

The development of company law in Europe is progressing at various levels. European Regulations regarding company statutes (SE; European private company, etc.) currently – and this is likely true for the future as well – affect only a small number of companies. Most European companies, and companies in third countries as well, are and will remain companies under national law. For European companies, the European Community has spurred on the harmonisation of substantive company law with varying density. But they remain companies under national law, and to some extent considerable differences remain even in the case of extensive harmonisation of laws.

For companies under national law, the necessity of determining the law applicable to the company remains despite the harmonisation of substantive law. There is a widespread misconception that this would be facilitated or no longer necessary in the case of harmonisation of substantive law. Following the failure of the EEC Convention of 1968, however, international company law, conflict-of-law rules in company law, which are determinative for ascertaining the law applicable to a company, remained unaffected by any European harmonisation and/or standardisation. This is a serious failing which was accurately identified at the time, because the conflict-of-law rules in the EC States, which deviate from one another quite substantially, significantly impede companies under national law in terms of their freedom to enter the market. Of course, these impediments had to be accepted because the Member States were not prepared to correct the conflict-of-law rules. Not until the judgments by the European Court of Justice in the cases of *Centros*, *Überseering* and *Inspire Art*, particularly that in *Überseering*, was it made clear that companies must no longer accept these impediments, and that companies subject to the law of the Member States are guaranteed free movement throughout the entire Community without impairment of their identity and without forcing them to change their status. This cannot be attained without a new concept of the conflict-of-law rules of international company law. Harmonising substantive company law will not achieve this.

The case law of the ECJ has exposed the deficits of current international company law, but it has provided only partial answers which apply only in specific cases. Therefore, the German Council for Private International Law (*Deutscher Rat für Internationales Privatrecht*)\*, in consultation with the Federal Ministry of Justice, established a special Commission with the task of compiling an overall proposal for a European international company law in the form of an EC Regulation, taking into account the case law of the European Court of Justice. Only in the case that this is not achieved does the proposal advocate a clear rule in the conflict-of-law rules of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen*

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\* A scholarly consulting body of the Federal Ministry of Justice in existence for over 50 years, consisting of two Commissions: 1st Commission (family law, law of succession); 2nd Commission (company law, law of obligations, property law).

*Gesetzbuch – EGBGB*). In the course of the 1986 reform of private international law, legal persons had been excepted there in the expectation that a European rule would be established. In its proposal, the Commission states that it does not consider a general division of treatment in terms of conflicts of law between companies of Member States and third States to be appropriate.

The system of connection factors of the proposal focuses on the place of registration. Other than registration, the chosen organisation of the company and/or the connecting factors provided for contractual obligations under the Rome I Regulation are to play a role. Furthermore, the proposal determines which matters are to be treated pursuant to the thus determined applicable law, and thus simultaneously clarifies previously controversial questions with regard to delimitation. It also determines the extent to which questions of form are subject to the law applicable to the company. With a view to freedom to enter the market for companies and freedom to change the company form by allowing a change to the company form of another EC Member State, the proposal provides for supplementary conflict-of-law rules for cross-border mergers, divisions and asset transfers, as well as for the change of the applicable law for the purpose of changing the company form without transferring the actual seat.

The proposal does not render superfluous the progress in harmonising the company law rules of the Member States. It also leaves untouched the freedom to choose a European company statute, e.g. an SE, for a company. Rather, for companies existing and to be established under national law, it is characterised by taking into account the interests of the participants in applying the law which is appropriate to their needs; furthermore, it ensures that the freedom of entering the market is not impeded and enables a flexible reaction to developments for the purpose of better asserting their position in the market.