

Xenophobia or Competition?

BY ADRIAAN F.M. DORRESTEIJN

PROFESSOR OF INTERNATIONAL COMPANY LAW, UTRECHT UNIVERSITY, THE NETHERLANDS

40

Human beings may encounter xenophobia when they choose to settle down in another country. In the EU, the same has happened to legal humanoids such as companies. Registration has been barred by chambers of commerce, legal capacity has been denied by courts and host states required foreign companies to meet national standards such as a minimum capital. Although the European Court of Justice has removed such barriers with an impressive series of judgements – Centros, Überseering and Inspire Art – the freedom of establishment, guaranteed to individuals by the EC Treaty, never had its full impact on company law. Where the “real seat” approach is embodied in company law, companies are not allowed to transfer their centre of economic activities or head office to another Member State while staying registered in the country of origin. Even countries that advocate a more liberal approach may block the transfer of a company’s head office to another Member State, as has been decided in the Daily Mail judgement. Nevertheless, the European Court has made an important step on the road to a less rigid system. One may even see the first signs of an emerging European market for incorporations. In such a market, Member States with the most attractive company law may facilitate the greater part of incorporations to the detriment of other Member States. This may sound theoretical but is known to be the case in the U.S. where Delaware is the most popular state for incorporations.

As can be seen in this issue of *European Company Law*, Member States show a tendency to create “light vehicles” for the incorporation of non-listed businesses. Is the market for incorporations already functioning? There may be two reasons why states become engaged in competition. The first is a defensive one. Member States may want to prevent the “import” of foreign companies (or equivalent legal forms). The erosion of the traditional barriers by the decisions of the European Court may stimulate local entrepreneurs to look elsewhere for the incorporation of their business. They may be kept from doing so as long as there is an equally attractive national legal form at hand. The other reason to compete has a more offensive character. Member States may aim at capturing a larger part of the total number of incorporations within the EU, thus becoming an exporting country like Delaware. Most Member States in the EU, however, still seem to

be inspired by neither defensive or offensive thoughts. The overriding idea is to facilitate business, in particular to offer the flexibility that suits the small and medium-sized enterprise.

It is unlikely that further liberalisation of the market for incorporations will unleash tough competition for the popular light vehicle. It may still take considerable time before foreign companies have a reputation equal to that of the nationals. People may not easily want to do business with a vehicle they are not familiar with.¹ Investors may require a risk premium because a foreign species may offer less protection to creditors. By the same token, directors may run a greater risk to be held liable. After all, someone has to pay the bill.

In case competition should be really stimulated, the trump card is in the hands of the European legislator. What is needed is the introduction of a European Private Company along the same pattern as the SE. Such a private company will gain a respectable status in the Member States much easier than many a national light vehicle. And as the French approach to the SE shows, national legislators may adapt company law in order to create an attractive national version of the European legal form.² But even then, competition will be very limited as long as the registered office of such a European Private Company must be situated in the country of its head office.

¹ Cf. Christoph Teichmann, The European Private Company, in this issue of ECL.

² See Michel Menjucq, Implementation in France of the Regulation on the European Company: a strategic interpretation, in ECL 2004/3, p. 117.