

Company law: the elephant in the room

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Why European company law?

Main argument is the *level playing field*: member states are supposed to offer comparable conditions to companies from different countries

Different routes to achieve this level playing field:

- Full harmonisation (exactly the same rules for all companies)
- Partial harmonisation (with opt-in and opt-out possibilities)

Over the past decades: from full to partial harmonisation and co-ordination

In recent years focus on simplification (cutting red tape) and flexible solutions, and introducing new options and possibilities (European company, cross border mergers).

New initiatives: cross border divisions, SUP (new legal form with a single shareholder), possible revision of merger directive, transfer of seat/cross border conversion

Relevant: jurisprudence of the European Court of Justice (shadow law-maker)

Company law and employees

At first sight: two different planets (or even universes): capital and labour

Looking closer: changes in company law can have major consequences for labour

This is mainly (but not exclusively) the case in countries with participation systems (meaning worker influence on the boards of companies, like in Germany, Austria, Sweden, and to some extent the Netherlands).

The core problems (1)

Worker participation (EBLR) is directly linked to the legal form of the company (example: AG, GmbH). Changes in the legal form may affect worker participation:

- * Changing into a European legal form
- Changing into a foreign legal form (Delaware company, UK Ltd.)
- Transfer of seat with (or without) a change of legal form (conversion)
- Mergers (combining may of the former elements)

The core problems (2)

Traditionally two doctrines in the EU:

- Real seat: you are subject to the law of the member state where you conduct your activities (factories, employees etc.)
- Registered seat: you are subject to the law of the country where you are registered (example: a UK ltd. in the Netherlands).

Over the past decade, the registered seat doctrine has seized the initiative (to put it mildly).

EU-solutions to the core problems

European company: uphold the real seat doctrine and safeguard existing participation arrangements. Some problems here, but system OK

Cross border merger: no more real seat doctrine and weaker safeguards. Employee side on the defensive.

New proposals (SPE and SUP): danger for worker participation increases

European Court of Justice makes things worse

EJC rulings one-sidedly stress the freedom of movement of capital and view worker participation with distrust (as a possible barrier to free movement).

Real seat doctrine is run over by registered seat doctrine.

What to do?

- 1 Acknowledge the importance of company law (and even securities law) for labour; labour as a corporate governance mechanism
- 2 Think of ways to make worker involvement less dependent on the legal form of the company. Strong forms of I&C. Trade offs between I&C and EBLR!?
- 3 Size matters (thresholds), as does the location of the center of activity (SPE, SUP)
- 4 Think about positive rights (co-management) and negative rights (veto, block decisions)