

Capital and Companies: On the Move!

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The influence of free movement of capital on issues of company law reveals itself more and more.

Increasingly, the European Commission refers Member States to the Court of Justice for failure to comply with Article 56 EC. This article, as is well-known, prohibits all restrictions on the movement of capital. In the last few years, the Court has already rendered various judgments concerning golden shares and many more company law related rulings are on their way. Some of these new cases are quite “high profile”, already generating much publicity in news programmes and papers. There is of course the infringement case against Germany concerning the 1960 Volkswagen law.¹ Other high profile infringement procedures concern Poland (the UniCredit/HBV merger)² and the Netherlands (golden shares in KPN and TPG).³ It can, finally, be referred to an infringement procedure the Commission commenced in April 2006. This procedure concerns the much talked of French Decree of December 2005, which creates an authorisation procedure for foreign investments in certain sectors of the economy.⁴

Perhaps less “high profile”, but nevertheless of fundamental importance is a second – very recent – manifestation of the influence of free movement of capital on company law. I refer to the proposal for a Directive on the exercise of voting rights by shareholders of January 2006.⁵ The proposal is intended to strengthen the rights of *all* shareholders, regardless of the level of ownership, and is, with that, predominantly motivated by (the advancement of) freedom of capital. The fact is, it is settled case law⁶ that besides the so-called “direct investment”,⁷ also the common “acquisition of securities on the capital market” is within the scope of the Treaty provisions on free movement of capital.⁸

The relationship between the proposed Directive and free

movement of capital is even more explicit in the Commission’s “Impact Assessment” (257 pages!) of the proposal.⁹ Just one quotation (p. 7): “Investor protection leads to broader and more liquid financial markets. Corporate governance and investment decisions are linked insofar as outside investors – facing the risk of expropriations by management or larger shareholders – will be more willing to buy shares in corporations where management strategies and actions are properly supervised and where minority investors enjoy a high level of protection.” Correctly therefore, the Commission has chosen Article 95 EC (which concerns harmonisation for, in short, realisation of the internal market, including free movement of capital) and not Article 44 EC (which concerns freedom of establishment) as the legal basis for the Directive.

It is not just capital which is on the move. Companies too may be on the go. And again – as was the case with free movement of capital – both the Court of Justice and Community legislation play an important role. The Court’s *Sevic* ruling¹⁰ and the Directive on cross-border mergers¹¹ (to which special attention is paid in this issue of ECL, first by Rønfeldt & Werlauff and then by Storm) increase the possibilities for existing companies to reincorporate in other Member States. In particular, the cross-border change of legal form and the so-called downstream merger, i.e. the merger of a parent company into its subsidiary, contribute to a free choice of company law.

Sevic and the Directive on cross-border mergers compel Member States’ legislatures to further reflect upon the question of how to provide a more attractive system of company law. They too should get on the move ...

1 Case C-112/05 *Germany v. Commission* (still pending).

2 See IP/06/276 of 8 March 2006.

3 Joined Cases C-282/04 and C-283/04 *Commission v. Netherlands*. On 6 April 2006, AG M. Poiares Maduro delivered his opinion. According to the AG, the golden shares in question are in breach of Article 56 EC.

4 IP/06/438 of 4 April 2006.

5 Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, published on the Commission’s internal market website: < http://europa.eu.int/comm/internal_market >.

6 See, e.g., Case C-98/01 *Commission v. UK* [2003] ECR I-4641, paras. 39-40.

7 Direct investment is characterised, according to the Court (n. 6), in particular, by the possibility of participating effectively in the management of a company or in its control.

8 The future Directive, to be clear, will only concern listed companies.

9 SEC(2006) 181 of 17 February 2006.

10 Case C-411/03 *Sevic* [2005] ECR I-0000 (13 December 2005).

11 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 2005, L 310, pp. 1-9.