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Company Law Implications of the ECJ Cartesio Judgment

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Roundtable discussion on the Cartesio judgment of the ECJ

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Cartesio: Daily Mail déjà vu?



- journey all the way back to 1988?
- reconstruction of the „Berlin Wall”, where companies passing the border might be legally shot?

Two shifting objectives of the EC-preemption in the field of company law:



- Harmonisation →
 - the idea was triggered off by the political will to reduce potential for charter shopping in Europe, that is – in today's terms – to impede companies' mobility
- Companies' mobility →
 - interpretation (primary law mechanism) and facilitation (secondary law mechanism) of the fundamental freedom of establishment
 - gradually leads to the bottom-up harmonisation (self-harmonisation)

Shifting objectives' paradox



- In order to avoid regulatory competition, harmonisation was launched.
- In order to facilitate competition, (a fair amount of) harmonisation has been achieved.

Does Cartesio undermine companies' freedom of establishment?



Physical migration without legal migration



- Real exit:
 - country of origin may hinder (Daily Mail, Cartesio)
 - host country cannot reject (Überseering, Sevic)
 - (how about transparency? analogous application of the 11th Directive?)
- Pseudo-exit:
 - possible in any case via branch (Centros, Inspire Art)

Legal migration with physical migration:



- Possible via SE
 - Problems:
 - limited availability,
 - costly: three-steps-procedure
- Possible through cross-border downstream merger (10th Directive, Sevic)
 - Problem:
 - burdensome: two-steps-operation
- Should generally be possible according to Cartesio and the ratio of Sevic
 - Problem:
 - legal uncertainty

Legal migration without physical migration:



- Could be possible according to Cartesio, but
 - Possible barriers:
 - on the part of the „host“ (legal entry) MS: technicalities and conditions of corporate (re)formation
 - on the part of the MS of origin (legal exit): minority and creditor protection
 - missing legal framework: high degree of legal uncertainty

Migration of businesses or migration of ideas?



- “The notion of European company law stands less for the set of legal rules enacted by the European legislator, and more for a certain program of legal policy”
 - Marcus Lutter, *Europäisches Gesellschaftsrecht*, ZGR-Sonderheft 1984, at p. 6.

Mystery of driving forces in regulatory competition



- Tests:
 - ✓ **Demand:** Where do firms incorporate? (Marco Becht/Colin Mayer/Hannes F. Wagner, ECGI Working Paper N°.70/2006, September 2006)
 - Negative examples of Poland or Hungary
 - ✓ **Supply:** Does the freedom of establishment trigger off quality-increasing transformation of national company laws?
 - negative examples of Austria, Luxembourg or Baltic Countries

Companies mobility – after Cartesio an issue as hot as before?



- If we are to have funeral rather than wedding, let's look at least if there are any Cartesio's posthumous children

Outlook



- **The King is dead, long live the King!**
 - 14th Directive needed.
 - (but) **14th Directive has been needed irrespective of the outcome of the Cartesio case!**

Outlook



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- Stronger Case for the European Private Company (SPE)
 - mobility illusion demasked → counter-arguments against SPE undermined
- more „Trojan Horses” for the increased spill-over effects to further enhance system convergence of national company laws
 - means to help breaking out of inefficient dogmatic traps present in many jurisdictions



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Thank you very much for your attention !