

# New freedoms of legal forms of company

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In Europe a trend is spreading which can quite be compared to how the law of corporations according to the State of Delaware has spread in the US states. Due to national restrictions of the individual states and due to the exceptional freedom change the legal status of corporations in the State of Delaware, the corporation of the State of Delaware has become the universal institute in terms of corporate law within America.

In Europe, i.e. at least within the EU, a similar trend seems to be in the offing. It all began with the famous ECJ “Centros” decision of 9 March 1999. A Danish commercial register refused to register a branch of a British private limited company on the grounds that the foundation of the company in England had not complied with the Danish law regarding minimum capitalization. With the same argumentation (so-called “domicile theory”) foreign corporations were denied the registration in the commercial register also in Germany to date. The ECJ considered this a violation of the European freedom of establishment. As a result, the German Federal High Court of Justice (BGH) introduced a ECJ preliminary ruling, which – based on the “Centros” decision - dealt with the question of the legal capacity of a company incorporated under foreign law. The case in question was about a Dutch BV with head office in Germany, the action for damages of which because of constructional defects had been dismissed by German courts of instance on the grounds that as a foreign company the BV lacked legal capacity in Germany. The result of this submission was the ECJ “Überseering” decision of 5 November 2002 – another cornerstone on the way towards the implementation of a comprehensive freedom of establishment at a European level. In this decision the ECJ held that the non-recognition of the legal capacity of a foreign company from a EU member state also infringed the freedom of establishment. Meanwhile, even the supreme German courts are starting to change their views on the basis of the ECJ’s legal opinion. For instance, with its decision of 13 March 2003 regarding the legal capacity of foreign companies from EU member states the 7<sup>th</sup> Senate of the Federal High Court of Justice expressly supported the ECJ’s opinion. Nevertheless, many questions remain unanswered. For instance, the problem is yet unsolved whether the European principles of freedom of establishment can also be applied to companies from third countries. By the way, the Second Senate of the Federal High Court of Justice has recently decided that US companies have unlimited legal capacity in Germany on account of the treaty of friendship, commerce and navigation signed on 29 October 1954 between Germany and the United States of America.

Another landmark decision is expected from the “Inspire Art” proceedings which are currently pending before the ECJ. This case is amongst other things about the question whether national provisions which are specifically directed at bogus foreign companies and thus at the abuse of the European freedom of establishment are compatible with the freedom of establishment. Moreover, it is also about the question of the liability of managing directors, the equity position and the disclosure obligations of foreign companies. Respective Dutch provisions which affect a limited company incorporated under British law are under close scrutiny. It remains to be seen whether the ECJ will support the motion of the competent advocate general, Siegbert Alber, who considers the Dutch provisions to be judged inadmissible.

Based on this development pushed ahead by the ECJ’s rulings, it crystallizes that there is a freedom to choose legal forms of company within the EU, the limits of which, however, have not been set clearly yet. On the other hand, special attention will have to be directed to the British limited company, which as a “whole purpose” company is suitable for all activities. Owing to the minor capitalization requirements, it also seems to be applicable for all

occasions. According to the conception of British corporate law, the limited company has a reserve liability of £ 2.00. As we know from foundations conducted by ourselves, British registers meanwhile also enter companies with amounts in euro so that these companies have nominal capital which can also be registered in Germany. A limited company can thus be applied almost without restrictions. Meanwhile, a limited company is entered in the German commercial register without any problems. By applying such a legal form of company even possible advantages of the German tax law can be used. Even the foundation of a Limited & Co. KG and its entry in a German commercial register is possible under German law; our office has already successfully conducted the foundation and entry of such a Limited & Co. KG.

Given this situation, the question of planning an establishment or a group can almost no longer be seriously asked unless the advantages of the implementation of international legal forms of company are considered with such planning of a group, even it is only planned at a national level.