European dimensions to national law
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Abstract for a paper

The European Private Company (SPE)

Company law is one of the areas where the European legislator has had a significant influence. Up till now thirteen Company Law Directives, based upon Article 44(2)(g) EC, are enacted. Areas like representation, capital protection, publication, judicial (de)merger and company accounts are more or less harmonised. Despite this harmonization programme, large parts of company law still remain in the hands of Member States.
Businessmen may choose a form of company governed by a particular national law system. However, the European legislator has created European legal forms for cross border co-operation of business, based upon Article 308 EC. Already three regulations were enacted providing for the creation of supra-national business entities: in 1985 on the European Economic Interest Grouping (EEIG); in 2001 on the Statute for a European company (SE) and in 2003 on the Statute for a European Cooperative Society (SCE). On the 25th of June 2008 the Commission presented its proposal for a Statute for a European Private Company (SPE). However, despite their designation as European legal forms, these regulations do not create supranational, 'pure' European legal forms. The legal forms do have a hybrid character; both EU-law and national law are applicable.
In the paper we will analyze whether there is a rationale for the introduction of the EPC. Does the EPC has an added value to the SE at the one hand and to the domestic legal forms of private companies at the other? The SE is designed for large companies, whereas the EPC is designed for small and medium-sized enterprises (SMEs). Therefore it could be contended that the SE does not meet the special requirements of SMEs. However, as a result of the case-law of the European Court of Justice on the freedom of establishment of Articles 43 and 48 EC, European businessmen are free to choose one of the 27 domestic private company forms. From the decisions in Daily Mail, Centros, Überseering, Inspire Art and Cartesio it is clear that Member States have to recognise companies validly incorporated under the law of another Member State, regardless of their actual centre of administration. Member States are not allowed to apply certain provisions of national company law to foreign companies, unless it has been proven that the company acted fraudulently. From this point of view, the need for the introduction of the EPC is not obvious.
Furthermore we will analyse the pros and cons of the EPC. The following points are – inter alia – discussed:

- Does the introduction of the EPC meet the subsidiarity criterion of Article 5 EC by not requiring a cross-border element?
- There is a key role for the articles of association of the EPC. A lot of subjects must be covered by it. What is the consequence if a subject is not covered? Application of the national law of the registered office of the EPC?
- Is there an additional role for general principles of law, like reasonableness and fairness?

Hanny Schutte-Veenstra en Hylda Boschma - Groningen, April 9th 2009