Companies & Firms in a Cross-Border EU Context: The Hybrid Legal Status of Managers in Cross-Border Civil Procedural Law … and Further …

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A 'new' European Parliament has been elected. Following vivid and lively debates in all EU Member States, the attendance polls (over 50%) moreover showing to be considerably higher compared to previous EP-election rounds one may even speak of a strong mandate. This is comprehensible: economically and socially speaking cross-border mobility is flourishing, and a new generation – referred to by some as 'Millennials' – for whom the whole of 'Europe' is their natural habitat and 'home' is knocking on doors.

But a further intensifying borderless 'Europe' poses new challenges, not in the least for companies and firms operating more and more on cross-border scale. Following CJEU interpretative rulings over the past decades paving the way to freedom of establishment of companies and firms as addressed under Articles 49 and 54 TFEU,[1] a next challenge emanating from growing cross-border company relations imposes itself on business worlds and courts: in case of disputes between cross-border operating companies and their officers, still apart from the proper law to be applied to such disputes, the court of which (Member) State should conflicting parties turn to? In order to answer that question recourse must be had, since the early seventies of last century, to European Civil Procedural law as enshrined in (today) EU Regulation 1215/2012 on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters.

While attempting to formulate clear-cut jurisdiction parameters for conflicts arising between companies and their 'officers', however, a complicating factor comes to it, namely the hybrid nature of the legal status of company managers is reputed for under most legal systems: is this type of relationship to be characterized as one being of a *company* law, or rather of a *labour* nature, or perhaps even both? There is hardly any need to explain that the answer to that question is crucial, as it is decisive, first, in the stage of defining a court's *competence*, and further, in the very next stage, the court competent having been assigned, what is deemed to be the proper law relevant, company and/or labour law.

As to the first stage (establishing the court's competence), an thought-provoking interpretative CJEU ruling just saw the light: in its judgment of April 11 last[2] the Court was requested to interpret cross-border civil and commercial procedural law to a case even reaching beyond the framework of EU Regulation 1215/2012, namely in view of the Regulation's legislative complementary tool for the EEA, the so called 2008 Lugano II Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Briefly, the Court's interpretative ruling boiled down to the outcome that in view of establishing the court's competence under the reign of section 5 of Title II (Articles 18 to 21) governing *employment* relationships ' … a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an "individual contract of employment", within the meaning of those provisions, where, even if the

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1 Forthcoming, under the auspice of ITEM (Institute of Transnational and Euregional cross-border cooperation and Mobility)/ICGI (Institute for Corporate Law, Governance and Innovation Policies), is empirical research of T. Biermeyer & M. Meyer, *Cross-Border Corporate Mobility in the EU – Empirical Findings 2019* (Vol. I).

2 CJEU C-603/17 (*Peter Bosworth & Colin Hurley v. Arcadia Petroleum Limited and Others*), not yet reported.

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shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties.'

This ruling provides more than enough food for further thought, as indirectly speaking it may well have some triggering effects. Autonomously defining and filling in jurisdiction parameters concerning the relationship between companies conflicting with their 'officers' for the purpose of EU/EEA cross-border civil procedural litigation is one thing, for a start, but, frankly speaking, in the light of such conflicts expectedly to be adjudicated more frequently, EU Company Law Working Groups can hardly avoid further a (renewed) debate on an issue that has been considered as a 'no go era' for harmonization ever since the first draft in the year 1972 (!) for a Fifth Company Law Directive *on the functioning of company organs* (i.e. shareholders, managers and others) failed. Speaking about new challenges, this one deserves to be taken up again.

Autonomously defining jurisdiction parameters for the purpose of EU/EEA cross-border civil procedural litigation is one thing, for a start, but, frankly speaking, in the light of conflicts between companies and their managers to be adjudicated more frequently, EU Company Law Working Groups can hardly avoid a (renewed) debate – not only from point of view of EU cross-border civil procedural law but also from the perspective of substantive law – with regard to the issue how to position company managers within companies (employee protective bias or not?). As after all companies and therefore their managers operate in a Single Market presupposing an equal level playing field, it seems worth to contemplate the need for further harmonization of Member State company laws.