European Company Law in 2020: Mobility and Sustainability

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1. 2019: AN IMPORTANT YEAR FOR COMPANY LAW

Looking back at the end of December 2019 I conclude that this year was an important year for European company law. After publication of the EU Company Law Package in April 2018, the Directive on the use of digital tools and processes and the Directive on cross-border operations were adopted in 2019. As stated in other Editorials in this journal, the first proposal with its narrow definition of 'digitalization' was not ambitious enough whereas the second proposal could in some respects be characterized as overambitious.[1] That surely does not relate to one missing topic in the Company Law Package, i.e. conflict of law rules, which has been described as 'a big hole, rendering it incomplete in a very important aspect.'[2] However, I believe the European Commission made a wise decision not to include these rules in the package. Not only would adoption then have become even more difficult and probably impossible, applying ECJ-case law on freedom of establishment uncertainty in practice is nowadays mostly the result of uncertain national laws and less because of lack of harmonization. Member States are free to determine the connecting factors and should respect each other's choices.[3] Since it will be more and more difficult to determine where the real seat of an internationally operating company is located, harmonization will probably follow bottom-up over time into the direction of the incorporation theory. After *Überseering*, e.g. Germany changed to the incorporation theory and Belgium followed in 2019.

In any case, in light of the topic – cross border conversions, mergers and divisions all in one directive – and the numerous weaknesses, e.g. the provision on 'artificial arrangements', especially the adoption of the proposal for cross-border operations the next year is a big achievement of the European legislator.

After – too – many years, the internal market will finally have harmonized and similar rules for the three operations. For Member States 2019 also meant the deadline for implementing the Revised Shareholder Rights Directive and the impact on national laws was in many cases probably bigger than the implementation of the original Directive. Although I have put forward some criticism on the three proposals on several occasions (mainly in Dutch journals), as a European law professor I am happy that after years of lack of ambition from the European Commission in the field of company law, the train is finally running again!

2. 2020: CROSS-BORDER MOBILITY AND SUSTAINABILITY

Looking forward, what can we expect for company law in 2020? Two events will definitely play a role: the installment of the new European Commission at the end of 2019 and the fact that the Brexit date is now definitely set for 31 January 2020. With that in mind and with the adoption of the Directive on cross-border operations I foresee two main topics for 2020: cross-border mobility and sustainability. Brexit can play a direct role for the first topic and an indirect role for the second topic. The Green Deal will most certainly influence the activities related to sustainability in company law.

2.1. Cross-Border Mobility

The number of cross-border mergers has in most years seen an increase since the implementation of the CBM-Directive and it is expected that mergers will remain a common operation in 2020. Cross-border transfers of the registered office already take place in practice on the basis of case law on freedom of establishment, (probably) mainly *Cartesio* and *Vale*.[4] But since no harmonized rules are in place and thus uncertainty exists on applicable rules these operations are relatively scarce. The operations that take place in Member States which do not provide for specific rules, like the Netherlands, show a diverse and creative mix of applicable rules stemming from other operations. Although implementation of the

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1 *See* F. Möslein, *Back to the Digital Future? On the EU Company Law Package's Approach to Digitalization*, 16(1) Eur. Comp. L.J. 4–5 (2019); S. M. Bartman, *The Adopted Proposal for an EU Directive on Cross-Border Operations: A Realistic Compromise*, 16(5) Eur. Comp. L.J. 140–142 (2019); T. Biermeyer & M. Meyer, *European Commission Proposal on Corporate Mobility and Digitalization: Between Enabling (Cross-Border Corporate) Freedom and Fighting the 'Bad Guy'*, 15(4) Eur. Comp. L.J. 110–111 (2018).

2 J. Schmidt, *The Mobility Aspects of the EU Commission's Company Law Package: Or – 'The Good, the Bad and the Ugly'*, 16(1) Eur. Comp. L.J. 13–17 (2019), with reference to 'urgent appeals from practitioners and scholars'.

3 *See* mainly *Daily Mail*, *Überseering* and *Cartesio*. Action from the European Commission for this topic should be taken for the European Company (SE), where the real seat theory is mandate for SE's even from incorporation theory countries. In my inaugural lecture in Nov. 2019, I pleaded for a flexible regime whereby the SE follows the national public company regarding the connecting factor.

4 *See* the different reports with empirical data from Biermeyer & Meyer and e.g. T. Biermeyer & M. Meyer, *Corporate Mobility in Europe: An Empirical Perspective*, 15(3) Eur. Comp. L.J. 64–65 (2018).

Verbrugh, Maarten A. 'European Company Law in 2020: Mobility and Sustainability'. *European Company Law Journal* 17, no. 1 (2020): 4–6.

Directive on cross-border operations is only due in January 2023, a common framework is now provided. Even though the Directive gives a number of choices to Member States and therefore some uncertainty will remain, the format and the main aspects of the procedures are now clear. This limits the freedom companies have used so far to choose any legal regime. In other words, because of *Cartesio* and *Vale* the Directive is directly relevant not only for Member States but also for companies from the moment of its adoption. And since in this case more certainty compensates ample for less freedom an increase of cross-border conversions can be expected. The same goes for cross-border divisions but there seems to be less need in practice for divisions and (unfortunately) only division through the formation of a new company is covered by the Directive.

One issue, however, has become more complicated and uncertain with the adoption of the Directive, especially before implementation in the Member States. It might negatively influence the use in practice, namely how can a competent authority determine that the operation is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes? The fact that the specific indicative factors that the authority should consider in assessing 'serious doubts', has been moved from the Articles in the original proposal to the Recitals in the Directive during the political process makes the provision even more complicated. Recital (36) is very specific and urges the authority to act in a certain manner but the Recitals do not lead to an amendment of Directive 2017/1132 and they do not create a direct obligation for Member States to implement. This 'movement' illustrates a more general and problematic tendency to make Recitals in Directives longer and longer, which goes against the Agenda for Better Regulation. Problematic is also that according to the same Recital 'the authority may consider that if the operation were to result in the company having its place of effective management or place of economic activity in the Member State in which the company or companies are to be registered after the cross- border operation, that would be an indication of an absence of circumstances leading to abuse or fraud'. This suggests that the opposite situation, whereby a company only transfers the registered office in order to choose a more attractive company law (in this case from an incorporation theory country), is suspicious. But at the same time it follows from *Polbud* that companies are not obliged to undertake economic activities in the host state. From the perspective of the host country that applies the incorporation theory the place of effective management is indifferent and can be anywhere in the world.

Hopefully Member States do not wait until 2023 but also after implementation of the Directive in national laws questions on national and European level will remain. In any case, it is foreseeable that in 2020 the number of cross-border operations will increase. And with Brexit, January might very well turn out to be a popular month with companies moving in or out the UK.

2.2. Sustainability

The attention from the European Commission for sustainability has grown over the last years with, amongst others, the Non-financial Reporting Directive in 2014, the revised Shareholder Rights Directive in 2017, the Action Plan on Financial Sustainable Growth in 2018 and the Green Deal in 2019. In my inaugural lecture in November 2019 I pleaded for a more integrated and visible corporate governance policy with a focus on sustainability in company law and harmonization of a stakeholder model. Relying on the conference 'Company Law and Climate Change' on 12 December 2019 in Helsinki[5] and in line with the Green Deal we can expect a proposal from the Commission in 2020 on a redefinition of the interests of the company and on directors' duties. The idea is that directors and supervisors, when formulating the company's strategy and taking decisions, should take into account their effects on Sustainable Development Goals (SDGs) and climate change. Directors' duties were part of the initiative for a 5th Directive in 1972 which proposal has been withdrawn in 2001. One of the reasons for this failure was the fierce resistance of the UK. Although the time seems right for a new paradigm in Anglo-Saxon countries, most recently illustrated by the Business Roundtable in the US pleading for a stakeholder model, Brexit will certainly make it easier to adopt a new proposal in Europe on this topic.

Since directors' duties are deeply rooted in national traditions the European Commission should be very careful with a new initiative and not be too ambitious. Member States can, of course, go a step further if they wish, e.g. in their national corporate governance codes. Instead of explicitly referring to the SDGs and climate change – something large companies already have to report on – the proposal should in my view oblige directors and supervisors of listed companies to focus on long-term value creation for the company and not solely for the shareholders. The Dutch Corporate Governance Code 2016, Principle 1.1, for example, states for example: 'The management board focuses on long-term value creation for the company and its affiliated enterprise, and takes into account the stakeholder interests that are relevant in this context.'[6] Not only will such a proposal have a higher chance of being adopted, long-term value creation will in many cases only be possible if SDG's and climate change are taken into account and are therefore implicitly part of

5 Keynote speech from Salla Saastamoinen, Director for Civil and Commercial Justice, Directorate-General for Justice and Consumers European Commission. Since I could not attend the Conference my observations are based on by hearsay and documents.

6 *See* https://www.mccg.nl/english.

such a less ambitiously formulated duty. Moreover, for most tech companies climate change seems less of an issue than abuse of power, data manipulation and privacy protection.

In general, I believe that a harmonized stakeholder model 'light' with enough flexibility for Member States will be an important next step for Europe and would give a strong signal to investors all over the world. This challenge is in the right hands of Commissioners Von der Leyen and Timmermans, coming from two prominent stakeholder-countries. Hopefully their huge ambitions for the coming years, as laid down in the Commission's Green Deal proposal, does not stand in the way of this signal.