables the tailoring of the co-determination model to the particular structure and needs of the company; 2) in an SE the co-determination extends to employee representatives from other Member States, which makes it less likely that purely national interests will be pursued by a representative board consisting of representatives from different Member States; and 3) the SE provides an opportunity to reduce the number of members of the supervisory board, which may be very large in a German public limited

---

13 See M.M. Siems, 'SEVIC: Beyond Cross-Border Mergers', 2007 *EBOR*, p. 313.

14 N. Lenoir, *La Societas Europaea ou SE – Pour une citoyenneté européenne de l'entreprise*, Rapports officiels, Ministère de la justice, Documentation Française, 2007.

15 See also Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, EGCI Working Paper 08/2003, p. 34, available online at [www.ssrn.com](http://www.ssrn.com).

16 The overview available at [http://www.worker-participation.eu/european\\_company/se\\_companies/news](http://www.worker-participation.eu/european_company/se_companies/news) (visited March 2008) shows that also after September 2007 (when the conference was held) the majority of new SEs were incorporated in Germany.

company. Moreover, Reichert explains that smaller companies may use the SE to avoid becoming subject to the stringent German One-third Participation Act or even the so called Montan Co-Determination Act, which requires half of the members of the supervisory board to be employee representatives. Another reason to choose the SE is that it allows for the adoption of a one-tier board structure, an option (still) not available to traditional German companies. At the end of his paper Reichert mentions the controversial German practice of establishing shelf SE's, which can be bought by entrepreneurs wishing to avoid the lengthy registration procedure.<sup>17</sup> After reading Reichert's account one cannot help wondering whether the introduction of the SE may in the end lead to changes in the German co-determination rules, in spite of the tremendous effort made by Germany to prevent erosion of the German co-determination rules as a consequence of the introduction of the SE.<sup>18</sup>

The two remaining papers in this special issue discuss two important aspects of the Cross-border merger Directive, being the protection of creditors and the protection of minority shareholders. The main conclusion of Raaijmakers & Olthoff's paper is that the differences among Member States in the ways in which they afford protection to creditors of merging companies create unnecessary and unjustifiable impediments to cross-border transactions. As it is illusory to expect that these impediments will be removed soon by an amendment to the Tenth Directive, Raaijmakers & Olthoff submit that the 'unfinished business' be finished by further aligning the national provisions on creditor protection by way of a change to the Third Directive, which lays down provisions applicable to national mergers. It is striking that Wyckaert & Geens arrive at a similar conclusion for the topic of minority protection. In their introductory remarks they state that nothing is as complicated – and consequently as challenging – as minority protection in corporate law. It becomes clear from their paper that the European legislator has yet to rise to this challenge, however. The fact that the Third Directive does not provide for minority protection may – as Wyckaert & Geens suggest – be attributed to the fact that minority protection was simply less of an issue in 1978 than it is today. However, not that much has changed since then. Both the SE Regulation and the Cross-border Merger Directive merely provide that Member States *may* adopt provisions designed to protect minority shareholders of the company being acquired who have opposed the merger. So minority protection in the case of a cross-border merger is – in the eyes of the European legislator – a matter which can be left to the discretion of the Member States. As the implementation process nears its completion, we see that some Member States have chosen to afford protection to minority shareholders where others did not do so. The Dutch situation is interesting because, although no specific minority protection is afforded in case of a *national* merger, the Dutch legislator has proposed to introduce provisions protecting minority shareholders of the disappearing company in case of a *cross-border* merger. Wyckaert & Geens contend that this difference in approach<sup>19</sup> – which is mirrored in the difference between the Third Directive on the one hand and the SE Regulation and the Cross-border Merger Directive on the other hand – is attributable to the legislator's concern about the change in applicable law which is a consequence of a *cross-border* merger. Although this concern is understandable, it shows a vision on the rationale for minority protection which is too narrow.

---

17 A company which specializes in these shelf-SE's is Foratis, see [http://www.foratis.com/thema\\_en/000128/europ\\_aktiengesell\\_ag\\_se.html](http://www.foratis.com/thema_en/000128/europ_aktiengesell_ag_se.html) (visited March 2008). For criticism of the shelf-SE see: [http://www.seeurope-network.org/homepages/seeurope/file\\_uploads/blanke\\_ga-vorratsse-summary\\_en.pdf](http://www.seeurope-network.org/homepages/seeurope/file_uploads/blanke_ga-vorratsse-summary_en.pdf) (visited March 2008).

18 For other examples of ways in which the German co-determination rules may be eroded, see: Van Hulle/Maul/Drinhausen, *Handbuch zur Europäischen Gesellschaft (SE)*, 2007, nos. 254-258.

19 This difference is also highlighted by Raaijmakers and Olthoff, who mention some Dutch authors who have suggested that the distinction made between national and cross-border mergers will not be accepted by the ECJ.

It is not just the change in applicable law which should give rise to minority protection in case of a cross-border merger. As many jurisdictions recognize, the fact that a merger – whether national or cross-border – leads to a structural change of the company in which the shareholder invested is a sufficient reason to offer minority shareholders an exit right. In their conclusion Wyckaert & Geens suggest that the Commission uses the opportunity of the review of the Tenth Directive due in 2012 to redo its homework on this subject. It is clear from the two papers on the Cross-border Merger Directive that further harmonization of national laws is necessary to remove obstacles to cross-border restructuring, no matter how difficult and time-consuming this may prove to be in an EU with 27 Member States.

To sum up, speakers at this conference urge the European legislator to improve the SE statute, to facilitate cross-border mergers by removing obstacles created by differing rules on creditor and minority protection and to propose a Directive on transfer of the registered office. It is to be hoped that the European legislator will take these suggestions to heart. But this still leaves some things to be desired. I will mention just one wish: a European Directive on cross-border division. If companies are free to merge across borders, they should also be able to do the opposite.<sup>20</sup> It seems, though, that the European legislator has placed another issue concerning cross-border company mobility high on the agenda: it plans to come forward with a proposal for a European Private Company.<sup>21</sup> According to the Commission, the EPC, or *Societas Privata Europaea*, is needed to encourage SMEs to operate across borders, since currently the single market counts for less than 1% of the revenues of SMEs. This is what the Commission has in mind: ‘The SPE must be easy to set up, cheap to run, and as uniform as possible throughout the EU. It must leave a great deal of flexibility to founders and shareholders to organise themselves internally in the way that is best suited to their activity.’<sup>22</sup> The Commission acknowledges, however, that, besides being modern, flexible and uniform, the EPC should also be protective of creditors and minority shareholders.<sup>23</sup> That means that 27 Member States will have to reach an agreement<sup>24</sup> on the appropriate degree of protection to be afforded to creditors and minority shareholders (not to mention the employees!). Apart from the spectre of the SE hovering above this project, there is another reason to doubt whether it deserves to be at the top of the Commission’s list. Since Inspire Art, Member States have engaged in regulatory competition, trying to make their national private limited companies more attractive to businesses.<sup>25</sup> Why would a business need the EPC if it can use any flexible limited company from a Member State to do business across the EU? And if there really are convincing reasons to introduce the EPC, would it then not be better to aim for a Directive instead of a Regulation?<sup>26</sup>

My final remarks show that the discussion on corporate mobility will not subside: there is still a lot of work to be done. After fifty years, corporate mobility has finally received the attention it deserves: it has become a hot topic!

---

20 See M.M. Siems, ‘SEVIC: Beyond Cross-Border Mergers’, 2007 EBOR, pp. 314-315.

21 See [http://ec.europa.eu/internal\\_market/company/epc/index\\_en.htm](http://ec.europa.eu/internal_market/company/epc/index_en.htm)

22 Jörgen Holmquist, Director-General Internal Market and Services, European Commission, speech delivered at a conference on the European Company in Brussels on 10th March 2008, available online at [http://ec.europa.eu/internal\\_market/company/epc/index\\_en.htm](http://ec.europa.eu/internal_market/company/epc/index_en.htm) (visited March 2008).

23 See the speech mentioned in the previous footnote.

24 The Commission plans to propose a Regulation, which means that *all* Member States must agree on its content in order to have it adopted.

25 See M. Becht, C. Mayer & H.F. Wagner, *Where Do Firms Incorporate?*, ECGI Law Working Paper no.70/2006, August 2007, available online at [www.ssrn.com](http://www.ssrn.com)

26 This was suggested by Harm-Jan de Kluiver at the conference mentioned in footnote 20. Slides of his presentation are available at [http://ec.europa.eu/internal\\_market/company/epc/index\\_en.htm](http://ec.europa.eu/internal_market/company/epc/index_en.htm) (visited March 2008).