



Position Paper of the Council of the Notariats of the European Union on the separability of the registered office and the administrative centre in the draft SPE Regulation

1. The separability of the registered office and the administrative centre of the SPE as envisaged in the Commission draft leads to wide-ranging **circumvention of any protective standards** of Member States. It makes the establishment of **letterbox companies** possible and leads to extensive loss of control of Member States over their Public Limited Company Law. The consequence is a **“race to the bottom”** with regard to transparency as well as to legal registration and socio-political minimum standards:
 - The separation of the seats also creates considerable difficulties in the areas of the **accounting and record publication rules**. When separating the registered office and the administrative centre it is only necessary to register a **branch** at the location of the headquarters. In line with the Company Law Directive on Branches (Directive 89/666/EC) only a few of the company’s documents have to be disclosed by a branch office. The **annual financial statements** are usually only available in the **language** and according to the **accounting rules of the registered office**. Effectively informing creditors on the legal and economic circumstances of the company does not occur in the Member State in which the centre of business activities is located.
 - **Experience** to date has also shown that shareholders and management often completely **omit to register** a branch office at the actual domicile of the company. Due to the fact that the limitation of liability of capital companies normally already becomes effective when entering it in the register at the place of the registered office, it is often no longer appealing to register a “branch office” at the location of the headquarters. This does, however, contravene the legal provisions on registration. The **imposition of penalties by the registering authorities** at the place of the administrative centre is usually **weak** because they often are not even aware of the company’s existence. Conversely, the registering authorities at the place of the registered office are often not interested in effectively



monitoring the disclosure obligations of companies whose administrative centre is abroad because trading in their own country is normally not affected by discrepancies.

- Creditors will incur **greater expenses** when trying to **assert** their **claims** against the company. This will adversely affect small creditors such as consumers and employees, in particular. It does not conflict with **consumers** in principle laying a claim at their place of residence. But also in this event the writ will have to be served abroad, which will clearly prolong the proceedings as experience has shown. In addition, the claimant will incur significant additional costs by having to have the documents to be served translated.
- 2. The separability also does not conform to the **acquis communautaire**: Keeping together the registered office and the administrative centre is already provided for the **European Company** (Art. 7 SE Regulation 2157/2001) as well as for the **European Cooperative Society** (Art. 6 SCE Regulation 1435/2003) – for the above reasons. There is no reason to diverge from this in the case of the SPE.
- 3. In addition, the **jurisdiction of the European Court of Justice [ECJ]** does **not necessitate separability** of seats. The ECJ respects the various laws of the Member States: some require that not only the registered office but also the administrative centre are located on national territory, whereas others grant companies the right to transfer their administrative centre abroad. The EC Treaty takes account of this disparity in national laws, putting a company's registered office, central administration or principal place of business on an equal footing as the connecting factor. Moreover, the **latest judgment** by the ECJ in the legal matter **Cartesio**¹ confirms that under Community law there is no objection to merging the seats.

¹ Case number C-210/06



4. That this is so has its reasons: the **ECJ** jurisdiction recognises that the **Community legislator** has **extensive discretion when defining the fundamental freedoms**². This is why **scholars** consider for the most part that the Community legislator can decide to keep together the registered office and administrative centre³.
5. Due to the dangers associated with the separability of seats, both the **Social Committee** and the **Economic Committee of the EP** voted in favour of keeping seats together like with the SE and the SCE in their comments on the draft statute. Unfortunately, only the **Legal Committee** did not follow suit.
6. In the end the **separability** of registered office and administrative centre for the SPE **will also penetrate the SE** where transparency and participation standards would then also be extensively by-passed. The **Commission** has **already announced its intention** to make the relevant changes to the SE-Regulation.⁴ Then the **participation** would be **largely destroyed for both listed as well as unlisted corporate entities of the European legal form**.
7. The **suggestion** from the **French Council presidency** according to which the question of seats could be decided *“by national law in agreement with Community law”* **does not offer solutions to the above problems**. The Community law does give the Community legislator the possibility to provide for the consolidation of the seats. In how far the Member States can make use of this has, however, not yet been completely clarified by the ECJ. The risk of proceedings on the grounds of breach of contract must be avoided at all costs.

² For this reason the ECJ possibly also considered that linking the insolvency proceedings to the main activity and thus the administrative centre of a company is readily permissible by the European Insolvency Regulation even though this leads to the respective Member State's own laws being applied in large measures to companies from other Member States. Case No. C341/04 (Eurofood).

³ *Teichmann*, Binnenmarktkonformes Gesellschaftsrecht, 2006, 156 ss.; *ders.*, ZGR 32 (2003), 367, 399 s.; *Zimmer*, ZHR 168 (2004), 355, 363 s.; *Roth*, Festschrift Westermann, 2008, 1345, 1353 s.

⁴ See Memorandum from the Commission on the simplified company context in the area of Company Law, Accounting and Audits dated 10.07.2007, COM(2007) 394 to end, Appendix 3.2.



8. As far as individual Member States envisage the possibility of cross-border relocation of the administrative centre of companies established according to their law, there is no reason for the registered office and administrative centre of an SPE not to be kept together on the Community level. The **ability to relocate the administrative centre abroad** in the case of national companies **strengthens** the **national law** (that will continue to apply) and all its protective provisions for the employee, consumer and registration system (export of own law). The **separability of the seats on the European level, in contrast, weakens the national legal system**, because European companies will only be incorporated in states without sufficient legal registration and socio-political minimum standards (circumvention of own law).

Conclusion:

Numerous reasons support the maintenance of the *acquis communautaire* with regard to the question of seats. When considered closely, **the reason for the separability** is finally **only the possibility of bypassing legal protective standards** at the location of actual business activity of the company (“**letterbox problem**”). This should hardly be a political goal worth supporting. By contrast, the possibility of easily and quickly relocating the company abroad without first having to wind-up and re-incorporating the company is a legitimate and important goal that is envisaged by the 14th Directive on Company Law. However, this has nothing to do with the separability of the seats.

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