

CHANGING COMPANY LAW IN THE NETHERLANDS

Contribution by Mrs. K.A.M. Schopman from the Dutch Association of Chambers of Commerce to the 2004 ECRF-Conference, held in Paris

At last years conference in Seville, dr. García of the University of Barcelona spoke about the recognition by a EU-member state of companies incorporated in another EU-member state. This is an issue, because there are quite some differences between the rules on companies in the EU-member states. The most important difference, in my opinion, is the difference between the “Real seat theory” and the “Theory of constitution”. Those systems are the reflection of a fundamentally different view on companies in Europe. The countries that apply the “Real seat theory” show great interest in the way a company is founded. They want their own rules to be applied on every company in their country. The countries that apply the “Theory of constitution”, like the Netherlands, assume that the company was founded legally and focus merely on the external aspects of the company, to make sure they are acceptable.

The fact that there are two main flows, causes practical problems that are very serious. For example, if a Dutch private limited company, a B.V.¹, decides to move its activities to Belgium, there is a problem. According to Dutch law, the B.V. stays a Dutch legal person, because the B.V. is constituted in the Netherlands. According to Belgian law, however, the Dutch B.V. has become a Belgian B.V.B.A.² by moving its activities to Belgium. Belgium follows the “Real seat theory”. This means that there is one company with two “legal faces”. According to Dutch law, the B.V. has to comply with Dutch rules; according to Belgian law, the B.V.B.A. has to comply with Belgian law. Unless the company is dissolved according to Dutch law and incorporated again according to Belgian law, with all the negative fiscal consequences, this problem cannot be solved under the current European rules. The difference between the two theories is the cause of the problem.

It can get worse if a company, founded in a “Real seat theory-state” moves its activities to a “Theory of constitution-state”. If a German limited company (a GmbH³) were to move all its activities from Germany to the Netherlands, there is a problem. German law says: all your activities are transferred to the Netherlands, so you have to convert into a Dutch legal form. But Dutch law says: we acknowledge the fact that you are a German legal person and you cannot convert into a Dutch legal person. This means that there might not be a legal person anymore. Who owns the assets of the company now? Is there a legal person and what rules apply to it?

I don't expect this problem to be solved in the short term. Neither will I look into the question whether or not one system is better than the other. Both systems come with their own pros and cons.

What is interesting, next to the fact that our lack of harmonization within Europe is causing big problems for companies, is that in both systems there are likely to be aspects that are contrary to

¹ Besloten Vennootschap

² Besloten Vennootschap met beperkte aansprakelijkheid

³ Gesellschaft mit beschränkter Haftung

the EC Treaty, in which the free movement of companies in Europe is embodied. Over the last years, the European Court of Justice has given several judgments in cases on this subject. Last year, dr. García already discussed the Centros- and Überseering-ruling, in which the Danish and German system on recognition of foreign companies were declared in contravention of the EC rules on the free movement of companies in Europe.

On September 30th 2003, the European Court of Justice has ruled that the Dutch “Law on formal foreign companies” was contrary to the EC Treaty⁴. The Netherlands apply the “Theory of constitution”, which means that if any EC-company moves their activities to the Netherlands, it is not necessary (nor possible!) to transfer into a Dutch legal form. However, there are some exceptions to this liberal consideration.

Before I will tell you about the consequences of this ruling, I will give a short reproduction of the relevant Dutch company law.

To incorporate a Dutch B.V., according to Dutch law a capital of at least € 18.000 is required. Also, a declaration of the Ministry of Justice that there are no (criminal or financial) objections against the founder or founders of the company is needed.

For some people, these or other requirements are a reason to divert to other European countries and set up a legal person under that jurisdiction. These companies have no business activities in that other country, but solely in the Netherlands. Because of the “Theory of constitution”, which of course was never set up with this intent, these companies can easily escape the demands of Dutch company law. This unwanted practice has led to the Dutch “Law on formal foreign companies”. Formal foreign companies are companies that are foreign, only in name. In reality they are Dutch companies. The content of this law came down to the application on these companies of the most important Dutch rules on incorporating a B.V.

In a reaction to the before mentioned European Courts ruling, the scope of the Law on formal foreign companies was limited to legal forms from countries outside Europe⁵. This means that, as long as you stay in the European Community, you can choose whatever system fits you best for your Dutch company. Since then, especially the English Limited company has become more popular. This did not come as a surprise, because there are little requirements for incorporating this legal entity, compared to similar legal persons in other European countries.

Dutch lawyers call this the “Race to the bottom”. And the bottom seems to be found in England. The Dutch government decided that this has to change. They want to make the Dutch system “the bottom” again, just like it was before the 1970’s, when the Dutch legal system was sometimes referred to as “the Delaware of Europe”. There is talk of abolishing the requirement of a minimum capital and some other rules that have before been qualified as important for the protection of people and businesses dealing with the company. The reason for this is as follows. First of all, the Netherlands have always done business internationally. Trading with foreign countries is considered to be very important for our small country. This is why we want our legal facilities to be attractive to foreign companies, so they will choose to do business under our jurisdiction. Secondly, it turns out that the current rules do not live up to the expectations. Cus-

⁴ Chamber of Commerce Amsterdam vs. Inspire Art Ltd, case C-167/01 at 30 September 2003.

⁵ This law is not yet effective; the Parliament is still discussing it, but it is not likely that the draft will change.

tomers and other businesses can still become the victim of ill-disposed directors of companies, despite the measures taken.

It is my belief that, because of the increasing influence of the European Community on the member-states, more European countries will want their legal system to be attractive for foreign investors and businessmen. Also, the new European Company (Societas Europaea or SE) that can be incorporated as of next week, is likely to accelerate this development. The SE will make it possible for companies to “travel” from one jurisdiction to another within the European Union⁶.

Maybe, this will be the start of a Europe-wide competition for the favor of the companies. And that brings me to the conclusion of this short contribution: The developments I reflected, may be a start to a certain harmonization of the several systems of company law within Europe. This harmonization will solve a lot of practical problems for companies when moving their activities to another European country.

Whatever happens, now you are warned: the Netherlands have great intentions to seduce companies, whether European or not, to conduct their business in a Dutch legal form!

⁶ A legal person of one of the EU member-states can be converted into a SE. A SE can be converted into a legal person of any (other) EU member-state. The SE is therefore a channel from one jurisdiction to the other, when it comes to company law!