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*347 HOW DOES CORPORATE MOBILITY AFFECT LAWMAKING? A COMPARATIVE ANALYSIS

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This Article examines the impact of increased corporate mobility on corporate lawmaking in the European Union (EU). More specifically, what is the answer to a simple question: has the increased mobility which arose from the implementation of the Societas Europaea (SE) and the path-breaking decisions of the European Court of Justice spread regulatory competition and caused the emergence of a Delaware-like member state in Europe? Two types of corporate mobility are distinguished: (1) the incorporation mobility of start-up firms, and (2) the reincorporation mobility of established firms. As to incorporation mobility, the Centros triad of cases makes it possible for start-up firms to incorporate in a foreign jurisdiction and many entrepreneurs have taken advantage of this new freedom. However, recent data from Germany and the Netherlands indicate declining numbers of such foreign incorporations over time. Moreover, Centros-based incorporation mobility is a rather insignificant phenomenon, economically speaking, since the only incentive is minimized cost of incorporation. National lawmakers have responded by amending their statutes to lower these costs. But, because out of pocket cost minimization at the organization stage is only of secondary importance in “choice-of-business-form” decisions, no competitive pressures arise ***348** that would engage national legislatures in far-reaching reform of corporate governance more generally. As to reincorporation mobility, which concerns the migration of the statutory seat of a firm incorporated in one member state to another, the SE has opened the door, but not wide enough to serve as a catalyst for company law arbitrage. Reincorporation mobility is still far from available in the EU. As a result, competitive pressures do not yet motivate changes in the fundamental governance provisions of national corporate law regimes.

Introduction

It is increasingly argued that the European Court of Justice (ECJ) has prompted competitive corporate lawmaking in Europe. [FN1] The string of cases starting with Centros provides two important pre-conditions for regulatory competition: mutual recognition and minimum standards. At present, start-up firms of all sizes can select a statutory seat anywhere in the European market without being hampered by severe constraints built into their home states' corporate law. Although the ECJ has not explicitly pronounced the incorporation doctrine, domestic courts now normally apply the law of the state of incorporation to corporate affairs (the rapport among directors, officers, and shareholders). This is true even if the corporation in question transacts no other business in that state. Under the ECJ case law, a member state in which a corporation has its seat can only impose its own stricter legal standards if it can justify them as essential requirements to protect the general interest. These standards must be applied reasonably and on a non-discriminatory basis. [FN2] Start-up firms have taken advantage of this new freedom, choosing to incorporate in member states offering more favorable conditions, in particular, the absence of minimum capital requirements. The United Kingdom has emerged as the situs of choice.

The UK, which recently overhauled its company law, could be well placed to establish itself as the leading state for European business***349** formations, like Delaware in the United States. The question arises whether and to what degree these developments might encourage lawmakers, in the United Kingdom or other member states, to engage in competitive lawmaking by designing policies that provide a more attractive regulatory environment in the corporate law arena.

Unfortunately, the Delaware model offers little immediate encouragement. The U.S. market for corporate charters was jump-started more than a century ago by a state seeking a yield of premium franchise taxes and chartering fees by luring large existing corporations to a regulatory comfort zone that extended from antitrust to corporate governance. [FN3] Delaware continues to operate within this incentive framework, albeit only from the corporate governance angle. As yet, such incentives cannot be replicated in Europe. The rulings in Centros, Überseeing, and Inspire Art do not explicitly offer large existing firms the possibility of free choice to reincorporate and migrate across borders. [FN4] And even if they did, charter fees and franchise taxes are not available to entice European member states to modernize and optimize their corporate law regimes.

If not franchise taxes and chartering fees, what else might motivate European national lawmakers to create more responsive corporate legal regimes, and how might corporate mobility figure in such an environment? Delaware lawmakers now have a secondary incentive thanks to the demands and the economic benefits emanating from a large professional services sector located in the state. [FN5] There follows a second, weaker European analogy: member state lawmakers can seek to provide legal rules and institutions that are attractive to both domestic and foreign firms if doing so benefits the professional services industry. [FN6] For this reason, it has been argued that the introduction of the Societas Europaea (European Company, SE) Statute in 2001 and its subsequent implementation in October 2004 could provide a strong impetus for company law shopping in Europe. [FN7] The SE for the first time allowed a European corporation to reincorporate without first liquidating itself and forming a completely new entity. Moreover, the internal governance structure of an ***350** SE continues to be governed largely by national legislation. Consequently the SE Statute could stimulate regulatory arbitrage across the EU. More specifically, a firm can, in theory, convert into an SE to avail itself of a more beneficial corporate law regime, so long as it is willing to move its seat to that more beneficial state. It follows, theoretically, that a jurisdiction might have incentives to provide such benefits. A sophisticated corporate legal regime, characterized by responsiveness to the demands of management and capital, could bestow prestige onto the jurisdiction's lawmakers and bring revenues to its legal intermediaries.

This scenario gains additional credibility with the recent adoption of the Directive on Cross-Border Mergers and the ECJ's Sevic case. [FN8] The Directive allows corporations to merge and restructure across borders within the EU, and could enable firms to overcome some obstacles to free corporate mobility stemming from differences in national corporate laws, thereby stimulating competitive lawmaking. Sevic suggests that medium-sized and large firms have a right to relocate their seat based on the legal rules they prefer. As a practical matter, this parallels the mobility option offered by the SE.

The door to mobility has opened only in theory, however. Absent accurate data on cross-border mergers, it is too early to conclude whether the Directive and the Sevic case will actually lead to increased reincorporation and eventually more regulatory competition in Europe. Barriers remain, quite apart from the lack of affirmative national lawmaking. First, tax barriers continue to limit European firms' mobility and hence deter lawmakers from jumping on the competition bandwagon. For instance, if a firm seeks to move its administrative seat to another member state while remaining incorporated in its own member state for the purpose of tax avoidance, the member state of origin may freely impose conditions. [FN9] Second, the lack of a common history, culture, and language among the member states further reduces the possibility of U.S.-style corporate lawmaking in Europe. [FN10] Third, national lawmakers resist encroachments on their own judicial discretion. National regimes created barriers to corporate mobility to preserve their lawmakers' autonomy long ago ***351** and its continued preservation reinforces the barriers, despite the founding of the EU. One could argue that as long as the member states retain enough discretion to deter the emigration of existing firms, the real seat doctrine has only been diminished, not eradicated. If eradication is indeed the ECJ's ultimate goal, the job has not yet been completed.

Still, there have been recent signs of responsiveness among European lawmakers as in the promulgation of a limited liability partnership in the UK and the flexible société par actions simplifiée (SAS) in France. [FN11] These, plus the beginning migration to the United Kingdom and the reincorporation of large firms under the SE statute, raise the question whether Europe approaches (or has indeed reached) a tipping point at which the responsiveness to corporate mobility displaces the desire to preserve national control.

This Article reviews the recent evolution of corporate mobility and corporate law in Europe. Part I explains and assesses the process by which European corporate law has evolved, tracing its development back to the founding of the EU in 1957. It shows that the member states have consistently attempted to prevent any intervention into their national corporate law legislation. Upon the inception of the EU, most member states followed the real seat doctrine, blocking corporate mobility and limiting choice of situs. The creation of the EU could have facilitated movement away from the real seat doctrine, [FN12] but it did not. Founding member states, such as France and West Germany, feared the consequences of a so-called "race-to-the-bottom" in corporate law. This led to the introduction of top-down harmonization of national corporate law regimes; the member states agreed, in exchange for political benefits or rents, to desist from opportunism after attaining Community membership. This cooperative agreement included an additional element: member states would only agree to the harmonization of national corporate laws if it could be achieved without alteration of their own laws' core components. [FN13] The member states' subsequent reluctance to adopt EU level corporate law confirmed and reinforced the desire for national legislative autonomy.

Part II turns to recent disruptions of the EU's corporate lawmaking pattern. Even as the EU has continued to pursue its ***352** harmonization strategy, policymakers within the Commission have set out to design a more independent agenda on the basis of Article 308 (formerly 235) of the EC Treaty. [FN14] EU level business models, such as the SE, have been introduced to stimulate cross-border mobility while at the same time covering the creation and conversion of particular undertakings. Part II analyzes the impact of the introduction of the SE and assesses whether its implementation has led to an increase in firm mobility that might induce member states to embark on a more innovative and ambitious lawmaking path.

Part III turns to ECJ case law and to the mobility of start-up firms. It will show a significant pent-up demand for incorporate start-up companies in a low-cost jurisdiction. Marco Becht, Colin Mayer, and Hannes Wagner investigated new company formations in the United Kingdom between 1997 and 2006 and showed an increase in the number of "foreign" private limited companies from 4,400 per year pre-Centros to 28,000 post-Centros. [FN15] They also show that 48,000 of the almost 120,000 "foreign" private limited companies formed in the United Kingdom post-Centros came from Germany alone. [FN16] This increased mobility has created competitive pressures. Germany, the Netherlands and, to a lesser extent, France have been driven to institute reforms to their corporate law and tax regimes not only to stem the flow of firms migrating to the United Kingdom, but also to establish a reputation as competitive jurisdictions. [FN17] Part III offers a detailed analysis of the UK incorporation pattern, an analysis that implies a disappointing picture of responsive lawmaking incentives. Based on data from Germany and the Netherlands, the volume of incorporation mobility resulting from the ECJ case law is presently declining. Declining or not, the volume is rather trivial in any event, both as an economic proposition and as a lawmaking motivation. So far, the ECJ decisions have only triggered minor initiatives, influencing some jurisdictions--like Germany and the Netherlands-- to eliminate or reduce minimum capital requirements for private companies and to focus on low-cost formation. There has been little or no sign of broader legislative innovation or case law reform.

***353** Part IV concludes that even as the new mobility has contributed to discreet modifications of company law in some member states, what little mobility exists is objectively insufficient to promote demands for new institutions and to alter lawmakers' incentives and behavior. It is too early to predict the emergence of a European Delaware.

I. EU Company Law Directives: The "Non-Competition" Strategy

Under the historic pattern of EU level corporate lawmaking, national legislatures have had a virtual monopoly, supported by the twin pillars of the real seat doctrine in conflict of laws and national tax regimes. The real seat doctrine barred essential legal recognition of firms that attempted to change their state of incorporation while maintaining their seat. This does not mean that all member states followed the real seat doctrine. Some endorsed the incorporation doctrine and recognized foreign incorporations of domestic businesses. But even in the latter jurisdictions, national regulators restrained local entrepreneurs from incorporating elsewhere by restricting their reentry: reentering firms, termed "pseudo foreign corporations," were required to apply the core rules of the home member state. Mobility could be achieved only by physical relocation of the firm's administrative headquarters--the "seat." Barriers in the form of exit taxes remained in place. The trio of real seat doctrine, restrictions on pseudo foreign corporations, and exit taxes constituted a stable, long-term lawmaking equilibrium; a cooperative strategy prevailed and no incentives existed for member states to engage in competitive corporate lawmaking activity.

EU corporate lawmaking initiatives have not disrupted this balance. From the inception of the harmonization program in 1957 through the modernization period of the High Level Group of Company Law Experts, EU corporate law was never intended to stimulate a right of establishment of pseudo-foreign companies; it has not lowered barriers to corporate mobility. Indeed, under its present non-intervention approach, EU lawmaking deters member states both from dismantling costly legal barriers to reincorporation and from developing responsive measures aimed at encouraging corporate mobility. Thus the EU's harmonization program reinforced the non-competition equilibrium among the member states.

A. The First Generation of Company Law Directives

Prior to the establishment of the EU, Europe amounted to a group of island jurisdictions, in which domestic lawmakers, each with different constituencies and political concerns, pursued their own policy agendas. Each jurisdictional island possessed an elite group of ***354** legislators, judges, regulatory agencies, professionals, and legal academics responsible for interpreting, preserving, and developing the law. They did so within conservative frameworks, mostly undisturbed by, and unresponsive to, possible changes in the legal systems of surrounding islands. As jurisdictional islands, the states remained privileged to close their borders in response to exterior competitive threats. For example, in the nineteenth century, Belgium tried to play a non-cooperative corporate law game vis-à-vis France, encouraging French executives to change their jurisdictions of incorporation. France and other high cost jurisdictions responded to this opportunistic initiative by introducing the real seat doctrine, which provides that the laws of the host state apply if the actual center of the corporation's activities is located there. This doctrine in effect closed the borders to corporate entry and exit.

It becomes more difficult to keep the border closed when an island jurisdiction becomes part of a common market in which national trade barriers gradually disappear. Pressure for corporate mobility is more likely to surface in such an environment. Actions by a federal lawmaking body can help stimulate cross-border activities and the Treaty of Rome (1957) establishing the European Common Market, entailed just such possibilities. The Treaty was designed to encourage the creation of an integrated market by assuring the free movement of goods, services, people, and capital. It gave foreign corporations the right to establish branches in another member state (host state) without being subject to more restrictive corporate law provisions there. At that time, the real seat theory remained dominant.

But in 1957 many feared that the doctrine was losing ground. The Netherlands had recently abandoned it. Furthermore, it appeared that the Treaty could usher in a new era of corporate mobility. Article 293 (formerly 220) of the Treaty invited member states to enter into negotiations regarding the 1968 Brussels Convention on Mutual Recognition of Companies and Legal Entities, which would have abandoned the real seat doctrine in favor of the incorporation doctrine. Reaction was split. Some founding member states feared an outbreak of the so-called “race-to-the-bottom.” They had learned important lessons about the effects of charter competition from the U.S. experience. [FN18] Competition was seen to entail substantial losses for domestic interest groups. France in particular was concerned that the Netherlands, which had a more flexible corporation law code, ***355** would not cooperate in corporate tax matters, [FN19] and would therefore be able to attract a large number of pseudo-foreign companies.

Charter competition's opponents responded by using the lawmaking process, triggered by the Treaty and aimed at the elimination of disparities among the laws of EU member governments, to reduce potential benefits of competition. France and West Germany promoted top-down harmonization of national corporate laws as an EU agenda item. Existing members and new entrants went along and the EU's mandatory corporate law Directives were the result. They sought to ensure compliance with a minimum level of regulation. With a common set of legal rules shared by each jurisdiction, no member state would have the power needed to create law that would attract incorporations and hence no incentives to compete would exist.

This first generation of corporate law Directives restated the existing content of the member states' national laws. They created mandatory rules, such as minimum capital requirements and disclosure rules, but the Directives made no attempt to expand the mutual recognition of firms. Even as EU lawmakers justified the harmonization Directives as measures to protect creditors and shareholders, their lawmaking scheme maintained special interest provisions that were already in place in the respective member states prior to the elimination of trade barriers. [FN20] Incumbent management, for example, had every reason to support provisions that would limit dividend payments and share repurchases in order to have more leeway to reinvest the firm's profits.

To sum up, the early member states respected each other's corporate law. They agreed to desist from non-cooperative corporate lawmaking in exchange for membership in the Community. They negotiated and enforced a political agreement that protected their national stock markets and domestic labor agreements. Still small in number, they were concerned with political stability as well as economic integration. They valued political payoffs yielded by stable corporation laws more highly than the chance for enhanced economic profit held out by corporate mobility and competitive experimentation.

***356** B. Harmonization and the Adoption of the Directive on Cross-Border Mergers

The second wave of corporate law Directives was arguably more flexible, granting states options with respect to compliance. These options ensured that the Directives did not interfere with core elements of given member states' national laws, reflecting the added diversity of legal regimes resulting from the admission of new member states, including the United Kingdom. But the style of legislative drafting remained unchanged, with rigidity and top down mandate remaining the dominant mode. So even as the compliance option signaled a more cooperative approach to harmonization, the member states proved unable to agree on particular Directives.

The rigid approach eventually showed its limitations. Harmonization of core areas of corporate law, for example, the structure and responsibility of the board of directors or cross-border mergers, proved slow and ineffective. [FN21] This did not come as a surprise: the member states valued the autonomy of their national legal regimes. They had fundamental disagreements regarding important issues, such as board composition and employee participation, and so proved reluctant to implement the harmonization rules. Without a politically acceptable consensus, regular vetoes of directive proposals under Article 100 of the EC Treaty (now Article 94) followed.

In 1985, the ECJ and the European Commission responded to calls for greater flexibility by adopting a new approach to harmonization, namely minimum harmonization and mutual recognition. [FN22] The following year, the Single European Act (SEA) attempted to resolve possible veto blockages at the Council level by providing for a consultation procedure and qualified majority voting. A number of corporate law Directives were promulgated between 1968 and 1989, removing a wide range of discrepancies between the member states' rules with respect to the protection of shareholders. [FN23]

The EU reached another stage in the evolution of the harmonization with the development of the subsidiarity principle, embraced by ***357** the member states in the 1992 Maastricht Treaty on the European Union. [FN24] Subsidiarity, embodied in Article 5, concerns areas that are not within the exclusive competence of the EU [FN25] and determines the allocation of competencies between the EU and the member states. [FN26]

The European Commission, building on the principles of subsidiarity and proportionality, developed a new, more flexible type of Directive. The new approach moved away from the provision of minimum standards to a framework model. Even with the introduction of this new standard, however, success of harmonization corporate law has been limited. Deeply rooted conflicts persist between the member states over the direction and pace of implementation of corporate law Directives, as exemplified by the significantly weakened Directive on Takeovers passed in 2003.

The Commission's current efforts to reform the regulatory framework for corporate law have been largely inspired by recommendations made by a High Level Group of experts commissioned by the EU. [FN27] These measures are designed to simplify existing rules and improve freedom of choice between alternative forms of organization. The program looks toward reform at four levels. First, the Commission proposes to modernize corporate law by further harmonizing corporate disclosure, board structure, and director liability requirements and by amending capital requirement rules. Second, it plans to adopt rules facilitating corporate restructuring and mobility. Third, it proposes the establishment of a permanent coordination structure, the European Corporate Governance Forum, to work alongside member state agencies to sanction unfit directors. Fourth, it proposes to strengthen the supervision of auditors and to adopt comprehensive rules on the conduct of audits. This initiative largely ***358** retraces terrain covered by previous harmonization attempts; accordingly, its prospects for success are dim.

What has borne fruit is the High Level Group's call for an urgent submission of a revised Directive on cross-border mergers resulted in Directive 2005/56/EC which entered into force on December 15, 2005. Negotiations over a directive to facilitate the merger of corporations that have their statutory and business seat in different member states had been ongoing for two decades. [FN28] Such transactions traverse national company law protectionism: since a cross-border merger results in the ceasing of the acquired and absorbed companies, one member state's corporation law potentially loses its application to the enterprise and with it the protection of national shareholders, creditors, employees, and other stakeholders. The new Directive's provisions, which should have been implemented into national corporation laws by December 15, 2007, apply to mergers in which at least two corporations are governed by the laws of different member states. The adoption of these rules could be viewed as a significant disturbance of the EU's non-competitive corporate law equilibrium.

Still, the Directive on cross-border mergers does not give merging firms carte blanche to adopt a legal system that presents them with a preferred governance structure and board composition. The Directive is largely based on the provisions of the SE Statute, and strict principles and arrangements relating to employee participation--as set out in the Council Directive No 2001/86/EC of October 2001 with regard to the involvement of employees in the SE--apply under the Directive if the corporation law of the absorbing company does not provide for at least the same employment participation regime as is applicable in one of the merging and thus disappearing companies. With respect to the involvement of employees, the Directive applies only if the merging companies have an average of more than five hundred employees in the six months preceding the publication of the draft terms of the merger.

As the Directive's provisions follow from those of the SE Statute, it might be useful to look to the SE for the genesis of the legislative movement favoring cross-border mobility.

***359** II. The Societas Europaea: Challenging the “Non-Competition” Strategy?

A. The SE: An Incomplete Lawmaking Product

First generation EU lawmakers were convinced that an SE Statute could create an economic environment in which firms could reach their full potential and, more crucially, promote cooperation among firms located in different regions of the EU. [FN29] In line with the first harmonization Directives, the Commission initially aimed to create a uniform and comprehensive legislative proposal to serve as a basis for a truly genuine European business model. This led to a first proposal in 1970. But, since its approach threatened the member states' lawmaking autonomy, this proposal predictably failed to obtain approval. It took until 1989 before the Commission published a new draft Statute. In order to expedite its adoption, it was decided to address the employee participation issue in a different Directive. A report--produced by a group of experts chaired by former Commission President Etienne Davignon--outlined a compromise solution regarding labor participation and opened the door for compromise legislation that resolved political difficulties, though only by referring extensively to the national corporation law of the member state where the SE would have its administrative seat. [FN30] The Council finally adopted the SE Statute in December 2000, and it entered into force in October 2004.

The SE Statute makes it possible for a firm to effect reincorporation from one member state to another by reorganizing as an SE and transferring the administrative seat. Under the Statute, legal persons may form an SE through (1) merger of two or more existing companies that are governed by the laws of at least two different member states (cross-border merger), (2) formation of a holding company promoted by public or private limited companies, (3) formation of a jointly held subsidiary, or (4) conversion of an existing public limited company. [FN31] Some governance matters are directly governed by the SE Statute. Most matters, however, are determined by renvoi to the national company law of the member state where the SE has its seat. The Statute explicitly allows firms to select a one-tier system of corporate governance in which the SE comprises a general meeting of shareholders and a board of directors. If the SE prefers to have a supervisory board that monitors the board of directors, the Statute provides for the implementation of a two-tier system.

***360** Significantly, the Statute does open a door for a German Aktiengesellschaft (AG) to escape the strict German rules on labor codetermination, but not based on a unilateral management decision. A special negotiation procedure for worker participation must be followed upon the SE's creation. [FN32] The Directive distinguishes between information and consultation on the one hand and participation on the other. The employee representatives must be informed in all cases of material decisions and given the opportunity to influence the deliberation and decision-making process. In addition, if twenty-five percent of the originating firm's employees have a right to participate in management, the employees' representatives must consent to the planned composition of the supervisory board (two-tier) or board of management (one-tier). Thus, a German AG whose unions agree to give up all or part of their supervisory board representation can reorganize as an SE with whatever governance structure agreed to by the unions. No relocation of the administrative seat to another member state need occur.

The Statute offers three advantages. To begin with, as the first European level legislation that allows for cross-border mergers, it makes it relatively easy to relocate the administrative seat into another member state. [FN33] Second, the Statute holds out cost advantages for a firm not seeking to change its seat but wishing to consolidate operations in multiple member states. Even if it plans no change of seat, a firm can merge its various subsidiaries into the SE. The SE emerges as a unitary entity organized in one member state with operating branches in other states across the EU. The advantage is that all companies in the group now follow a single body of corporate law. The recent conversion of Alliance AG into an SE suggests that firms do see cost advantages in operating under a single set of rules. Third, the Statute makes it possible for a parent to merge out a minority shareholder interest in a subsidiary without having to take the potentially costly step of making a tender offer for the minority shares. [FN34]

Despite its encouragement of corporate mobility and other advantages, many experts question whether the SE makes any sense in practice. Practitioners express skepticism about EU level legislative measures and point to the lack of statutory guidance when it comes to incorporation and operation as an SE. They view this European business***361** form as compromise legislation that offers rigid and unattractive choices for the structuring of a firm's internal affairs. [FN35] Even though the Statute clears a path around obstacles in the cross-border reincorporation process, the path is much too narrow to lead to an uninhibited choice of situs of incorporation. For instance, start-up firms cannot establish an SE ex novo or ex nihilo. [FN36] What is more, the provisions set forth in the Directive on Involvement of Employees stipulate the level of employee involvement in the formation and operation of an SE and, as a result, decrease rather than increase the SE's attractiveness. [FN37] In particular, the need to enter into negotiations with employee representatives creates a bottleneck. Last, but not least, the absence of a specific tax regime, particularly with regard to cross-border seat transfers, is likely to be a significant impediment to the SE's use.

Still, as of mid-December 2008, more than 300 SEs had been incorporated. The resulting pattern of usage allows for some preliminary conclusions about the SE's role in stimulating corporate mobility.

B. The SE: A Vehicle for Company Law Arbitrage?

Corporate law forum shopping has not been a salient motivation for the 310 SEs that were formed so far. Although numbers of new SEs have steadily increased quarter by quarter since its introduction in October 2004 (see Figure 1) overall numbers, whether quarterly or in aggregate, remain small. This suggests that the Commission's efforts to find an attractive alternative for firms seeking to pursue cross-border activities or migration strategies have borne little fruit.

But the numbers can also be read positively: the Commission's new business model is being used in increasing numbers even if it has not encouraged forum shopping. The average number of new SEs per quarter was only eight as of the end of 2007. In contrast, the fourth quarter of 2008 saw approximately fifty new entities emerge. Critics must accordingly acknowledge that there is demand for an EU-level business form designed to facilitate cross-border movement. Moreover, if we take into account the SE's time-consuming formation procedures and the legal advisors' unfamiliarity with it, [FN38] the small ***362** but growing numbers come as no surprise. Indeed, in an environment in which differences in culture and legal traditions abound, the SE should be considered a success: it enables more cross-border mergers and activities, and also offers firms subject to different jurisdictions a cost-effective means of pursuing inter-jurisdictional strategies.

A more complete picture of the effect of the SE on corporate mobility emerges from a look at the main determinants of SE formations. Analyzing the available data yields some interesting, albeit unsurprising, conclusions. First, it appears that the benefits of establishing an SE outweigh its considerable formation costs mainly in jurisdictions with widespread employee participation rights. For instance, German BASF AG estimated a cost of €5,000,000 to convert to an SE. This amount includes the costs of compliance with the necessary legal and accounting requirements as well as registration and disclosure costs. [FN39] The fact that eighty-seven percent of the SEs are established, and have their administrative seat, in countries with strict regulations, particularly in the area of formation and employee participation (see Table 1), indicates that there are important reasons other than cross-border benefits that make it cost-effective to accept the cumbersome formation requirements. There is evidence that firms interested in the SE model may also be attracted to the advantages of its flexible governance structure and its protection of shareholder participation rights.

Figure 1: Total Number of SEs Registered (October 2004 to December 2008) [FN40]

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***363** Table 1: Correlation Between Participation Rights and Number of Registered SEs

ountries with widespread participation rights at board level	
Germany	85 SEs[FN [FN41]] registered
Czech Republic	111 SE registered
Hungary	2 SEs registered
Luxembourg	13 SEs registered
Netherlands	29 SEs[FN [FN42]] registered
Norway	6 SEs registered
Austria	12 SEs registered
Slovakia	5 SEs registered
Sweden	4 SEs registered
Denmark	2 SEs registered
Countries with limited participation rights at board level	
Belgium	7 SEs registered
Cyprus	7 SE registered
Estonia	1 SE registered

France	8 SEs registered
Latvia	3 SEs registered
Ireland	1 SE registered
Spain	1 SE registered
Countries with no (or very limited) participation rights at board level	
Liechtenstein	2 SE registered
United Kingdom	11 SEs registered

Source: Adapted from information available at http://ecdb.worker-participation.eu/.

While the SE allows firms to adopt voluntarily the corporation law of a more flexible and liberal jurisdiction by changing their administrative seat, firms tend not to do so for practical and psychological reasons. Of the "normal" SEs, i.e., those that actually have operations and employees, we see that more than sixty percent have been formed by the conversion of national corporations that had one or ***364** more subsidiaries in other member states (see Figure 2). Instead of stimulating reincorporation mobility, then, the SE competes with national business models, such as the Aktiengesellschaft in Germany.

Figure 2: SEs per Category

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Source: adapted from information available at http://ecdb.worker-participation.eu/. [FN43]

The following business cases exemplify the advantages of the SE.

In August 2006, MAN B&W Diesel AG, a German world market leader of two- and four-stroke engines, [FN44] converted to an SE. Significantly, it was the first German company that successfully concluded an agreement with the employee representatives of different European business divisions. Even though Augsburg remained the administrative and statutory seat of MAN Diesel SE, the conversion offered the possibility to deviate from the rigid co-determination provisions that apply to the German AG by reducing the number of supervisory board members from twelve to ten as well as by giving its supervisory board (Aufsichtsrat) a more international composition (thereby reducing the influence of German workers). [FN45] The intended conversions by Fresenius AG, a German Healthcare company, and BASF AG indicate that this is the prime motivator for German companies. Both companies attempt to involve all European employees in ***365** the appointment procedure of the members of the supervisory board. [FN46]

Other companies in strict regulation jurisdictions, such as Germany and Austria, go a step further and take the opportunity to choose a one-tier board structure. A recent example is Mensch und Maschine Software SE, a high-tech company that focuses on Computer Aided Design and Manufacturing (CAD/CAM) solutions. This German-based firm converted to an SE adopting the one-tier system because it is the preferable corporate governance structure for listed high-tech companies in which management holds a significant number of the outstanding shares. A single tier board makes prompt and flexible decision-making possible. This is viewed as a substantive benefit for firms that operate in a fast-growing and ever-changing business environment and may explain why the majority of the "normal" SEs opted into the one-tier system offered by the SE Statute.

Finally, twenty-seven percent of the set of SEs have been established as ready-made shelf, or "preformed" companies. These are organized by promoters as ready-made corporate entities for sale to entrepreneurs. They provide a convenient option for a firm requiring an EU-level business form without first going through the complex, costly, and time-consuming formation requirements. [FN47]

Part III, discussing post-Centros start-ups, will show that in this category too, "registration agents" play an important role in promoting new practices. For instance, the German Foratis AG, which according to its website is a market leader in shelf companies, [FN48] offers SEs for a purchase price of €132,000. With such an SE, buyers acquire an EU-level entity with a share capital of €120,000. Because many of the SEs that are offered off the shelf by this agent are structured as a one-tier board, it could indeed be concluded that corporate governance rather than mobility considerations are responsible for the appearance of a niche market for shelf SEs. [FN49] The fact that ***366** Foratis AG focuses on the German market reinforces the conclusion that the SE is generally viewed as an additional "national" business form that, besides its international allure, offers advantages mainly in the area of corporate governance.

Some tentative conclusions can be reached now about this EU-level initiative four years after its introduction. On balance, experience with the SE suggests wide acceptance that management uses the SE to streamline internal governance structures and to protect minority shareholders from exposure to opportunism by non-shareholder constituencies. At the same time, the legislation has not resulted in the hoped-for increase of reincorporation mobility. It appears that substantial legal cost and cultural barriers stave off the use of the SE for migration of administrative and statutory seats to other member states, even though it is tailored to suit larger companies and its use as such is becoming more widespread. Finally, it is foreseeable that companies located in the EU's new member states will value the European label of the SE more than companies in member states of longer standing. [FN50] Because firms in most Eastern European member states are perceived to lack credible enforcement mechanisms and high quality governance institutions, corporate lawyers in recent years have urged them to use the SE to facilitate entry into foreign markets. Because of its European status, the SE is viewed as a reliable contract party that offers effective protection to its investors and creditors.

To be sure, these are important developments, but not developments that significantly enhance mobility. European developments that do enhance mobility have occurred, but they apply only to smaller and private companies in the wake of Centros and its progeny. Part III will assess these developments as they have triggered competitive pressures that could stimulate innovative corporate lawmaking by national legislatures.

III. ECJ Case Law: Challenging the "Non-Competition" Strategy?

A. The "Incorporation Mobility" Cases

Corporate mobility is a prerequisite for regulatory competition among member states and, according to a body of corporate law scholarship in the United States, can significantly affect the level of ***367** experimentation and the quality of institutional arrangements. [FN51] In the United States, corporate mobility is seen as a unique phenomenon--any corporation can select its jurisdiction of incorporation at any point in its life cycle so long as its managers and shareholders agree on the choice. In Europe, corporate mobility is a more complicated notion that makes a fundamental distinction between reincorporation of existing firms and incorporation of start-up firms. EU legislation had opened only a narrow door for reincorporation of existing firms. For start-ups, in contrast, things have changed radically. The Centros line of decisions make it possible for an entrepreneur in member state A to incorporate a start-up company in member state B and later to establish a branch containing all of the assets and activities of the business in state A, even if that state subscribes to the classical seat theory. Even if the establishment in state B serves the purpose of avoiding state A's rigid corporate law rules, such as minimum capital requirements, the corporation normally obtains full recognition in state A without following any of state A's corporate law requirements.

The Centros-case is itself an example of this scenario. Centros involved Danish nationals who, seeking to evade Danish minimum capital requirements, organized a close corporation in the United Kingdom. Then, seeking to establish the actual business in Denmark, the organizers sought Denmark's permission to register a branch. Permission was refused, and the ECJ decided that this refusal was contrary to the freedom of establishment under Articles 43 and 48 of the

EC Treaty. Denmark, like the United Kingdom, follows the theory of incorporation. The firm's primary establishment--its legal status as a corporation--was accordingly not in question. The case solely concerned the “secondary establishment” of a branch by an English private company in Denmark. Secondary establishment refers to the setting up of agencies, branches or subsidiaries. The ECJ expanded the scope of the term “branch,” reducing the difference between primary and secondary establishment to a minimum and ruling that under the Treaty, Denmark could not refuse to register a branch of a firm organized as a private limited company in the United Kingdom even if the sole purpose was to evade the application of Denmark's minimum capital requirements. [FN52] To be sure, this new permissiveness has its limits. Under the Cassis de Dijon decision, [FN53] the Court does allow the Treaty's freedoms to be restricted when justified***368** by the public interest. Yet, the ECJ rejected the Danish justification for minimum capital. Creditors of closely held firms, said the Court, could look to means of protection other than minimum capital requirements, and governments seeking to protect creditors could adopt measures less burdensome to fundamental freedoms. [FN54]

Centros did not involve a country of origin following the real seat doctrine, and thus did not explicitly rule the real seat doctrine contrary to Community law. Still, the judgment has important implications for corporate migration. The English private company in this case had been incorporated by Danes who never intended to conduct operations in the United Kingdom. Read broadly, the case shows that entrepreneurs can incorporate in countries offering internal processes and legal regimes that lower their costs regardless of where the firms' assets, employees, and investors are located. [FN55] But the case also points to possible limits to the privileges extended, leaving open the exact parameters of mutual recognition. If in a future case a member state imposes higher minimum standards as a condition for recognition, said the ECJ in Centros, such measures must be proportional and non-discriminatory. [FN56] It remains to be seen which minimum standards will prove proportional and non-discriminatory, in particular with regards to minimum standards protecting stakeholders other than creditors.

The ECJ continued along the Centros path in Überseering, opening the door to a transfer of the real seat. The case holds that when a firm incorporated in member state B, in which it has its initial registered office, is deemed to have moved its actual center of administration to state A, Articles 43 and 48 of the EC Treaty preclude state A from applying its law so as to deny the firm's capacity to bring legal proceedings before its national courts. [FN57] As in Centros, refusal***369** to recognize a firm's corporate status was held to be a disproportionate sanction for the mere transfer of the real seat. Strictly speaking, the Überseering-judgment does not address the incorporation process by a newly established firm in a member state different from its actual place of business. However, since the existing corporation did not move its statutory seat--and thus kept its corporate nationality--this case is considered to be a further clarification of Centros and not a different aspect of corporate mobility.

Both Centros and Überseering left open questions regarding the scope of a member state's prerogative to apply national law to pseudo-foreign companies. Inspire Art answered some of these questions, extending the rule beyond the issue of recognition and addressing the application of a member state's broader system of corporate law. Inspire Art involved a Dutch enterprise organized in the United Kingdom solely for the purpose of avoiding Dutch company law's stringent rules. The organizers registered a branch in the Handelregister of the Chamber of Commerce in Amsterdam, but refused to register as a pseudo-foreign company. The ECJ then addressed the question whether Articles 43 and 48 of the EC Treaty preclude the Netherlands from imposing additional demands such as those found in the Wet op de formeel buitenlandse vennootschappen (WFBV-Dutch law on pseudo-foreign companies).

The ECJ held that Article 1 of the WFBV, which required Inspire Art to register as a pseudo-foreign company, was contrary to Article 2 of the Eleventh Council Directive, which does not allow member states to impose disclosure requirements above those provided by the Directive. The Court also ruled that it was part of the freedom of establishment if a company, established in one member state, carries out its operations in another member state. Moreover, the ECJ held that the minimum capital requirements for pseudo-foreign companies mandated by the WFBV were in violation of the freedom of establishment and not justified by the exception of Article 46 or any other requirement in the general interest.

Summing up, Centros introduced mandatory mutual recognition and review of minimum standards. It implied, contrary to the real seat doctrine, that incorporation in one member state cannot be called into question in another simply because the firm's central administration is not located in its state of incorporation. Überseering applies that reasoning to a transfer of real seat. Inspire Art extends the ruling from mandated access to judicial process to substantive corporate law.

***370** B. The Reincorporation Mobility Cases

The Centros triad does not cover reincorporation. Laws applying to reincorporation continue to retard the mobility of established European companies, as illustrated by the following scenario: Company X, incorporated in member state A wishes to reincorporate in member state B. To this end, company X plans to organize a front company X1 in state B and then merge company X into the front company. Company X will retain its administrative headquarters in State A and remain resident there for tax purposes. The company laws of neither state A nor state B include provisions that facilitate a merger of a company formed under one regime with a company formed under the laws of another state.

The lack of corporate law provisions facilitating company X's planned transaction was the rule rather than exception in the EU. Mergers of this kind were only possible in a small number of member states, specifically Greece, Italy, Portugal, and Luxembourg. National policymakers, content to follow old patterns, have opened few doors to facilitate these cross-border combinations. Absent statutory recognition of the merger, company X literally must incur the cost to transfer its assets and liabilities to a new entity in state B, liquidating itself in state A prior to the transfer.

A robust freedom of establishment could arguably remedy this situation. The ECJ took a step in this direction in its decision involving the merger between Security Vision Concept SA and Sevic Systems AG. The case concerned a sale of all assets by a Luxembourg firm to a German firm in exchange for the German corporation's common stock. The parties structured the transaction so that the Luxembourg transferor was liquidated after the asset transfer. German corporate law recognized such mergers “by dissolution without liquidation” only among domestic firms, and the German register of companies refused the registration of the merger. The ECJ held that the refusal violated Articles 43 and 48 of the EC Treaty, citing cost savings and brushing aside concerns of fiscal supervision and protection of creditors and minority shareholders. [FN58]

Note that the merger in Sevic Systems did not touch upon the law of the transferor state, Luxembourg. The scenario described previously therefore is not covered in all particulars: company X still needs the right to exit state A's corporate law regime in addition to the recognition of the merger in state B while keeping its headquarters in state A. Also, Sevic only covers a merger that results in both the transfer of the statutory seat and the real seat. Exit from state A becomes complete only if state A recognizes the state B incorporation ***371** of an entity with a local administrative seat. State A's real seat doctrine could thus remain a barrier.

Furthermore, even if both states A and B enacted facilitating corporate law, other reincorporation costs could render company X immobile. Reorganizing under a foreign corporate law statute often triggers taxes on hidden reserves, effectively restricting the demand for different national governance systems. If this exit tax burden exceeds the expected cost savings held out by the alternative legal regime, migration is pointless even if there is a complete and consistent set of harmonization Directives in place.

The ECJ in Lasteyrie du Saillant [FN59] addressed the permissibility of exit taxes in the context of the transfer of residence by an individual, self-employed person, prohibiting discriminatory taxation of the exiting taxpayer. Mr. de Lasteyrie left France in 1998 to settle in Belgium, transferring both his professional practice and tax residence. At that time, he held securities that exceeded twenty-five percent of the profits of a company subject to corporation tax in France--securities whose market value exceeded their acquisition price. The Code Général des Impôts includes a provision that prescribes a levy of income taxes on such value differences if a French resident leaves the country. The plaintiff challenged this provision and the case was referred to the ECJ, which held that the legislation in question was incompatible with the exercise of free establishment. The Court reasoned that the rule was discriminatory because taxpayers who transfer their residence abroad are taxed on latent increases in value, while taxpayers remaining in France are taxed on increase in value only after they have actually realized such gains. Thus, Lasteyrie du Saillant provides that exit taxes cannot hinder the free establishment exercised by a natural person and that exit tax regimes must comply with the criteria established in Centros. [FN60]

Lasteyrie du Saillant is important because it challenges the discretion of member states to use exit taxes interfering with the freedom of establishment. It follows that current exit charge rules applied to companies in a number of member states could be vulnerable to ECJ challenge. But the matter is not free from doubt, because the opinion distinguished between natural persons and corporate residents***372** and therefore left untouched the ECJ's earlier judgment in Daily Mail.

Daily Mail concerned a British company that wished to transfer its administrative seat to the Netherlands for the purpose of tax avoidance. The company planned to dispose of a large capital asset and to transfer its central office to the Netherlands in order to effect a transfer of its tax residence. Dutch tax residence in turn meant a stepped up tax basis on assets, averting a substantial United Kingdom capital gains tax on the planned asset sale. Meanwhile, no transfer of the firm's domicile of incorporation was contemplated. Since both the Netherlands and the United Kingdom follow the incorporation doctrine, transferring the administrative seat raised no questions concerning the governing company law. But United Kingdom tax law [FN61] required the Treasury's consent to the transfer of the company's seat and tax residence abroad. Daily Mail argued that the UK consent provision was contrary to Articles 43 and 48 of the Treaty.

The ECJ treated the claim as a company law matter, holding that Art 43 of the Treaty does not grant a company the right to transfer the administrative seat while retaining corporate status under the law of the jurisdiction of origin unless that jurisdiction's law allows for the transfer. The Court underscored, however, that "the rights guaranteed by [the Treaty] would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State." [FN62] The key point on the facts of the case, stressed the Court, was that the UK exit regulation applied in cases where the company wished to transfer its seat while maintaining UK company status. In such cases, the national legislation may freely impose conditions, such as obtaining consent of the Treasury.

Daily Mail coexists in tension with the Centros cases, creating a distinction between freedom of movement concerning immigration, as to which member states cannot impose any additional requirements, and emigration, as to which the national legislator under the laws of incorporation retains some discretion. Daily Mail's incidental acceptance of an exit tax barrier also stands in tension with the exit tax prohibition in Lasteyrie du Saillant. Many expected the ECJ to resolve the tension in favor of Centros and Lasteyrie du Saillant in the recent Cartesio case. [FN63] Instead, the Court took the occasion to reconfirm Daily Mail.

***373** Cartesio [FN64] involved a preliminary ruling made by the Court of Appeal of Szeged (Hungary) in proceedings with respect to the application of Cartesio Oktató és Szolgáltató bt ("Cartesio"), a limited partnership formed under Hungarian law, to amend the commercial register to record the transfer of its seat to Italy. Cartesio wished to remain registered in Hungary, but the Hungarian court rejected its request. It held Cartesio to Hungarian corporate law procedures requiring the company first to be dissolved and liquidated and then incorporated in Italy, with the new Italian company then registering as a branch in Hungary.

Before the ECJ, the Advocate General opined that such a blunderbuss application of the real seat concept violates freedom of establishment. [FN65] But the ECJ went on to hold that under Articles 43 and 48 of the Treaty, freedom of establishment is not violated when a member state restricts the transfer of an incorporated company's seat to another member state if the company retains its status under law of the member state of incorporation. [FN66] Following Daily Mail, the ECJ reasoned that the applicable national law defines the companies which are capable of enjoying the right of establishment, including any factor connecting the incorporated company to the territory of the member state. When a company breaks the connecting factor, the national law of the member state is no longer applicable and the company will no longer enjoy the right of establishment, particularly if the company reorganizes itself in another member state.

Daily Mail and Cartesio together establish a residual zone of vitality for the real seat doctrine, threatening to deter existing firms in real seat states from moving their businesses elsewhere. The zone clearly covers the case where a firm attempts to remove its seat to another member state but seeks to maintain its incorporated status and encounters barriers from tax as well as company law. The zone's boundaries are otherwise unclear, making it difficult to assess whether the ECJ will extend its freedom of establishment jurisprudence to legislation presently hindering corporate emigration, such as seat transfers and mergers. At the same time, even assuming the extension of the rule of Lasteyrie du Saillant to corporate entities, there will be cases where mobility will continue to imply adverse tax consequences.

***374** C. The Practical Impact of the ECJ Case Law

The ECJ decisions in Centros, Überseering and Inspire Art make it possible for new firms to migrate to more favorable jurisdictions. Arbitrage with respect to minimum capital rules is already under way. Europe's minimum capital requirements often exceed €8,000. These capital maintenance mandates constrain the repurchase of issued shares, the reduction of capital, and the issuance of new shares. They also have the effect of limiting access of wealth-constrained entrepreneurs to the corporate model, and at the margin reduce the number of potential start-up businesses. As a consequence, the demand for low-cost company law vehicles unhindered by capital maintenance requirements is relatively high across the EU. Given mobility, one would expect that jurisdictions without minimum capital requirements would attract more start-up registrations. This hypothesis is corroborated by the German Government's official database. Table 2 shows that shortly after the ECJ decisions more than ten percent of the newly incorporated companies in Germany were limiteds. This made Germany the absolute leader in post-Centros emigrations while the United Kingdom, with its private limited company form, is the overwhelmingly favorite host jurisdiction.

Table 2: Ratio of New Incorporations GmbH - Limited (Private Company UK)

	01/2005	02/2005	03/2005	04/2005	05/2005	06/2005	07/2005	08/2005
GmbH	3115	3113	3216	3018	2675	3056	2637	2666
Limited	357	359	403	429	399	426	381	441

Source: Deutscher Bundestag (BT) - Drucksache 16/283- 16.12.2005- Auswirkungen und Probleme der Private Limited Companies in Deutschland.

The Netherlands runs a distant second in terms of new incorporations of UK private limited companies with their activities in the Netherlands. Figure 3 shows the increasing popularity of the UK private limited company model in the Netherlands. This analysis is based on the January 1997 through June 2007 Chamber of Commerce Registry, which surveys all of the private limited companies that were established in the Netherlands in a particular year and that are still registered in July 2007. It distinguishes between the annual total of "Dutch" UK private limited company incorporations and the number of such firms still economically active as of July 1, 2007. The numbers show that many of these firms expire quickly if they ever do any business at all. [FN67]

Figure 3: Registered Private Limited Companies in the Netherlands established in 1997-2007 and still registered in July 2007

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Source: Data from the Dutch Chamber of Commerce. The total number of private limited companies is extrapolated from the registration between January 1, 2007- June 30, 2007; Marco Becht, Colin Mayer & Hannes F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, 14 J. Corp. Fin. 241 (2008).

***375** Post-Centros data for the period 2003-2006 collected by Becht, Mayer and Wagner corroborate the finding, showing that the rate of dissolution of these "Dutch" Limiteds is relatively high. Of the more than 6,000 "Dutch" private limited companies registered in that period, only approximately 2,000 were still registered at the Chamber of Commerce on July 1, 2007. [FN68] (The data also include branches of UK companies, but most of these companies have either Dutch names or a majority of directors who reside in the Netherlands, making them "Dutch" private limited companies.)

This set of Dutch migrants looks more robust if the focus is on the data for 2006 and the first half of 2007. These data show that more than 60% of the "Dutch" private limited companies remain active. [FN69] "Active" does not necessarily mean large; quite to the contrary, the economically active private limited companies are actually very small. Amongst these economically active companies, the most popular***376** sectors are wholesalers (20%), service providers (19%), retail companies (10%), construction and transport firms (10%), and IT and software businesses (9%).

Why do many of these firms have such short active lives? The low survival rate follows from the characteristics common to the start-ups that find foreign incorporation attractive. European firms incorporating in the United Kingdom are mostly "round-trippers" [FN70] looking for rock bottom cost and speed. Empirical evidence indicates that lower costs are the main factor inducing small companies to incorporate in the United Kingdom. Economic research shows that in the pre-Centros era, forming a private company was rather expensive, as a percentage of per capita GNI, and required many long and complex formalities in most member states. [FN71] In the United Kingdom, by contrast, costs are minimized and results occur quickly: a company can be established in a few days rather than waiting for weeks elsewhere. These advantages are brought to the attention of entrepreneurs on the Continent by commercial registration agents who advertise and vigorously promote the United Kingdom as a desirable destination for small companies. The agents commonly offer to create a company within twenty-four hours for an insignificant sum. Given such terms, incorporation need not necessarily presuppose an actual business. It is thus not surprising that the survival rate of "foreign" private limited companies is extraordinarily low. [FN72]

Meanwhile, the terms of foreign incorporation have not turned out to be quite as easy as some of these entrepreneurs believed. Practice reveals that foreign corporate law regimes contain significant disadvantages for some small businesses. A German entrepreneur using a UK private limited company may face more costs than initially expected due to the United Kingdom's different business climate: [FN73] loss of personal privacy, loss of competitive position, direct compliance charges, and administrative costs. Surprisingly, smaller German firms registered in the United Kingdom tended to default on their disclosure obligations under the Fourth and Seventh EU Directives on annual accounts and consolidated accounts of limited liability entities. Perhaps these small firms prefer to pay a fine rather ***377** than to reveal information that competitors could use against them. [FN74] Alternatively, the first wave of directors of "German" private limited companies may not have been adequately informed of their personal responsibility for the filing of annual returns and accounts under UK criminal law or may not have taken seriously the risk of having criminal charges brought against them. In the United Kingdom, in contrast, small businesses tend to file their financial disclosures in a timely and accurate manner.

Registration agents predict that German companies will adapt to the UK compliance practice, and research conducted by Companies House shows that the compliance rates have improved significantly. [FN75] This is unsurprising in view of the fact that in 2007 the standard UK prosecution warning letter was translated into German and forwarded to home addresses of directors of "German" private limited companies. There is little doubt that this initiative has prompted better compliance. Note that this sequence of events implies competitive motives in the United Kingdom, so if agents in the United Kingdom wanted a high volume of continental incorporations, it was especially important that Companies House avoided the prosecution of non-UK resident directors during the immediate post-Centros period.

Figure 4: Trends in the Number of Appointments of German and Dutch Directors in UK Private Limited Companies (January 2003=100)

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Source: The Dutch trend is adapted from information available at Companies House (UK). The German trend is adapted from Wilhelm Niemeier, Die "Mini GmbH" (UG) trotz Marktwende bei der Limited?, 28 Zeitschrift for Wirtschaftsrecht (ZIP) 1794 (2007).

These compliance problems may be contributing to an activity reduction. Figure 4 tracks numbers of German and Dutch directors appointed to UK private limited company boards since January 2003. The figure shows the number of directors appointed who are German or Dutch nationals (including the number of such directors in a UK branch or company that have a majority of British nationals as directors). Since we could rightly assume that the number of real UK private limited companies is relatively constant, it is obvious that the noticeable differences shown in Figure 4 are due to the changes in the respective total numbers of "German" and "Dutch" private limited companies that were set up in order to circumvent cumbersome domestic requirements. The chart overall shows an upward trend, particularly at the outset of the post-Centros period, a trend that probably reflects pent-up demand for a low cost vehicle. But beginning in fall 2006, the trend shifts, with numbers of new appointments declining. The leveling trend in the number of German and Dutch directors since 2006 could be the result of multiple causes, compliance problems among them. A question arises as to whether responsive lawmaking at home also figures into the mix.

***378** It appears that lawmakers who view small company migration to the UK private limited company as a problem calling for a solution have a ready expedient. All they need do is replicate the UK template and the UK vehicle's competitive cost advantage is undermined. Table 3 collects some facts about the company law regimes of the member states that have experienced significant numbers of UK limited incorporations. If incorporation mobility occurs in large volume only if migration to the host state promises economic gain for the businesses in question and their agents, then the motivating economic gains in this case are transaction cost savings and speed. Minimum capital requirements, high incorporation costs, and cumbersome formation requirements lead to a significant increase of the use of the UK limited in the post-Centros period. For instance, while the limited has always been a relatively popular business form in Germany, the number of UK limited companies increased significantly during the post-Centros period (from approximately 2,000 to ***379** more than 40,000). Given this correlation between formation requirements and the use of the UK business form, home lawmakers could arguably reduce its popularity by eliminating its durational and cost advantages. It should come as no surprise that this is already beginning to happen.

Table 3: The Correlation Between the Increased use of the Limited and Formation Requirements

Country	Pre-Centros (1997-1999)	Post-Centros (2003-2006)	Relative increase (post-Centros divided by pre-Centros)	Minimum capital (required paid-in capital)	Costs (€)	Duration (days)
Germany	2,009	43,181	21.5	25,000 (12,500)	1,000	24
Austria	240	3,141	13.1	35,000 (17,500)	2,000	30
Denmark	446	2,291	5.1	16,800 (16,800)	6,175 (-August 2003)	23 (- August 2003)
Netherlands	1,590	6,652	4.1	18,000 (18,000)	2,000	10
Belgium	914	1,841	2.0	18,550 (6,200)	1,500	30

Source: Adapted from Wilhelm Niemeier, GmbH und Limited im Markt der Unternehmensrechtsträger, 27 Zeitschrift für Wirtschaftsrecht 2237 (2006); Marco Becht, Colin Mayer & Hannes F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, 14 J. Corp. Fin. 241 (2008); www.doingbusiness.org.

Consider the case of Denmark, where lawmakers modified their private company law to fast track (from two to three weeks to two to three hours) their formation procedures but without altering in effect the minimum capital requirements. As a result, there was a sixty-five percent drop in the use of the UK limited in Denmark, that is of the 2,291 Post-Centros "Danish" private limited companies only 807 were established in 2004 to 2006.

Other countries have made different adjustments. For instance, France lowered its minimum capital requirement to €1 in 2003. In Germany, the proposal is to reduce the minimum capital. [FN76] In the Netherlands, despite the relatively low number of firms attracted to the UK legal regime (see Table 3) a new legislative measure [FN77] would ***380** make it easier and less costly to establish a Dutch private company, the BV, by abolishing the €18,000 minimum capital requirement and by simplifying the formation procedures as well as the drafting of the articles of association. Although the Dutch simplification proposals entail both theoretical and practical problems, the legislation could reduce company flight to pre-Centros levels.

D. Responsive (but Not Competitive) Lawmaking in Germany and the Netherlands

The previous discussion highlights a crucial point concerning incorporation mobility in the EU. For the most part, only the smallest start-up firms consider adoption of a British limited--those which are more responsive to features of corporation law that lower out of pocket costs rather than those responsive to the features of corporation law that deal with internal governance structures. This results in a clear incentive for lawmakers to reduce or eliminate minimum capital requirements and to provide simpler formation rules, but not much more.

Thus, incorporation mobility resulting from the ECJ case law is a less significant stimulus for competitive lawmaking than proponents had predicted. If we view “choice-of-business-form” decisions in the aggregate, out of pocket costs of incorporation emerge as only one of a number of determining factors. This dilutes post-Centros competitive incentives for national legislatures. [FN78]

We accordingly expect member state policymakers to remain within their existing incentive framework. Under the prevailing pattern of corporate lawmaking, legislators occasionally upgrade an existing corporate form but refrain from undertaking fundamental reforms. Such upgrades seek to facilitate the easy use of corporate vehicles, but only within a narrow margin. The legislatures are unlikely to touch the core components of the legal tradition and its legitimating features. They tend to leave familiar, “tried and tested” provisions in place, and rarely introduce more than a few necessary changes. This makes it easy for lawyers and existing firms to adjust to the changes and protects their investments in established practices. As a result, such statutory upgrades rarely entail much technical or political difficulty for lawmakers. Fundamental changes to core systemic elements that would introduce innovations enabling ***381** firms to adopt more effective governance structures imply political complications, and are therefore avoided. [FN79]

Some recent corporate law reform initiatives have proven costly and time-consuming for their legislative proponents. This is evidenced by: (1) the difficulty to design acceptable improvements, and (2) the reluctance of lawmakers to agree and quickly implement the proposed changes. It seems that economic and political pressures have not built up sufficiently to force more aggressive legislative action. If high stakes competition were the underlying motivation, enactment would be smoother and quicker. [FN80]

In Germany, for example, the current upgrade process began with a proposal to change the law on the limited liability company (Gesellschaft mit beschränkter Haftung, GmbH) in particular to (1) reduce the minimum capital requirement from €25,000 to €1, (2) transplant the British wrongful trading rule, [FN81] and (3) give firms the option to choose a single layer member-managed GmbH. The German legislature had a two-phase reform in mind. First, a compromise proposal would have lowered the capital requirement from €25,000 to €10,000; subsequently, a more fundamental reform would have included further adjustments. However, due to the change in government after elections in September 2005, the proposed reform has not seen the light of day. Major reforms that involve deviations from the current rules on the preservation of share capital and the notarial deed requirement for the transfer of the shares are unlikely to find support in the near future. Reform groups seeking a more flexible and lower cost GmbH structure failed to overcome the system's barriers and to end legislative stasis, presumably because they failed to alter society's perception of the need for change.

But the increasing popularity of the UK limited does continue to focus German attention on corporate law reform. A competition-driven law reform impulse does persist: a new proposal to introduce a modernized GmbH was published in May 2006. The proposed act--Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)--reflects the three main functions of the GmbH law: [FN82] (1) The incorporation of a GmbH should be fast, cheap, and simple; (2) the new GmbH should offer a transparent shareholder***382** structure; and (3) creditors should be better protected against illicit exploitation and rent seeking strategies of the owners. The reform measures simplify the registration system, permitting a fast and electronic registration with the Chamber of Commerce. The availability of a public shareholders' list at the Chamber of Commerce emphasizes the importance of electronic registration. It is the intention of the new Act to consider only registered persons as shareholders; an up-to-date electronic list should help prevent the acquisition of the company by unregistered shareholders. In order to make the GmbH an attractive product, the new Act also proposes to abolish the requirement that the firm's registered office be located in the same country as its corporate seat. Surprisingly, however, the upgraded GmbH would still require a minimum capital of €10,000. Finally, as a trade-off for the reduced minimum capital requirement, the Government proposes to increase the managing director's liability in the event of the firm's insolvency. Thus Germany's legislature seeks to preserve the popularity of the GmbH as the entity of choice through compromise.

In May 2007, the German Government submitted a revised version of the MoMiG Act to Parliament. It provides smaller firms with the possibility of incorporating as a variant of the GmbH without minimum capital, but with the legal requirement to save profits until a minimum level of capital has been reached (the Unternehmergesellschaft). The original proposal allowed the founders of small firms with a maximum of three shareholders, who make use of the statute's model articles of association (Mustergesellschaftsvertrag), simply to sign the model articles--which will be attached to the corporate statute. This procedure would streamline and expedite the incorporation process by eliminating the notarial deed. [FN83] Despite the fact that "traditionally thinking" lawyers have prevented the abolishment of the notarial deed, [FN84] these measures would certainly have an effect on the German use of the UK limited company similar to the effect of the fast track registration system in Denmark. But they would not bestow "Delaware Status" upon Germany (or upon Denmark).

The Netherlands is considering a private company law (Besloten Vennootschap, BV) reform that provides measures to resolve complex issues in closely held business relationships. The issues range from problems of collective action to free-riding, shirking, private information, and opportunism. The legislation makes the BV more accessible ***383** and flexible, with the goal to encourage entrepreneurship and innovation. In particular, the Dutch proposal seeks to minimize the three specific agency problems inherent in the governance structure of non-listed companies.

The first agency problem involves conflicts between the company and third parties such as creditors and employees. The proposal eliminates the minimum capital requirement and capital maintenance rules and replaces them with an expanded directors' liability for unlawful payment of dividends or unlawful stock purchase or redemption. Under the new regime, board members may be jointly and severally liable towards the company if a proposed dividend or stock purchase or redemption does not meet the liquidation test--which means that directors must check and verify that the company will still be able to pay its debts at the time of the dividend payment or stock redemption. Shareholders can only be called upon to return any payments received if they acted in bad faith and the company faced bankruptcy within one year after the unlawful payment of dividend or unlawful stock redemption.

The second agency problem is shareholder-director conflict. The "new" BV attempts to mitigate vulnerability to conflict by allowing parties freely to contract about their own decision-making arrangements. The Dutch bill explicitly states that a general meeting of shareholders may give instructions to the board of directors regarding the general course of the financial, social, and economic policies. In order to give full effect to the parties' intentions, companies may furthermore issue shares without voting powers or dividend rights attached to them. These shares may be categorized in different and separate classes, with, if the articles of association so permit, each class being entitled to appoint and remove at least one director.

This "contractual" flexibility also offers a solution to a third agency problem, the one arising between the controlling and minority shareholders. Minority shareholders with the power to appoint their own directors have better protection from opportunistic behavior and expropriation on the part of the controlling shareholders. This would not obviate the need for ex post enforcement to protect minority investors in non-listed companies. In a non-listed company that is characterized by a relatively small number of shareholders, no ready market for the corporate stock, and with substantial majority shareholder participation in management, direction, and operation of the firm, minority shareholders still could be locked into a very unpleasant situation and left basically unprotected and vulnerable. The Dutch Civil Code already provides for an exit/buy-out remedy that shareholders can use as a last resort if other, softer mechanisms prove to be insufficient. Any shareholder may require the other shareholders to acquire his or her shares if his or her rights are ***384** prejudiced by the conduct of these shareholders. Unfortunately, this statutory exit right is a costly and time-consuming legal procedure involving complicated valuation issues. The proposal would streamline the buy-out and valuation procedure and permit temporary injunctions.

While the Dutch BV proposal seeks to promote efficiency and simplification of corporate law, it is questionable whether the changes are fundamental enough to attract foreign companies or to prevent domestic firms from migrating to other jurisdictions. The BV, even as amended, will not be as user-friendly as alternative regimes. The relationship between the shareholders and the board of directors will be governed mainly by the articles of association under Dutch corporate law. The Dutch Civil Code expressly requires that firms disclose essential information in the articles, such as the capital structure, the company's objectives and any deviations from the statutory default rules. [FN85] In addition, the incorporation formalities will continue to suffer from a variety of technicalities, including a notarial deed drawn up by a lawyer who specializes in incorporations. Moreover, the deed of incorporation, which contains the comprehensive set of articles of association, must be filed and made public with the Dutch commercial registry. The Dutch proponents sidestepped the issue of relaxing the mandates tied into the notarial deed, which would have improved the chances for increased competitiveness of the BVs. Thus they have limited their own reform's attractiveness to start-up firms.

IV. Conclusion

This Article has addressed European legislative responses to increased corporate mobility arising from the implementation of the SE and from European Court of Justice decisions, which allow start-up firms to set up business in other member states.

The SE has not triggered significant corporate movement and has thus not prompted any national level regulatory adjustments. Switching to the SE is expensive and its future benefits are uncertain. There is a limited number of cases in which the SE helps firms to overcome inefficiencies inherent in rigid national regimes. Some companies in jurisdictions such as Germany, with extensive employee participation rights, find it worth the cost to convert to a SE. But aside from such express benefits, the SE will not set more competitive lawmaking in motion. Its rules are simply not designed for the needs of a wide range of companies and while it opens a door to ***385** migration by moving the administrative seat, it does not offer the freedom to choose a corporate law based on mere nominal contacts.

ECJ case law, on the other hand, has triggered legislative movement to transform the private company model into a more flexible, all purpose vehicle. Company law's rigid formalities and capital maintenance rules thwarted the emergence of more flexible legislation, but the increased desire for mobility has removed some of the obstacles and opened up opportunities for reform-minded lawmakers. The scope of these reforms remains narrow because the competitive pressure is largely limited to economically-negligible small entre- preneurs, who mostly aim to minimize the out of pocket costs of incorporation.

Mobility is still largely constrained by member state regulation. Even though the ECJ has reduced the reach of the real seat doctrine and its barriers to freedom of movement, the Court has not effectively eliminated it. ECJ case law, for instance, does not explicitly resolve issues involving a domestic company wishing to exit its state of incorporation. Serious obstacles still prevent a burst of mobility. They include the absence of a reincorporation procedure and the levy of exit taxes that restrict cross-border mobility.

The ECJ may yet remove these remaining obstacles to cross-border mobility as it continues its line of decisions in the future. ECJ interventionism certainly would make domestic lawmakers more responsive. They have already reacted to the loss of small start-ups and they certainly would adjust their regulatory and fiscal strategies to keep large, existing domestic firms at home. Whether a European Delaware is on the horizon is a more difficult question fraught with speculation. All one can say is that the present situation under the EC Treaty does not entail incentives similar to those that drive U.S. charter competition.

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Commission contract number 027190.

[FN1]. See Joseph A. McCahery & Erik P.M. **Vermeulen**, The Evolution of Closely Held Business Forms in Europe, 26 J. Corp. L. 855 (2001); Erik P.M. **Vermeulen**, The Evolution of Legal Business Forms in Europe and the United States (2003). See also John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, in 58 Current Legal Problems 2005, at 369 (Jane Holder & Colm O'Cinneide eds., 2006); Martin Gelter, The Structure of Regulatory Competition in European Corporate Law, 5 J. Corp. L. Stud. 247 (2005), for a second wave of research.

[FN2]. See Case C-212/97, Centros Ltd. v. Erhvervs-og Selbskabsstyrelsen, 1999 E.C.R. I-1459, §34 ("[I]t should be borne in mind that, according to the Court's case law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.").

[FN3]. See William W. Bratton & Joseph A. McCahery, The Equilibrium Content of Corporate Federalism, 41 Wake Forest L. Rev. 619, 626-30 (2006).

[FN4]. See Case C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC), 2002 E.C.R. I-9919; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10155.

[FN5]. See Bratton & McCahery, supra note 3, at 679-86.

[FN6]. See Erik P.M. **Vermeulen**, The Evolution of Legal Business Forms in Europe and the United States (2003); John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, in 58 Current Legal Problems 2005, at 369 (Jane Holder & Colm O'Cinneide eds., 2006).

[FN7]. See Luca Enriques, Silence Is Golden: The European Company Statute as a Catalyst for Company Law Arbitrage, 4 J. Corp. L. Stud. 77 (2004).

[FN8]. See Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross-Border Mergers of Limited Liability Companies, 2005 O.J. (L 310) 1; Case C-411/03, Sevic Systems AG v. Amtsgericht Neuwied, 2005 E.C.R. I-10805.

[FN9]. See Case 81/87, The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust, 1988 E.C.R. 5483. For an integrated review of tax barriers and corporate law barriers to international migration, see Mitchell A. Kane & Edward B. Rock, Corporate Taxation and International Charter Competition, 106 Mich. L. Rev. 1229 (2008).

[FN10]. See Christian Kirchner, Richard W. Painter & Wulf A. Kaal, Regulatory Competition in EU Corporate Law after Inspire Art: Unbundling Delaware's Product for Europe, 2 Eur. Co. & Fin. L. Rev. 159 (2005).

[FN11]. See Joseph A. McCahery & Erik P.M. **Vermeulen**, Understanding (Un)incorporated Business Forms (2005).

[FN12]. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3, [hereinafter Treaty of Rome, or the Treaty] (now The Treaty Establishing The European Community, 2006 O.J. (C321) E37) provided for the right of foreign corporations to establish branches in another member state, without being subject to more restrictive corporate law provisions of the host state.

[FN13]. See David Charny, Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the 'Race to the Bottom' in the European Communities, 32 Harv. Int'l L.J. 423 (1991).

[FN14]. In The Treaty Establishing The European Community, 2006 O.J. (C321) E37, 179, art. 308, it specifies two preconditions for unification: (1) action by the Community should prove necessary to attain, and (2) the powers provided in the Treaty are insufficient. See Richard M. Buxbaum & Klaus J. Hopt, Legal Harmonization and the Business Enterprise, in 4 Corporate and Capital Market Law Harmonization Policy in Europe and the United States 210-12 (1988).

[FN15]. See Marco Becht, Colin Mayer & Hannes F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, 14 J. Corp. Fin. 241 (2008).

[FN16]. See also Wilhelm Niemeier, GmbH und Limited im Markt der Unternehmensrechtsträger, 27 Zeitschrift für Wirtschaftsrecht 2237 (2006).

[FN17]. See Idier Martin & Forrest G. Alogna, New Delaware, Wall St. J. Eur., Dec. 20, 2007, at 12.

[FN18]. See Charny, supra note 13. See also Joseph A. McCahery & Erik P.M. **Vermeulen**, The Evolution of Closely Held Business Forms in Europe, 26 J. Corp. L. 855 (2001).

[FN19]. See William W. Bratton & Joseph A. McCahery, Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation, 38 Common Mkt. L. Rev. 677 (2001).

[FN20]. See William J. Carney, The Political Economy of Competition for Corporate Charters, 26 J. Legal Stud. 303 (1997).

[FN21]. See Stephen Woolcock, Competition Among Rules in the Single European Market, in International Regulatory Competition and Coordination, Perspectives on Economic Regulation in Europe and the United States 289, 289-321 (William W. Bratton, Joseph A. McCahery, Sol Picciotto & Colin Scott eds., 1996).

[FN22]. See Charlotte Villiers, European Company Law - Towards Democracy? (1998).

[FN23]. The European Community has adopted an array of directives (First, Second, Third, Fourth, Sixth, Seventh, Eight, Eleventh, Twelfth, and the Securities Directives), which regulate disclosure and ultra vires, capital requirements of public corporations, mergers and divisions of public corporations, corporations' annual and consolidated accounts, the qualification of accountants, disclosure of branches, formation of single member corporations, admissions to stock exchange listing, public offers of listed and unlisted securities, acquisitions and sales of major holdings, and insider trading. See Vanessa Edwards, EC Company Law (1999).

[FN24]. Besides constraining the Commission's role through the subsidiarity principle, the Maastricht Treaty also introduced the co-decision procedure. As a consequence, the European Union's decision-making structure closely resembles the constitutional form of democratic federalism in which central government policies are agreed to by a simple majority of elected representatives from lower-tier governments. See Robert P. Inman & Daniel L. Rubinfeld, Rethinking Federalism, 11 J. Econ. Perspectives 43 (1997).

[FN25]. Areas within the exclusive competence of the Union are subject to the proportionality test of Article 5 §3 of the Treaty, which provides that "action by the Community shall not go beyond what is necessary to achieve objectives of the Treaty"; proportionality and subsidiarity both apply to nonexclusive areas.

[FN26]. First of all, it has to be determined whether there is a power under the Treaty to take action. The subsidiarity principle then determines whether and how the Community may act. It must be shown that the objectives of the proposed action cannot be sufficiently achieved by the member states. The finding must then justify the further conclusion that in view of the measure the objective can be better achieved at Community level. The proportionality test as defined in §3 of Article 5 still has to be satisfied.

[FN27]. See Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe (2002), http:// ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

[FN28]. A first draft of the Directive on cross-border mergers was presented in 1984. Commission Proposal for a Tenth Directive of the Council Based on Article 54 (3) (G) of the Treaty concerning Cross-Border Mergers of Public Limited Companies, COM (1984) 727 final (Jan. 8, 1985), 1985 O.J. (C 23) 1.

[FN29]. See Paul Leleux, Corporation Law in the United States and in the E.E.C., Some Comments on the Present Situation and the Future Prospects, 5 Common Mkt. L. Rev. 113 (1967-68).

[FN30]. Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), 2001 O.J. (L294) 1.

[FN31]. See id. art. 2, at 4, title II, at 7-12.

[FN32]. Id. section II at 7.

[FN33]. The registered office of an SE may be transferred to another member state. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person. Council Regulation 2157/2001, supra note 30, art. 8 P 1, at 4.

[FN34]. Allianz bought out minority shares of RAS, an Italian insurer, in connection with its conversion to SE status. See Patrick Jenkins & Tobias Buck, On the move: why European companies may see benefits in a corporate statute with fewer limitations, Fin. Times (London), Oct. 11, 2005, at 19.

[FN35]. See Joseph A. McCahery & Erik P.M. **Vermeulen**, Does the European Company Prevent the 'Delaware-effect'?, 11 Eur. L. J. 785 (2005).

[FN36]. The significant amount of minimum capital that is required to form an SE is yet another dissuasive element in the SE Statute. The minimum capital requirement of €120,000 would certainly prevent start-up firms from opting for this EU-level business form. See Council Regulation 2157/2001, supra note 30, § 4.

[FN37]. See Council Directive 2001/86, 2001 O.J. (L294) 22.

[FN38]. A feasibility study of a European Statute for SMEs (financed by the European Commission) shows that businesses, especially small and medium-sized enterprises, are not familiar with the possibility of forming an SE; 91.3% were not familiar with this EU level business form. See AETS, Etude de faisabilite d'un statut européen de la PME (2005), http:// ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/doc/fr_rapport_ final_sme.pdf.

[FN39]. See Conversion Documentation, Conversion of BASF Aktiengesellschaft into a European Company (Societas Europaea, SE) with the company name BASF SE.

[FN40]. This figure depicts the information available on 306 registered SEs.

[FN41]. One SE was liquidated.

[FN42]. Two SEs were converted to private limited companies residing in the Cayman Islands.

[FN43]. Almost fifty percent of the operating SEs are concentrated in the financial sector.

[FN44]. See http://www.manbw.com.

[FN45]. This explains the specificity of the SE and its virtual absence in jurisdictions without stringent participation rights. For German companies, the SE could be a relatively quick and efficient means to transform their board structure to meet international standards, whereas for other firms it constitutes a burdensome and costly alternative.

[FN46]. See Ivar Simensen & Gerrit Wiesmann, German Blue Chips Ponder Switch to SE Format Corporate Governance, Fin. Times (London), Apr. 12, 2007, at 24; Richard Milne, Porsche's Designs on VW Lead it to Steer to a Different Company Structure, Fin. Times (London), Apr. 12, 2007, at 24; Ivar Simensen & Gerrit Wiesmann, Unions Weakened on Supervisory Board Allianz's Change from AG to SE Has Given Greater Flexibility to Management, say Ivar Simensen and Gerrit Wiesmann, Fin. Times (London), Apr. 12, 2007, at 24; Reinhard Hönighaus & Ivar Simensen, Allianz Plans to Raise _3.5bn in German Property Sale, Fin. Times (London), May 4, 2007, at 21.

[FN47]. See Press Release, Beiten Burkhardt Establishes Its Own European PLC, Dec. 5, 2005, available at http://www.bblaw.com/Press_ releases.571.0.html?&cHash=0abe6d5f47&tx_ttnews[tt_news]=488.

[FN48]. See http://www.foratis.com.

[FN49]. For instance, it follows from the available data that two companies purchased a shelf SE at Foratis AG: (1) Atrium Erste Europäische VV SE was renamed into Convergence CT SE in January 2006, and (2) Donata Holding SE was before the acquisition called Atrium Fünfte Europäische VV SE. Both companies have a one-tier board structure. In the first months of 2006, Foratis registered four new SEs. Atrium Achte Europäische VV SE and Atrium Neunte Europäische VV SE were registered in April 2006. Atrium Dritte Europäische VV SE and Atrium Vierte Europäische VV SE were established in March and February 2006 respectively. In October 2007, Atrium Elfte Europäische VV SE and Atrium Zehnte Europäische VV SE were incorporated.

[FN50]. For instance, since May 2007 more than 100 SEs were established in the Czech Republic. See also AETS, Etude de faisabilité d'un statut européen de la PME (2005), supra note 38, for similar conclusions. An unnoted, but equally important development is the leading role played by registration agents in the market for shelf-SEs.

[FN51]. See Roberta Romano, The Genius of American Corporate Law 14-24, 32-51 (1993); Ralph K. Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Leg. Studies 251 (1977).

[FN52]. See Werner F. Ebke, Centros - Some Realities and Some Mysteries, 48 Am. J. Comp. L. 623 (2000).

[FN53]. Case 120/78, Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

[FN54]. At the time of the Centros-decision, most member states viewed minimum capital requirements as essential to obtaining limited liability protection. However, these requirements do not pass the four factor test. See Case C-212/97, Centros Ltd. v. Erhvervs-og Selbskabsstyrelsen, 1999 E.C.R. I-1459, §34. (“[I]t should be borne in mind that, according to the Court's case law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary to attain it.”)

[FN55]. This trend is far from new. In Case 79/85, Segers v. Bestuur Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 1986 E.C.R. 2375, the court already decided that under Article 43 (ex 52) a Dutch sole proprietor could incorporate in England, because setting up a Dutch close corporation took considerably longer--even if he intended to continue to operate wholly in the Netherlands.

[FN56]. See Case C-212/97, Centros Ltd. v. Erhvervs-og Selbskabsstyrelsen, 1999 E.C.R. I-1459, §§31-38.

[FN57]. The ECJ rejected German case law principles under which a Dutch corporation was denied legal entity status and, consequently, the right to bring an action in a German court. The ECJ took the view that since member states defer negotiating the mutual recognition of firms under Article 293, denying the Dutch corporation of the procedural right to bring an action fails to comply with Articles 43 and 48 of the Treaty.

[FN58]. Case C-411/03, Sevic Systems 2005 E.C.R. I-10805.

[FN59]. See Case C-9/02, Hughes de Lasteyrie du Saillant v. Ministerie de l'Economie, des Finances et de l'Industrie, 2004 E.C.R. I-2409.

[FN60]. See Bratton & McCahery, supra note 19, for the four-factor test. A subsequent case, Marks & Spencer, does not achieve the extension. There the ECJ recognized that limiting the possibility of offsetting subsidiaries' losses against profits of the parent company can be justified (1) to protect the fiscal cohesion of the national tax system, (2) to avoid the double offset of losses, and (3) to restrict tax evasion. Since ECJ decisions are interpreted restrictively, it is fair to argue that we still need a clear decision that reverses the conclusions of the Daily Mail case. See Case C446/03, Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes), 2005 E.C.R. I-10837.

[FN61]. Section 482 (1) (a) of the Income and Corporation Taxes Act 1970.

[FN62]. Case 81/87 The Queen v Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust [1988] ECR 5483 paragraph 16.

[FN63]. See Klaus J. Hopt, Concluding Remarks at the 1st ECFR Symposium (Oct. 13, 2006), in 4 Euro. Co. & Fin. L. Rev. 169 (2007) (arguing that the ECJ should "issue a clear statement that it is doing away with the specter of Daily Mail, maybe when it decides the recent Hungarian referral case.").

[FN64]. See Case C-210/06, Cartesio, 2006 O.J. (C165) 17.

[FN65]. Opinion of Advocate General Poiares Maduro, Case C-210/06, Cartesio, §§ 26-35, 22 May 2008.

[FN66]. Case C-210/06 Cartesio Oktató és Szolgáltató bt (a limited partnership) (Case C-210/06); [2008].

[FN67]. The Netherlands considers a company as "economically active" if it employs at least one person for at least fifteen hours per week.

[FN68]. In Germany, we see a similar trend: the evidence shows that about fifty percent of "German" Limiteds fail already after one year, and more than ninety percent are dissolved after two years of trading. See Wilhelm Niemeier, Die "Mini GmbH" (UG) trotz Marktwende bei der Limited?, 28 Zeitschrift for Wirtschaftsrecht (ZIP) 1794 (2007).

[FN69]. In Germany, just more than half of the private limited companies register their trading activities in Germany. See id.

[FN70]. See Becht et al., supra note 15.

[FN71]. See Simeon Djankov et al., The Regulation of Entry, 117 Q. J. Econ. 1 (2002).

[FN72]. See Niemeier, supra note 68.

[FN73]. The costs for creating a British limited for a foreign company are not excessive. For example, the German registration company Go Ahead offers a UK limited for €260. However, there are some additional costs that users of the UK private limited company tend to discount or overlook. For instance, VAT registrations, opening a bank account, domain and website charges are not included. Also, there are major legal costs associated with the translation and legalization of the incorporation documents. See Robert R. Drury, Senior Lecture in Law, Univ. of Exeter, The EPC Versus the Private Limited Company, at the 5th European Company Law and Corporate Governance Conference (June 28, 2007).

[FN74]. See also Hugh Williamson, Germany's love of the 'Limited', Fin. Times (London), Oct. 3, 2006, at http://www.ft.com/cms/s/0/8a9afc14-5344-11db-99c5-0000779e2340.html.

[FN75]. Letter from Thomas Smith, Director of Communications of Companies House, to William W. Bratton, Joseph A. McCahery and Erik P.M. **Vermeulen** (July 13, 2007) (on file with the authors).

[FN76]. See Ulrich Seibert, Close Corporations - Reforming Private Company Law: European and International Perspectives, 8 Eur. Bus. Org. L. Rev. 83 (2007).

[FN77]. See T.P. van Duuren, Hendrik J. Portengen, Erik P.M.Vermeulen & B. Bier, De vereenvoudigde BV (2006).

[FN78]. Scholars have made a similar point for the US. See Ian Ayres, Judging Close Corporations in the Age of Statutes, 70 Wash. U. L. Q. 365 (1992); William W. Bratton & Joseph A. McCahery, The Equilibrium Content of Corporate Federalism, 41 Wake Forest L. Rev. 619 (2006).

[FN79]. See Joseph A. McCahery, Erik P.M.Vermeulen, Masato Hisatake & Jun Saito, Traditional and Innovative Approaches to Legal Reform: The 'New Company Law', 8 Eur. Bus. Org. L. Rev. 7 (2007).

[FN80]. In this respect, it is worth noting that Delaware's legislature strives to maintain legislative pre-eminence by periodically amending its corporate laws. See Joseph A. McCahery & Erik P.M. **Vermeulen**, Corporate Governance of Non-Listed Companies 141 (2008).

[FN81]. The wrongful trading regulation requires directors to monitor the firm's health and, if necessary, to take some remedial or preventive measures that prevent their firms from sliding into insolvency.

[FN82]. See Seibert, supra note 76.

[FN83]. The increased incorporation mobility arguably puts some pressure on the formal use of lawyers as notaries in the incorporation process. That is not to say that their function is outdated in the modern business world. Much will depend on the value-added content of the services they provide.

[FN84]. See the special edition of the German Law Journal, Renovating the German Private Limited Company - Special Issue on the Reform of the GmbH, Volume 9 (2008).

[FN85]. Among other things, the system of voting, supervision, and regulations concerning the conduct of the shareholders general meeting.

57 Am. J. Comp. L. 347

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