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Minimum capital requirements and the CJEU

Minimum capital requirements for private limited companies in
Germany and Austria as an example of the CJEU's judicature's
indirect influence on national legislations

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Summary

The influence that is exerted by the Court of Justice of the European Union ("CJEU") on national legislations is uncontroversial. Everybody is aware of the direct influence that the CJEU obtains whenever it for example declares a national provision incompatible with EU law and therefore invalid. However, there exists also an indirect influence of its judicature which has the same power to modify the Member States' laws. Even though the CJEU does not officially declare national rules to contravene EU-law and demands a change in a Member State's system, sometimes this is exactly what happens after a line of judgements - and not just casually.

This indirect influence is clearly evident as far as minimum capital requirements for private limited companies are concerned. The CJEU's judgements on the freedom of establishment enabled the movement of companies in the EU. This possibility led to a competition of systems which made some Member States' private limited companies less attractive for founders than others. One reason for the disadvantage are minimum capital requirements. This is why especially countries demanding a high amount of such a capital, felt pressured into changing their laws governing limited liability companies. Two examples that illustrate this indirect impact of the CJEU's judicature over the time vividly are Germany and Austria. Germany carried out modifications in 2008 by introducing a new legal form for private limited companies, which does not demand any minimum capital, next to the regular form for companies with limited liability, the GmbH. In Austria changes concerning the law governing limited liability companies are planned to be implemented this year. Here, the minimum capital requirement is going to be lowered to less than a third of the current amount.

In order to be able to determine how exactly this indirect influence of the CJEU's judicature looked like and how much power it possessed in Germany, respectively is about to have in Austria, the conducted and the planned reform as well as the situation before the judgements will be examined in this thesis.

Abbreviations

CJEU or Court	Court of Justice of the European Union
GesRÄG	Gesellschaftsrechts – Änderungsgesetz
GmbH	Gesellschaft mit beschränkter Haftung; name for private limited companies in Germany and in Austria
GmbHG	GmbH-Gesetz; name for the law governing the GmbHs in Germany and in Austria
Limited	Private limited company by shares; private limited company in the United Kingdom
MikraTraG	Gesetz zur Bekämpfung von Missbräuchen und zur Förderung der Transparenz im GmbH-Recht
MindestkapitalG	Gesetz zur Neureglung des Mindestkapitals der GmbH
MoMiG	Gesetz zur Modernisierung und Verhinderung von Missbräuchen im GmbH-Recht
SARL	Société à la responsabilité limitée; private limited company in France
SARL	Sociedad a responsabilidad limitada; private limited company in Spain
SNLE	Sociedad limitada nueva empresa; private limited company in Spain
SPE	Societas Privata Europaea
TFEU	Treaty of the Functioning of the European Union
UG	Unternehmergesellschaft (haftungsbeschränkt); private limited company in Germany

In the Bibliography (Austrian and German journals)

BC	Zeitschrift für Bilanzierung, Rechnungswesen und Controlling
DStR	Deutsches Steuerrecht
EuZW	Europäische Zeitung für Wirtschaftsrecht
GeS or GES	Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht

GesRZ	Der Gesellschafter - Zeitschrift für Unternehmens- und Gesellschaftsrecht
JA	Juristische Arbeitsblätter
NZG	Neue Zeitschrift für Gesellschaftsrecht
NJW	Neue Juristische Wochenschrift
wbl	Wirtschaftsbetriebliche Blätter
ZIP	Zeitschrift für Wirtschaftsrecht

1 Introduction

1.1 Purpose

The judgements of the Court of Justice of the European Union (“CJEU” or “Court”) have a great impact on the Member States’ legislations. This direct influence of the CJEU’s judicature on certain provisions of national laws is for example demonstrated by the outcome of preliminary rulings: the Member States have to change their rules or accept something which might not be valid according to their national rules.

It is interesting to observe that the Court’s judicature does not just possess this direct but also an indirect influence on national legislations. Member States might consider changing their legal provisions not because it was ruled in a judgement to do so but because of the development that followed this judgement, which put them in a less favourable position in comparison to others.

Minimum capital requirements for private limited companies in several Member States are good examples to illustrate such a situation. After the CJEU’s judgements on the freedom of establishment, or in other words the “free movement of companies”, starting with the *Daily Mail*¹ and particularly the *Centros*²-case in 1999, a still ongoing discussion began about lowering or abandoning the minimum capital requirements for private limited liability companies in the European Union. The debate already led to changes in the German system and will probably lead briefly to changes in the Austrian legislation.

The purpose of this thesis is to examine how strong the indirect influence of the Court’s judicature on national legislations is and remains to be over time by using the example of minimum capital requirements for private limited companies³ in Germany and Austria.

¹ Case C-81/87 *The Queen v.H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483.

² Case C- 212/97 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

³ In the following the term whenever the term “minimum capital” or “minimum capital requirements” stands alone, it shall always refer to this legally prescribed capital for private limited companies.

1.2 Method, Concept, Theories

I would describe the method which will be used as the “traditional legal method”. It applies an analytical approach to the subject. This means that the relevant case law and literature concerning the topic will be described at first. In the next step advantages and disadvantages will be examined, a critical analysis will be carried out and finally a conclusion will be drawn.

In order to examine the topic the CJEU’s most relevant judgements on the freedom of establishment - Daily Mail⁴, Centros, Inspire Art⁵, Überseering⁶, Cartesio⁷ and VALE⁸ - are examined more closely and their impact on company law in the EU will be discussed in Chapter 2.

The freedom of establishment for companies is regulated in Article 49 Treaty of the Functioning of the European Union (“TFEU”) and Article 54 TFEU.

Art 49 TFEU lays down that “*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited*”. Art 54 TFEU makes clear that not only natural persons but also corporations can rely on this freedom. Consequently, any company validly established under the laws of a Member State and recognized as being an EU company, is to be treated the same way as a natural person for the purposes of the exercise of freedom of establishment.⁹

In order to enable a discussion concerning the indirect influence of the CJEU’s judgements regarding the freedom of establishment on national legislations the seat theory and the incorporation theory will be used. The distinction between these two theories is important because the impact is different for Member States using the seat theory than for those applying the incorporation theory.

⁴ In the following the judgements, which are relevant for the topic and are cited here in Chapter 1, will not be cited again when nothing particular from the cases is mentioned but just their name.

⁵ Case C- 167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] ECR I-10155.

⁶ Case C- 209/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I- 9919.

⁷ Case C- 210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

⁸ Case C- 378/10 *VALE Építési Kft* [2012].

⁹ John Armour and Wolf Georg Ringe, ‘European Company Law 1999-2010: Renaissance and crisis’ (2011) 48 *Common Market Law Review* 124, 130.

The seat theory or real seat doctrine states that a company is governed by the rules of the state where the main seat is genuinely located.¹⁰ This means that the connecting factor determining the law applicable to companies is their seat of administration.¹¹ The real seat doctrine is used in most continental Member States, like Spain, France, Belgium and also Austria as well as Germany.¹² The main argument in favour of this theory is that when not using this doctrine the domestic company law which is mostly affected by the activities of the resident companies would be circumvented.¹³

The incorporation doctrine, on the contrary, regards the place of registration as the decisive factor and is mainly used in the United Kingdom, Ireland, The Netherlands¹⁴ and Denmark¹⁵. The advantages of this theory are legal certainty since the place of registration can be easily discovered as well as the promotion of the mobility of companies.¹⁶

After having defined the EU legal background, the indirect influence that the CJEU's judgements had, alternatively will have on the minimum capital requirements for private limited companies in Germany and Austria, which are named *Gesellschaft mit beschränkter Haftung* ("GmbH") in both states, will be described in Chapter 3.

In this context it should be mentioned that Germany and Austria are chosen because they are both applying the real seat theory. Moreover, they obtain high minimum capital requirements. Furthermore, in both countries discussions about the maintaining of this legal instrument started due to the influence of the CJEU's judicature on the freedom of establishment.

In the part dealing with the German development, scholars arguments for and against the legal instrument of minimum capital requirements will be reviewed and the discussion about its necessity as well as the impact of the CEJU's judgements on this debate and the reform of the German system will be evaluated.

¹⁰ Kristin Nemeth, 'The Austrian Supreme Court (Oberster Gerichtshof), Case 6 Ob 123/99b, Judgement of 15 July 1999' (2000) 37 Common Market Law Review 1277, 1278.

¹¹ Wulf-Henning Roth, 'Case C- 212/97, Centros Ltd. V. Erhevers- og Selskabsstyrelsen, Judgement of March 1999, Full Court (2000)' 37 Common Market Law Review 147.

¹² Mathias Siems, 'Convergence, Competition, Centros and Conflicts of law: European Company Law in the 21st century' (2002) European Law Review 47, 48.

¹³ Siems (n 12) 49.

¹⁴ Siems (n 12) 48.

¹⁵ Wolfgang Zöllner, 'Konkurrenz für inländische Kapitalgesellschaften durch ausländische Rechtsträger, insbesondere durch die englisch Private Limited Company' (2006) 1 GmbH Rundschau 1.

¹⁶ Siems (n 12) 48.

In the next step a closer look will be taken at the Austrian situation. Also here, the current status quo concerning the minimum capital requirement as well as the discourse about it and the forthcoming reform will be examined. It will be demonstrated how strong the indirect influence of the CJEU's judicature on this discussion still remains to be.

At the end, in the final Chapter 4, a conclusion will be drawn summarizing the main aspects, showing the most important outcome of this thesis and pointing out how important the CJEU's judicature on the freedom of establishment was and still is for national legislations especially as far as minimum capital requirements are concerned.

1.3 Delimitations

Some of the judgements that are also related to the freedom of establishment like *Marks & Spencer*¹⁷, *Cadbury Schweppes*¹⁸, *National Grid Indus*¹⁹ and *Della Valle*²⁰, are not described in Chapter 2.

This is due to the fact that I want to focus on the milestone-judgements that according to me describe the different points of view the CJEU took over the years. In this context it should also be stated that the judgements, that are not considered, are tax-cases and their important outcome for company law in general is clarified in the judgements which are described. Moreover, the current literature, which is relevant for my topic, almost exclusively refers to the mentioned judgements.

The examination of the indirect influence of the CJEU's legislation concerning minimum capital requirements is limited to Germany and Austria. Other countries, like for example France or Spain which are also affected by the CJEU's judgements on the freedom of establishment, are not taken into consideration.

This can be explained firstly by the limited amount of time given for research. Moreover, according to me, Germany and Austria are the best examples to illustrate the indirect influence on the discussion about minimum capital requirements. In addition to this, the

¹⁷ Case C-446/03 *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837.

¹⁸ Case C-196/04 *Cadbury Schweppes plc v. Commissioners of Inland Revenue* [2006] ECR I-7995.

¹⁹ Case C-371/10 *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond / kantoor Rotterdam* [2011].

²⁰ Case C-380/11 *DI.VI. Finanziaria di Diego della Valle & C.SapA v. Administration des contributions en matière d'impôts* [2012].

German and Austrian laws governing limited liability companies are very similar. However, after the changes have been carried out in Germany some years passed until reforms are planned in Austria now. This illustrates very well how the influence of the CJEU's judgements is still strong even though the tenor in the judiciary might seem to have changed. Additionally, these two countries illustrate how similar national legislations can find different solutions to deal with the indirect impact.

In this context it should be mentioned, that the examination is more focused on the German changes, since these modifications have already been carried out and the Austrian reform is - at the time of the writing of this thesis - just planned. Moreover, the debates of German and Austrian scholars concerning the advantages and disadvantages of minimum capital requirements are quite similar.

In addition to this, only the modifications concerning minimum capital requirements will be examined when discussing the reforms in Germany and Austria. Additional changes that have also been carried out as part of the reforms resulting from the indirect influence of the CJEU's judgements like other alterations of the German law governing private limited companies or planned amendments of other laws, like insolvency law or tax law in Austria, are left out.

Besides, in the Bibliography sometimes just surnames are used and first names left out. This is done because in the original source the forename was not stated. Moreover, in some cases, not the most actual version of literature, for example German commentaries, is used. This is due to the fact done because the literature has been current at the time the reforms have been carried out and hence are more suitable to describe the situation at that time.

2 CJEU's Judgements

2.1 Introduction

The Court ruled in several judgements which all were brought to it by preliminary ruling procedures about the mobility of companies within the EU and the extent to which they can rely on the freedom of establishment.²¹

In order to be able to discuss the indirect influence of the CJEU's judicature on minimum capital requirements in Germany as well as in Austria and, also on the real seat theory in general, a closer look has to be taken at the most relevant judgements on the freedom of establishment. Therefore, these judgements as well as their impact are examined more closely in this chapter.

At first a short overview of the cases will be given as well as the legal question that was answered is described. The second part will deal with their outcome and interpretation.

2.2 Overview of the judgements

2.2.1 Daily Mail

Daily Mail, which was decided in 1988, was the first case about the freedom of establishment and dealt with a company's right to emigration.²² It concerned the intended transfer of the central management and control of a company governed by the law of the United Kingdom to the Netherlands, which was motivated by less favourable British tax rules. The question was whether the denial of the consent for ceasing to be a resident for tax purposes in the United Kingdom by the British Treasury breached Community Law or not.²³

The Court held that this refusal was not a violation of EU law by reasoning that companies were creatures of national law.²⁴ In this respect, the CJEU did not rule that companies were

²¹ Marek Szydłov, 'Case C-210/06. CARTESIO Oktató es Szolgaltato bt, Judgements of the Grand Chamber of the Court of Justice of 16 December 2008, not yet reported' (2009) 46 Common Market Law Review 703.

²² Catherine Barnard, *The Substantive Law of the EU. The Four Freedoms* (3rd edn, Oxford University Press 2010) 320.

²³ Daniel Zimmer, 'Case C- 167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., judgement of 30 September 2003, nyr' (2004) 41 Common Market Law Review 1127 f.

²⁴ Zimmer (n 23) 1128.

restricted from changing their seat of residence, but that the Member States were allowed to impose restrictions on emigrating companies.²⁵

2.2.2 Centros

In its Centros-judgement from 1999, which dealt with an immigration topic,²⁶ the Court took a different approach and left more room to the freedom of establishment.²⁷

Centros Ltd. was a company incorporated under the law of the United Kingdom by two Danish citizens, Mr. and Mrs. Bryde, who were the only shareholders. The Brydes wanted to open a branch in Denmark at a time when Centros had never traded in the United Kingdom. The Danish registrar found that the aim was not opening a branch but creating a principal business establishment in Denmark and therefore refused the registration.²⁸ The Danish Authorities furthermore argued that Centros actually just intended to avoid the Danish rules governing the formation of companies like for example the minimum share capital.²⁹

In this case the referring court asked if the assessment of the Danish Authorities was contrary to Union Law. The CJEU came to the conclusion that a Member State cannot refuse the registration of a branch of a company that was formed in accordance with the law of another Member State, where it has its registered office.³⁰

2.2.3 Inspire Art

In 2003, in Inspire Art, which was also dealing with the immigration of a company³¹, the CJEU repeated its ruling in Centros, this time in respect of Dutch rules on minimum capital requirements and directors' liability. These norms applied to companies deliberately established in another Member State to avoid Dutch rules but carrying out their activities mainly in the Netherlands.³²

²⁵ Barnard (n 22) 320.

²⁶ Zimmer (n 23) 1129.

²⁷ Zimmer (n 23) 1127.

²⁸ Barnard (n 22) 329 f.

²⁹ Zimmer (n 23) 1128.

³⁰ Zimmer (n 23) 1128 f.

³¹ Weller, 'Einleitung' in Münchner Kommentar zum GmbHG, vol 1(1st edn, C.H.Beck 2010) marginal number 356.

³² Barnard (n 22) 331.

Inspire Art Ltd. was formed under the law of the United Kingdom. Its sole director lived in the Netherlands and was authorized to act alone and independently in the name of the company. Inspire Art started trading in 2000 and had a branch in Amsterdam. It was registered at the Chamber of Commerce without any indication of being a “formally foreign company” which was obligatory according to the Dutch law on formally foreign companies.³³ Moreover, such companies were obliged to provide the nominal capital required for a company with limited liability under Dutch law. If these conditions were not met, the directors were personally liable for the performance of the company’s contractual obligations.³⁴

The CJEU stated that the fact that the company was formed in the United Kingdom to evade Dutch company law, which was considered stricter, did not deprive the company of its right to take advantage of the provisions of the TFEU on the freedom of establishment. The only exception to this would be the proven abuse in an individual case.³⁵

2.2.4 Überseering

Überseering, which was decided in 2002, was a case that concerned an immigration topic as well. The Dutch company Überseering sued the German Company NCC for defective work carried out by NCC in Germany on its behalf.³⁶ The action was declared inadmissible both in the first and second instance. The reason given by the German Courts was that after being founded according to Dutch law, all shares of Überseering had been acquired by two German nationals who were residing in Germany. Consequently, the central place of management and therefore also the seat had been transferred to Germany. Since Überseering did not comply with the German rules governing the formation of a company, it did not possess legal personality, hence also did not have the capacity to bring court action in Germany.³⁷

The CJEU considered the German measures, which were basically an outcome of the seat theory, as a restriction of the free movement of establishment. Member States had to respect the legal personality which a company obtained according to its state of incorporation. It

³³ EU Focus, ‘Restrictions on establishment discussed’ (2003) 131 EU Focus 23.

³⁴ Zimmer (n 23) 1130, 1131.

³⁵ Zimmer (n 23) 1133.

³⁶ Barnard (n 22) 332.

³⁷ Peter Dyrberg, ‘Full free movement of companies in the European Community at last?’ (2003) 28 (4) European Law Review 528, 533.

could be concluded from this statement that in regard to the acceptance of the legal personality of a foreign company the incorporation theory had to be applied even in countries following the real seat doctrine.³⁸

2.2.5 Cartesio

In 2008, the Court's judgement in *Cartesio* followed. Like *Daily Mail* it concerned a company's right to departure. *Cartesio* was a company formed under Hungarian law and listed in the Hungarian commercial register. Its established office and real seat were in Hungary as well. *Cartesio* wanted to move its seat to Italy and applied to change this also in the commercial register. This application was rejected on the basis of the fact that it was not allowed according to Hungarian company law to transfer the seat to another country and to continue being a subject to Hungarian law.³⁹

In this judgement the CJEU recalled its statement from *Daily Mail* that companies were creatures of national law which only existed by virtue of the national legislation.⁴⁰ Furthermore, the Court left the power to decide which connecting factor it desired for a company to be established under its law to the Member State. Moreover, the state was authorized to determine that the company had to cease to exist if it moved its seat to another Member State and therefore lost the connecting factor described.⁴¹ Therefore, the company could not rely on the freedom of establishment. Hence, Hungary did not restrict the freedom of establishment in this case.⁴²

2.2.6 VALE

VALE, the CJEU latest judgement on corporate mobility in the EU⁴³ from 2012 dealt with an immigration case: *VALE Costruzioni Srl*, an Italian private limited company, wanted to transfer its seat and its business to Hungary. For this reason it asked to be removed from the commercial register, which was carried out by the Italian authorities as "removal and transfer of seat". Nine months later the former director of *VALE* and another natural person wanted to

³⁸ Weller (n 31) marginal number 352.

³⁹ Szydłov (n 21) 704.

⁴⁰ Szydłov (n 21) 707.

⁴¹ Weller (n 31) marginal number 363.

⁴² Weller (n 31) marginal number 364.

⁴³ Thomas Biermeyer, 'Shaping the space of cross-border conversions in the EU. Between right and autonomy: *VALE*' (2013) 50 *Common Market Law Review* 571.

establish the Hungarian VALE Építési Kft. They adopted the statute as well as paid the required share capital according to Hungarian law and applied to the competent authority for the registration of the company. In the application, it was requested to refer to the Italian VALE as a predecessor.⁴⁴ This request had the objective of accomplishing a cross-border conversion from an Italian Srl into a Hungarian Kft.⁴⁵ According to Hungarian law a conversion was just possible for domestic companies and the old legal entity could be referred to as a predecessor in the commercial register. For foreign companies these possibilities did not exist.⁴⁶

The first relevant topic was whether prohibiting a foreign EU company to convert into a Hungarian company was a violation of Art 49 and 54 TFEU. The CJEU came to the conclusion that allowing company conversions at a national level but not across EU borders was an unjustifiable restriction of the freedom of establishment.⁴⁷

The next important issue concerned the realisation of conversions and if a Member State could demand the domestic provisions on conversions to be applied also for cross-border conversions. The Court ruled that this did not violate the freedom of establishment in general. However, the principles of effectiveness and equivalence obliged the host Member State to designate the predecessor in law and take the relevant documents of the Member State of origin into account.⁴⁸

2.3 Outcome and Interpretation

The development of the CJEU's judicature on the freedom of establishment is interesting and sometimes rather surprising in the sense that it is not directly following previous judgements. I suppose this is related to the fact that these judgements touch a very sensitive issue for Member States. Especially the question whether the seat theory is compatible with EU law or not, seems to be a "hot potato" in EU company law.

⁴⁴ Peter Kindler, 'Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH' [2012] EuZW 888.

⁴⁵ Biermeyer (n 43) 572.

⁴⁶ Biermeyer (n 43) 572, 573.

⁴⁷ Biermeyer (n 43) 574 ff.

⁴⁸ Kindler (n 44) 890.

In its first judgement in this matter, in *Daily Mail*, which dealt with a question about the emigration of a company, the Court took a very restrictive approach.⁴⁹ It emphasized the importance of mutual recognition of corporate laws. Based on the judgement in this case the real seat theory seemed to be fully compatible with Union law and the discussion about the use of the real seat or incorporation doctrine was left to the Member States.⁵⁰

Then years later the Court took a different view.⁵¹ The *Centros*-judgement was groundbreaking and led to huge responses in literature. It was widely assumed that a new era of the freedom of establishment had started.⁵² The question at stake was whether the real seat doctrine would be classified as an unnecessary and unjustified restriction to the freedom of establishment⁵³ and whether it could be maintained within Union law.

This question was not answered until the judgements of *Überseering* and *Inspire Art*.⁵⁴ The Court then followed *Centros* in *Inspire Art*⁵⁵ as well as in *Überseering*⁵⁶ which led to an extension of the freedom of establishment.⁵⁷ However, also in these judgements the CJEU did not put an official end to the seat theory.⁵⁸

It should be kept in mind that *Centros*, *Inspire Art* and *Überseering* concerned the immigration of companies. It followed from these judgements, that even if the home Member State could impose restrictions for leaving companies, the host Member State could not do the same, if the company had been validly formed in another Member State. The host Member State had to judge immigrating companies according to the rules applied in their home jurisdiction. Hence, it had to use the incorporation principle for these companies.⁵⁹

Consequently, this meant that even if not officially declared invalid, the seat theory was de facto not applicable in such circumstances any more.

⁴⁹ John Armour and Wolf Georg Ringe, 'European Company Law 1999-2010: Renaissance and crisis' (2011) 48 *Common Market Law Review* 124, 130.

⁵⁰ Armour and Ringe (n 49) 133.

⁵¹ Armour and Ringe (n 49) 134.

⁵² Dyrberg (n 37) 531.

⁵³ Wulf-Henning Roth, 'Case C- 212/97, *Centros Ltd. V. Erhevers- og Selskabsstyrelsen*, Judgement of March 1999, Full Court' (2000) 37 *Common Market Law Review* 147, 150.

⁵⁴ Lang, 'Internationales Gesellschaftsrecht' in Hildegard Ziemons and Carsten Jaeger, *Beck'scher Online-Kommentar GmbHG* (13th edn, C.H.Beck 01.12.2012) <<http://beck-online.beck.de>> accessed 22.05.2013 marginal number 16.

⁵⁵ EU Focus (n 11) 24.

⁵⁶ Armour and Ringe (n 8).135.

⁵⁷ Zimmer (n 23) 1333.

⁵⁸ Dyrberg (n 37) 528.

⁵⁹ Weller (n 31) marginal number 356.

Also in its next judgment, *Cartesio*, the Court did not abandon the real seat theory. On the contrary, the CJEU ruled according to its Daily Mail-doctrine and stated again that companies were creatures of national law. Member States were free to determine that companies needed a connecting factor, like the seat, in order to be governed by their company law. This surprised all scholars who believed that the Court would continue its line of reasoning of *Centros*, *Überseering* and *Inspire Art* and also apply it to emigrating companies.⁶⁰

In a next step, the Court ruled in 2012 in *VALE*, which although dealing with a conversion case, could be seen as *Cartesio*'s successor. It was much anticipated in the hope that it would clarify the extent of corporate mobility in the EU and explain the outcome of *Cartesio*.⁶¹

In *VALE*, the Court stated that companies had the right to cross-border conversion. This judgement also entailed the rule that companies seeking to carry out such a conversion had to comply with the connecting factor that was required by the host Member State. Companies that wanted to convert to companies in countries following the real seat doctrine would therefore generally have to shift their central administration to this jurisdiction. Furthermore, the CJEU stated explicitly that this right should just be granted if an actual economic activity through a permanent establishment for an indefinite period was pursued in the host country.⁶² Moreover, companies could just convert if they fulfilled the establishment-criteria of their home Member State.⁶³

The CJEU did not state clearly that it wanted the principles of *VALE* just to be applied to conversion-scenarios, so some scholars argue that it should be generally used for establishment-cases.⁶⁴ Personally, I consider this argumentation to be questionable and a look will have to be taken at future judgements concerning this topic to make a statement like this. What can be determined definitely is that through giving more autonomy to national legislations within the limits of effectiveness and equivalence, *VALE* created another layer of rules in the already existing "jungle of rules" on cross-border corporate mobility.⁶⁵

To sum up, in all its judgements on the freedom of establishment the CJEU has never abolished the real seat theory officially. Nevertheless, it was very clear in its early case law – *Centros*, *Inspire Art* and *Überseering* – that particularly for immigrating companies the real

⁶⁰ Weller (n 31) marginal number 361 ff.

⁶¹ Biermeyer (n 43) 571.

⁶² Biermeyer (n 43) 586.

⁶³ Kindler (n 44) 893.

⁶⁴ Kindler (n 44) 893.

⁶⁵ Biermeyer (n 43) 571, 589.

seat doctrine could be considered as a de facto restriction of the freedom of establishment. At that time, this situation enabled the so called “competition of the systems” between the different Member States’ legal forms,⁶⁶ which was very well capable of indirectly influencing national legislations. An example that illustrates this vividly is given by Germany where changes of the law governing private limited companies were initiated because of this competition. This impact will be discussed in more detail in Chapter 3.

Even though some scholars argue that the situation is different now and that in its VALE-judgement the CJEU has abandoned its rulings in Centros, Inspire Art and Überseering,⁶⁷ I am personally still considering the influence of their core statements on national law quite strong. Member States following the real seat doctrine still feel this competition of systems. This can be demonstrated by the example of Austria, which is planning to change its law governing private limited companies for this reason now.⁶⁸ Details will be described in Chapter 3 as well.

⁶⁶ Lang (n 54) marginal number 17.

⁶⁷ Kindler (n 44) 893.

⁶⁸ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* Bundesministerium für Justiz 500/ME XXIV.GP [2013] <www.parlament.gv.at> accessed 22.05.2013 9.

3 Indirect Influence

3.1 Introduction

As was concluded in Chapter 2 the Court's judgements on the freedom of establishment made the competition of systems in the European Union possible. The enabling of such a competition had a tremendous influence on national legislations. One example that illustrates this influence very well is the minimum capital requirement for private limited companies. In other words, the question asked by national experts whether there can be a justification for this requirement in the light of such a competition.

There exists no general EU provision concerning the capitalization standards for private limited companies. Moreover, the Court did not rule that minimum capital requirements were contravening EU law in its judgements on the freedom of establishment. In *Inspire Art* for example the CJEU mentioned expressly that the Dutch provisions regarding share capital were not considered to be in conflict with the freedom of establishment as guaranteed in the TFEU.⁶⁹ Still, due to the competition of systems some Member States felt pressurised to change their rules. Discussions started and modifications followed or are about to follow.

This indirect impact of the CJEU's judgements on the freedom of establishment on national laws is very well illustrated by the examples of Germany and Austria which will therefore be examined in this Chapter.

3.2 Minimum capital requirements in the EU

Before being able to commence with the description of the Court's judiciary's indirect influence on minimum capital requirements, a brief introduction to this legal instrument will be given. In addition to this, its usage in the European Union will be described shortly.

⁶⁹ Daniel Zimmer, Case C- 167/01, 'Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.', judgement of 30 September 2003, nyr' (2004) 41 Common Market Law Review 1127, 1132.

The minimum capital requirement for private limited companies is the legally prescribed amount of money that shareholders have to invest in their company.⁷⁰ As the name indicates, shareholders are obliged to raise this sum at any rate⁷¹ but can of course always decide that the share capital should be higher than what the legislator demands as a minimum. Since shareholders gain the benefit of not being personally liable when choosing the legal form of a private limited company, the minimum capital constitutes the amount they are actually legally responsible for.⁷²

In Germany the minimum capital requirement for private limited companies is laid down in § 5 of the law governing the GmbHs, the *GmbH-Gesetz* (“GmbHG”), and amounts to € 25.000,00. This sum can either be paid in money or in investments in kind. If it is decided to use just money contributions, one half of this amount, namely € 12.500,00, has to be paid when registering the company.⁷³

Furthermore, during the reform carried out in 2008 a new private limited company, the *Unternehmergeellschaft (haftungsbeschränkt)* (“UG”), was introduced in § 5a GmbHG next to the GmbH which only requires a minimum capital of € 1,00.

In Austria, currently € 35.000,00 are demanded as minimum capital according to § 6 of the Austrian GmbHG, but a reform has been initiated that intends to reduce it. It should be mentioned here, that also in Austria just half of the required capital has to be paid, when only money contributions are used, as is stated in § 6a GmbHG.

In comparison to other countries in the EU these minimum capital requirements are very high.⁷⁴ Austria even obtains the highest legally prescribed capital of all the EU Member States⁷⁵ directly followed by Germany as number two – at least for the regular GmbH.⁷⁶

If countries decide to demand a minimum capital, it is in the main part distinctly lower. This is for example the case in Italy, Belgium or Spain.⁷⁷ The Spanish *sociedad a responsabilidad*

⁷⁰ Rüdiger Wilhelmi, ‘Das Mindestkapital als Mindestschutz- eine Apologie im Hinblick auf die Diskussion um eine Reform der GmbH angesichts der englischen Limited’ (2006) 1 GmbHRundschau 13.

⁷¹ Wilhelmi (n 70) 13.

⁷² Roth, ‘§ 5’ in Günther Roth and Holger Altmeppen, *GmbHG - Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (5th edn, C.H. Beck 2005) marginal number 11.

⁷³ Ulrich Haas, ‘Mindestkapital und Gläubigerschutz in der GmbH’ [2006] DSStR 993f.

⁷⁴ In Germany this refers to the GmbH and not to the UG.

⁷⁵ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* Bundesministerium für Justiz 500/ME XXIV.GP [2013] <www.parlament.gv.at> accessed 22.05.2013 9.

⁷⁶ Ulrich Seibert, ‘BB-Gesetzgebungsreport: Entwurf eines Mindestkapitalgesetzes (MindestkapG)- Substantielle Absenkung des Mindeststammkapitals’ (2005) 20 Betriebs-Berater 1061.

limitada (“SARL”) as well as the *sociedad limitada nueva empresa* (“SLNE”) both demand just about € 3.000,00.⁷⁸ In 2013, the average minimum capital requirement for private limited companies in the EU amounts to € 8.000,00.⁷⁹

Some Member States like England with its *Private limited company by shares* (“Limited”) and France with the *société à la responsabilité limitée* (“SARL”) formally do not require any minimum capital at all.⁸⁰

As far as minimum capital requirements and the laws governing private limited companies are concerned, a lot of countries were and still are influenced by the outcome of the CJEU’s judgements.

France, for example, was the first Member State to react to the Court’s judicature. It lowered the minimum capital requirement for its SARL from €7.500,00 to € 1,00 in 2003. Also in 2003, Spain introduced the SNLE next to the Spanish SARL. Both legal forms obtain the same minimum capital, but the newly introduced company enables a quicker establishment. Now, also the Netherlands consider changing their minimum capital requirement.⁸¹

In the following, it will be discussed what indirect influence the Court’s judgements on the freedom of establishment had on the German, respectively will have on the Austrian system regarding minimum capital requirements.

3.3 Germany

In Germany, the discussion about the minimum capital requirement was mainly carried out after the judgements in *Centros*, *Inspire Art* and *Überseering*, which made the traditional German GmbH suddenly subject to competition with other legal forms in the European Union. Finally, the German GmbH-System was reformed at the end of 2008 with the *Gesetz zur Modernisierung des GmbH-Rechts und Verhinderung von Missbräuchen* (“MoMiG”). The

⁷⁷ Haas (n 73) 993.

⁷⁸ Claudia Winkler, ‘Vom Mythos eines Regulierungswettbewerbes im Europäischen Gesellschaftsrecht’ wbl [2012] 421, 426.

⁷⁹ Bernhard Rieder ‘GmbH-Gründung um 75 Euro’ Der Standard, 13.03.2012 <<http://www.rdb.at>> accessed 22.05.2013.

⁸⁰ Christofer Rudolf Mellert, ‘Ausländische Kapitalgesellschaften als Alternative zu AG und GmbH - eine Synopse’ [2006] Betriebs-Berater 8.

⁸¹ Winkler, ‘Vom Mythos eines Regulierungswettbewerbes im Europäischen Gesellschaftsrecht’ (n 78) 426 ff.

minimum capital requirement was not the only change that was made in the MoMiG but it was the core issue in the legal discourse.⁸²

3.3.1 Competition of systems

The CJEU's judgements on the freedom of establishment made the competition between the different legal forms in the EU possible.⁸³ At least in some countries, especially those who followed the real seat doctrine, Centros, Überseering and Inspire Art changed the environment for establishing new companies completely.

In Germany, an intense discussion regarding the competing power of the German GmbH with other legal forms was started, especially as far as the British Limited was concerned.⁸⁴ Firstly, the GmbH was criticized for its complicated formal requirements during the establishment process. Secondly and more strongly, its relatively high minimum capital requirement was considered to have a bad influence on its competitiveness.⁸⁵

Entrepreneurs in Germany seemed extremely keen on choosing the legal form of a Limited when establishing a new company. According to estimations, 25.000 Limiteds had been founded in Germany until 2006. This meant in effect that every fourth new foundation of a private limited company was a Limited and not a GmbH any more.⁸⁶ Founders of new businesses seemed to be particularly fond of the Limited because it enabled a quick and also "cheap" establishment in comparison with the GmbH.⁸⁷

The other possible European legal forms like the French SARL, which just demanded € 1,00 as minimum capital as well, or the SLNE, which could be established in 48 hours, did not have great success in Germany at all. The most obvious explanation for this development could be found in language barriers.⁸⁸

⁸² Jan Schürnbrand, 'Die große GmbH-Reform 2008: Gesetz zur Modernisierung des GmbH-Rechts und Verhinderung von Missbräuchen (MoMiG)' [2009] JA 81.

⁸³ Lang, 'Internationales Gesellschaftsrecht' in Hildegard Ziemons and Carsten Jaeger, *Beck'scher Online-Kommentar GmbHG* (13th edn, C.H.Beck 01.12.2012) <<http://beck-online.beck.de>> accessed 22.05.2013 marginal number 17.

⁸⁴ Wolfgang Zöllner, 'Konkurrenz für inländische Kapitalgesellschaften durch ausländische Rechtsträger, insbesondere durch die englische Private Limited Company' (2006) 1 *GmbHRundschau* 1, 2.

⁸⁵ Wolfgang Müller and Sebastian Müller, 'Ausländische Gesellschaftsformen- eine wirkliche Alternative für deutsche GmbH-Unternehmer? 1. Teil: Deutsche GmbH, französische S.A.R.L und spanische SLNE' (2006) 11 *GmbHRundschau* 583.

⁸⁶ Volker Römermann, 'Der Entwurf des MoMiG- die deutsche Antwort auf die limited' [2006] *GmbHRundschau* 673.

⁸⁷ Zöllner (n 84) 2.

⁸⁸ Zöllner (n 84) 2, 3.

The German scholars warned about the risks that should always be kept in mind when establishing a company governed by the law of another Member State. Such risks could be constituted for example in the costs of an English lawyer for general advice or during a lawsuit.⁸⁹ Next to possible additional costs, critics also stated that the prestige amongst creditors might not be the best since a lot of these newly found Limiteds failed and went bankrupt.⁹⁰

Although the Limited therefore did not have the best reputation and the financial risks that could arise when choosing a Limited and not a GmbH were not to be underestimated, the competitive disadvantage for the GmbH - or at least the one that was assumed to be - remained.⁹¹

3.3.2 Reform

Against this background the discussion concerning a reform of the German GmbHG began which was finalized with the MoMiG.

Before starting to describe this reform, a brief look should be taken at the history of the German law governing GmbHs: The German GmbHG entered into force in 1892 after just a short time of preparation.⁹² In contrast to the German law governing public companies, the so called *Aktiengesellschaftsgesetz*, the GmbHG had not been subject to constant reforms.⁹³ Basically, even if there had been carried out some modifications⁹⁴, it had not been changed profoundly since its entering into force⁹⁵ until the big reform, the MoMiG, in 2008.

The fear that the GmbH would lose its competitiveness resulting from the wave of foundations of Limiteds in Germany led to a discussion about the reformation and

⁸⁹ Klaus Müller, 'Die Limited in Deutschland: Ein Überblick über das anzuwendende englische Gesellschaftsrecht' *Der Betrieb* [2006] 824, 829.

⁹⁰ Lorenz Fastrich, 'Einleitung' in Adolf Baumbach and Alfred Hueck (eds), *GmbHG* (20th edn, C.H. Beck 2013) marginal number 51.

⁹¹ Ulrich Seibert, 'GmbH-Reform: Der Referentenentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen' [2006] *ZIP* 1157, 1158.

⁹² Lutter and Hommelhoff, 'Einleitung' in Lutter and Hommelhoff, *GmbH-Gesetz* (16th edn Dr. Otto Schmidt 2004) marginal number 6.

⁹³ Seibert, 'GmbH-Reform: Der Referentenentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen' (n 91) 1157.

⁹⁴ Heribert Heckschen, *MoMiG in der notariellen Praxis* (1st edn, C.H. Beck 2009), marginal number 1.

⁹⁵ Lutter and Hommelhoff (n 92) marginal number 6.

modernization of the GmbHG⁹⁶ with the minimum capital requirement being the centre of this discourse.⁹⁷ Hence, even though the GmbHG seemed to fulfil its aim over the years to the satisfaction of all parties involved, the competition of systems finally caused a discussion about its modification.

As a first reaction to the GmbH being under such a great pressure the Ministry of Finance thought about a reduction of the minimum capital requirement to € 1,00 in the course of the *Gesetz zur Bekämpfung von Missbräuchen und zur Förderung der Transparenz im GmbH-Recht* (“MikroTraG”) including other changes, which was finally not even published as a draft.⁹⁸

After that, a draft of a law governing the minimum capital requirement, *Gesetz zur Neuordnung des Mindestkapitals der GmbH* (“MindestkapitalG”), was published in 2005, which suggested a reduction of the legally prescribed minimum capital to € 10.000,00 in order to strengthen the GmbH’s position in the competition of legal forms in the EU and facilitate new foundations.⁹⁹ In the end, it did not enter into force because no unanimous decision about the reducing of the minimum capital requirement could be taken. Moreover, scholars found that there was a need for other reforms as well, like for example the facilitating of the foundation process. All of these desired changes could be summarized with the keywords “modernisation”, “facilitation” and “combat of abuses”.¹⁰⁰

For this reason, in the next step the Ministry of Finance issued the first draft for the *Gesetz zur Modernisierung des GmbH-Rechts und Verhinderung von Missbräuchen*, the MoMiG, a law concerning the modernisation and combat of abuses, on the 29.05.2006. The first draft, which was called *Referentenentwurf*, was heavily rejected by the 66. German *Juristentag*.¹⁰¹ Firstly, the planned reduction of the minimum capital requirement to € 10.000,00 was criticised strongly. Secondly, the proposition of the introduction of a new legal form called *Unternehmergründergesellschaft* was opposed.¹⁰² Despite all the criticism, the *Referentenentwurf*, was used as a foundation for a changed second draft, called

⁹⁶ Heckschen (n 94) marginal number 2.

⁹⁷ Schürnbrand (n 82) 81.

⁹⁸ Fastrich (n 90) marginal number 39.

⁹⁹ Fastrich (n 90) marginal number 39.

¹⁰⁰ Fastrich (n 90) marginal number 39.

¹⁰¹ The German *Juristentag* is a society of jurists that is meeting twice annually and discussing current topics.

¹⁰² Heckschen (n 94) marginal number 3.

Regierungsentwurf, which was presented on the 23. 5. 2007 but still not fully accepted. After parts of it have been strongly modified, it was finally decided on positively on the 26. 6. 2008 by the German *Bundestag*. The MoMiG went into force on the 1. 11. 2008.¹⁰³

3.3.3 Discussion about the minimum capital requirement

The minimum capital requirement was the main issue in the discussion about a reform of the German GmbHG. In the following an overview will be given on the key points of this discourse.

In Überseeing one of the arguments of German scholars in favour of their system was that the seat theory should be applicable in order to ensure that a company, which was operating in Germany, obtained enough minimum capital in order to protect creditors and contractual partners.¹⁰⁴ This illustrates vividly that minimum capital requirements were a defining feature of the German corporation law¹⁰⁵ with creditor protection as the main justification for it.¹⁰⁶ The benefit of limited liability should just be allowed because there exists the obligation to possess at least this certain amount of money.¹⁰⁷ Therefore, the justification for the legal instrument of minimum capital was that it constituted the counterpart to the limitation of the shareholders' liability. This was also the legislator's initial will: limited liability had to be bought by giving this minimum security in return.¹⁰⁸

A legally prescribed minimum capital should safeguard that the business obtained enough equity and prevent a quick insolvency.¹⁰⁹ Its core aim, the protection of the company's creditors, should be granted at the establishment phase and shortly after that but also when the company was already operating as a kind of warning system.¹¹⁰ Proponents of the minimum capital requirement argued in its favour by stating that it had to be regarded as a basic equipment to start with. If a company would not possess any capital at all at the beginning of its economic activity, it could not operate properly and would not get any credit from third parties.¹¹¹ In addition to this, the existing minimum capital requirement of € 25.000,00 should,

¹⁰³ Heckschen (n 94) marginal number 3.

¹⁰⁴ Lang (n 83) marginal number 29.

¹⁰⁵ Schürnbrand (n 82) 81.

¹⁰⁶ Haas (n 73) 993.

¹⁰⁷ Schürnbrand (n 82) 81.

¹⁰⁸ Haas (n 73) 995.

¹⁰⁹ Roth (n 72) marginal number 11.

¹¹⁰ Haas (n 73) 993 ff.

¹¹¹ Joachim Hennrichs, 'Kapitalschutz bei GmbH, UG (haftungsbeschränkt) und SPE' [2009] NZG 921, 922.

although it could not prevent a company from generating losses in general, function as a buffer in case losses occurred.¹¹² Since shareholders did not have access to this legally prescribed minimum capital it was an appropriate means to hinder the company's insolvency.¹¹³

Opponents of this legal instrument, on the other hand, considered this argumentation to be invalid. They concluded that creditor protection neither in the start-up phase nor during the regular economic activity could be guaranteed by demanding the actual minimum capital. Since its height was the same for every GmbH, it was not determined according to real capital needs. This entailed the risk that it was far too low already at the beginning of the economic activity and thus could not ensure that the company survived the start-up phase. Therefore, due to this non-individual-calculation, the probability was very high that it was not capable of being used as a buffer for potential losses either.¹¹⁴

The ones in favour of it in turn described the minimum capital requirement as a *Seriösitätsschwelle*, which meant that it functioned as an indicator of how serious a business was to be carried out. Demanding minimum capital was considered as a means to avoid unserious or dubious establishments.¹¹⁵ Firstly, the sincerity of the founders and secondly, the seriousness of the purpose of the enterprise should be guaranteed.¹¹⁶ The willingness to raise at least the minimum capital could be regarded as a sign of commitment. Not everybody should be able to establish a GmbH, but just the ones that were serious about it.¹¹⁷

This argumentation was also not supported by everyone. Some concluded that the founders' seriousness could not be linked to an actual payment of just € 12.500,00 at least since just the half of the prescribed minimum capital had to be raised.¹¹⁸ Moreover, € 25.000,00 could not be regarded as a suitable indication for the economical solidity of the company.¹¹⁹ The critics used the same argumentation as for the unfeasibility to grant creditor protection: Since the minimum capital requirement was set for every company at the same height, it was not

¹¹² Hennrichs (n 111) 922.

¹¹³ Georg Bruckbauer, 'Die Reform des Rechts der Kapitalgesellschaften im kontinental-europäischen Raum' 2009 GeS 4, 5.

¹¹⁴ Haas (n 73) 995.

¹¹⁵ Wilhelmi (n 70) 13, 14.

¹¹⁶ Haas (n 73) 994, 995.

¹¹⁷ Seibert 'BB-Gesetzgebungsreport: Entwurf eines Mindestkapitalgesetzes (MindestkapG)- Substantielle Absenkung des Mindeststammkapitals' (n 76) 1061.

¹¹⁸ Haas (n 73) 995.

¹¹⁹ Haas (n 73) 994.

calculated according to the actual investment needs that had to be figured out on a case by case basis. As a consequence, not just creditor protection could not be granted but also no statement could be made about the seriousness of neither the founder nor the actual business activity.¹²⁰

As is shown in this discussion, a lot of arguments could be found for as well as against the maintaining of the actual minimum capital requirement. It seemed that once the discussion had started the question whether there exists the necessity of obtaining a legally prescribed minimum capital or not was one of the great controversies in German company law.¹²¹

How the actual reforms looked like in the MoMiG and what the German legislator decided to do with the issue of minimum capital requirements at last will be described now.

3.3.4 Changes concerning the minimum capital requirement

Finally, the German legislator decided to maintain the minimum capital at the amount of € 25.000,00 for the traditional GmbH but introduced a new legal form, called Unternehmergesellschaft (haftungsbeschränkt) alternatively UG (haftungsbeschränkt), the UG, which demands solely € 1,00 as minimum capital.¹²²

3.3.4.1 Minimum capital requirement for GmbHs

As already stated in the discussion about minimum capital requirements, the discourse about its necessity and utility was quite controversial. The most serious critics argued for a total abolishment of the instrument of minimum capital requirements¹²³ since the obligation to pay such a capital in general was considered as the competitive disadvantage in comparison to the Limited.¹²⁴ Others, who were principally content with the actual system but also wanted to

¹²⁰ Haas (n 73) 994.

¹²¹ Volker Triebel and Sabine Otte, '20 Vorschläge für eine GmbH-Reform: Welche Lektion kann der deutsche Gesetzgeber vom englischen lernen' (2006) 7 ZIP 7 311.

¹²² Hennrichs (n 111) 921.

¹²³ Seibert, 'GmbH-Reform: Der Referentenentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen' (n 91) 1158f.

¹²⁴ Dieter Leuering, 'Die Unternehmergesellschaft als Alternative zur Limited' [2007] NJW-Spezial 315.

enhance the attractiveness of the GmbH, voted for its reduction to € 10.000,00 like it was planned in the MindestkapG.¹²⁵

Still others, by contrast, considered the actual system not to reach far enough. These were the ones who voted for an increase by arguing that in order to safeguard the aim that setting a minimum capital requirement tried to achieve, it should be significantly enhanced. Only then a real obstacle that distinguished serious from unserious entrepreneurs could be created.¹²⁶ Related to this claim, setting the minimum capital requirement up to € 100.000,00 had been suggested.¹²⁷ Although there were some suggestions concerning the rise of the minimum capital, this was never really an issue in the drafts for the reform. In the light of the competition of systems such an increase was generally not considered to be advisable.¹²⁸

Even though the Limited was regarded as the great competitor, a lot of German jurists were against the abolishment or even the reduction of the existing minimum legal capital. This was illustrated by the strong vote of the 66. German Juristentag against the Referentenentwurf, where a decrease to € 10.000,00 had been suggested.¹²⁹

Maybe the strongest reason for not abandoning minimum legal capital or lowering it to € 10.000,00 was the argumentation that it was needed to show the seriousness of the founder or the purpose of the company, the Seriositätsschwelle.¹³⁰ It seemed that the fear that the “classic” GmbH would lose its image of being a reliable legal form for small and medium sized companies without this indicator of seriousness prevailed – at least superficially- over the demand for a reform.¹³¹

At the end of the day, the German legislator could not bring itself to abandon the minimum capital requirement, at least not for the traditional GmbH and decided to keep it at € 25.000,00.¹³²

¹²⁵ Seibert, ‘GmbH-Reform: Der Referentenentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen’ (n 91) 1158.

¹²⁶ Römermann (n 86) 675.

¹²⁷ Römermann (n 86) 675.

¹²⁸ Triebel and Otte (n 121) 312.

¹²⁹ Heckschen (n 94) 3.

¹³⁰ Hennrichs (n 111) 922.

¹³¹ Bruckbauer (n 113) 4.

¹³² Hennrichs (n 111) 922.

3.3.4.2 Unternehmergesellschaft (haftungsbeschränkt)

On the one hand, the MoMiG maintained the minimum capital requirement for the regular GmbH officially. However, on the other hand, it introduced the Unternehmergesellschaft (haftungsbeschränkt) or UG (haftungsbeschränkt) in 5a GmbHG, which is a legal form for limited liability companies requiring only € 1,00 as minimum capital.

Even though the UG has a different name it should not be considered as a completely new legal form existing next to the traditional GmbH or obtaining a less favourable rank¹³³ but should rather be regarded as a variation of the GmbH.¹³⁴ The UG is integrated in the GmbHG which means that all provisions governing the GmbH are applicable to it as well.¹³⁵

Exempted from this are only the regulations that allow the registration of the company without having paid the full but just the half of the share capital.¹³⁶ Since the shareholders can choose the height of the share capital on their own, the whole amount has to be paid at the establishment. This constitutes one difference to the GmbH where just the half of the minimum capital requirement has to be raised.¹³⁷ Additionally, when establishing an UG the share capital cannot be paid in investments in kind but only in cash.¹³⁸ Moreover, it is obligatory that the company name of a newly established UG contains the addition “haftungsbeschränkt”, which means “with limited liability”.¹³⁹ This should warn creditors and all the ones making business with an UG¹⁴⁰ about the fact that even though shareholders can decide that the minimum capital amounts to just € 1,00 they are still not personally liable.

The share capital of the UG can be constituted by any amount between € 1,00 at least and € 24.999,00 at most. If it reaches € 25.000,00, which is the height of the GmbH’s share capital, it converts into a GmbH.¹⁴¹ Whether a new company is established as a UG or a GmbH is consequently just dependent on the height of the share capital.¹⁴²

¹³³ Bruckbauer (n 113) 5.

¹³⁴ Holger Praetorius, ‘Die GmbH-Reform – eine Chance für Gründer?’ [2008] BC 293, 295.

¹³⁵ Bruckbauer (n 113) 5.

¹³⁶ Bruckbauer (n 113) 5.

¹³⁷ Bruckbauer (n 113) 5.

¹³⁸ Carsten Schäfer, ‘§ 5a Unternehmergesellschaft’ in Martin Henssler and Lutz Strohn (eds), *Gesellschaftsrecht* (1st edn, C.H. Beck 2011) marginal number 17.

¹³⁹ Praetorius (n 134) 295.

¹⁴⁰ Schäfer (n 138) marginal number 13.

¹⁴¹ Wachter, ‘§ 4 Unternehmergesellschaft’ in Münchner Anwaltshandbuch, Römermann (ed), *GmbH-Recht* vol.1 (2nd edn C.H.Beck, 2009) marginal number 78.

¹⁴² Schäfer (n 138) marginal number 6.

The legislator intended the UG to be used as a kind of transitory form for start-up companies until they could turn into “real” GmbHs. As a consequence UGs can only be established in the first place - no existing GmbH can be transformed into an UG.¹⁴³ Due to the fact that the UG should function as the starter version, which becomes a GmbH later on, it is obligatory to build a reserve each year, which has to amount to a quarter of the annual net profit. This provision has to be made until a minimum capital of € 25.000,00 is reached.¹⁴⁴

Called “GmbH-light”¹⁴⁵, “Mini-GmbH”¹⁴⁶ or “GmbH without a minimum capital requirement”¹⁴⁷, the UG should especially appeal to founders of new businesses¹⁴⁸ and thus keep them from choosing the legal form of a Limited. The UG should put the GmbH in a better position in the competition of systems. Entrepreneurs should be convinced by the simplicity, velocity and cost-effectiveness of its establishment process.¹⁴⁹

3.3.5 Assessment of the changes

At last, the German legislator decided to maintain the existing minimum capital for the regular GmbH and surprisingly did not abandon or lower it to € 10.000,00.¹⁵⁰ When taking a superficial look at the MoMiG this could be interpreted as sticking to this classical legal instrument. The introduction of the UG, however, discounts this first impression completely.

The legislator aimed at ending the dispute about the necessity of the preserving of the minimum capital. Moreover, it wanted to create an alternative to the Limited.¹⁵¹ The German government, on the other hand, did not want to encourage the establishing of GmbHs with a low share capital.¹⁵² At the end of the day, the legislator decided to preserve the existing minimum capital for the GmbH but establish the UG next to it, which should function as the German version of the Limited.¹⁵³

¹⁴³ Schäfer (n 138) marginal number 6.

¹⁴⁴ Bruckbauer (n 113). 5.

¹⁴⁵ Bruckbauer (n 113) 6.

¹⁴⁶ Praetorius (n 134) 294, 295.

¹⁴⁷ Schäfer (n 138) marginal number 4.

¹⁴⁸ Praetorius (n 134) 294, 295.

¹⁴⁹ Schäfer (n 138) marginal number 2.

¹⁵⁰ Praetorius (n 134) 293.

¹⁵¹ Wachter (n 141) marginal number 81.

¹⁵² Wachter (n 141) marginal number 81..

¹⁵³ Praetorius (n 134) 295.

The actual introduction of the UG could be regarded as a political compromise which was decided just very shortly before the acceptance of the draft.¹⁵⁴ The discussion whether this step should be taken or not was controversial till the end.¹⁵⁵ Since the discourse about the legal instrument of minimum capital requirements as already illustrated was quite controversial, it is not surprising that the introduction of a GmbH without demanding basically any such capital¹⁵⁶ turned out to be difficult as well. The disagreement regarding this topic already started with the first draft, the Referentenentwurf, where the potential establishment of the Unternehmensgründergesellschaft had been heavily criticised.¹⁵⁷

The proponents of the UG argue that since it is regulated by German company law, it is definitely a better option for entrepreneurs than the Limited.¹⁵⁸ Some scholars reason that the establishment of this legal form was a good compromise which is capable of enhancing the competitiveness of the GmbH by keeping up its prestige at the same time.¹⁵⁹

However, opponents claim that the factual abandonment of the minimum capital requirement by introducing the UG questions the traditional German system, where minimum capital was regarded as the centre of creditor protection.¹⁶⁰ Its critics furthermore describe the UG as a German experiment concerning a limited liability company without minimum capital. The abandonment of this legal instrument indicates that UGs are in constant potential danger of becoming insolvent.¹⁶¹ Furthermore, the opponents doubt that this abandonment will just be transitory like the legislator intended by demanding the building of a reserve until the minimum capital requirement of the GmbH is reached. They fear that this required minimum capital will never be raised.¹⁶² In the end, the level of creditor protection will therefore be a lot lower than when choosing the traditional GmbH. The fact that the GmbH is in a crisis cannot be used to justify the establishment of legal instrument, that leads to such a tremendous reduction of the level of protection.¹⁶³

¹⁵⁴ Fastrich (n 90) marginal number 41.

¹⁵⁵ Schäfer (n 138) marginal number 1.

¹⁵⁶ Schäfer (n 138) marginal number 4.

¹⁵⁷ Heckschen (n 94) 3.

¹⁵⁸ Praetorius (n 134) 295.

¹⁵⁹ Schäfer (n 138) marginal number 2.

¹⁶⁰ Fastrich (n 90) marginal number 52.

¹⁶¹ Hennrichs (n 111) 924.

¹⁶² Hennrichs (n 111) 924, 925.

¹⁶³ Bruckbauer (n 113) 5, 6.

No matter what critics say, entrepreneurs are fond of the UG. According to a report from 2012 already over 71.000,00 UGs have been established in Germany since 2008.¹⁶⁴ Especially founders in the service sector prefer the UG over the regular GmbH. Also, the experiences with this legal form seem to be very positive till now. Opponents were afraid that not a lot of the newly found UGs would last a lot longer than the establishment period.¹⁶⁵ It has to be stated here that there are statistics that indicate that an outstanding high amount of these new foundations just exist for a short time. However, there are also others that disprove this. Although the UG works out better than expected, still, a part of the German scholars keeps being sceptical towards the legal form of the UG.¹⁶⁶

Even if some experts are sceptical about the UG, I am of the opinion that not enough time has passed to really judge it properly. However, I do not consider the UG and the GmbH to be fully equivalent. Although all provisions of the GmbHG should be applicable to the UG, I do not really consider these two legal forms to be at the same level. For me this is clearly demonstrated by the argumentation that the UG should be used as a transitory company until a start-up business is ready to turn into a real GmbH¹⁶⁷ which shows that the UG should be used for young entrepreneurs that cannot afford to raise the minimum capital demand of € 25.000,00. Once being established with a serious and successful business, they should turn to the traditional and more serious legal form. Beyond that, the circumstance that creditors and business partners have to be warned with the addition “haftungsbeschränkt”¹⁶⁸ is not a sign that indicates equality with the traditional GmbH either.

I suppose that the decision for this solution was not an easy one for the German legislator. It is still very much in favour of the traditional system including the minimum capital of the regular GmbH.¹⁶⁹ However, although it has been a difficult compromise to make, in my mind, it still seems that the German legislator found a clever way out – at least for itself – and passed the responsibility on to others: By establishing this legal form, the legislator did not really take a final decision concerning the question of the maintaining or abandoning the

¹⁶⁴ Walter Bayer and Thomas Hoffmann, ‘Frühsterblichkeit von Unternehmungsgesellschaften’ [2012] NZG 887 ff.

¹⁶⁵ Walter Bayer and Thomas Hoffmann, ‘Erfahrungen mit der Unternehmungsgesellschaft in Deutschland - Exempel für Österreich?’ [2011] GES 104, 106 ff.

¹⁶⁶ Bayer and Hoffmann, ‘Frühsterblichkeit von Unternehmungsgesellschaften’ (n 164) 887 ff.

¹⁶⁷ Schäfer (n 138) marginal number 6.

¹⁶⁸ Schäfer (n 138) marginal number 13.

¹⁶⁹ Wachter (n 141) marginal number 81.

minimum capital requirement but left the decision about the importance of minimum capital to the founders of a new business.¹⁷⁰

3.3.6 Indirect Influence

Despite the German legislator could not bring itself to make a final choice as far as the minimum capital requirement was concerned, the modifications that had been carried out, in particular the introduction of the UG, were landmark decisions in the German law governing limited liability companies. The question at stake was how important the indirect influence of the CJEU's legislation had been for this reform.

In my opinion this influence was extremely strong. As a matter of fact, I would go so far to say that without the situation that had been created after the Court's judgements on the freedom of establishment, these reforms might not have been carried out or at least would have been accomplished a lot later.

It is of course possible and probable, that there had existed thoughts about reforms, especially regarding the minimum capital requirement, before Centros, Überseering and Inspire Art. This can be easily concluded from the controversy of the discussion. Still, the German as already mentioned GmbHG had not been reformed considerably until the CJEU's judicature on the freedom of establishment made the competition of systems possible. When considering the time it took to finally agree to reforms, one can easily assume that the Germans were basically content with their system before. However, in order to be able to compete with other legal forms of private limited companies in the EU modifications were considered necessary at that time.

It is of utmost importance in this context to bear in mind that the actual real first steps that led to the reform started after the CJEU's first judgements on the freedom of establishment.¹⁷¹ Hence, although the CJEU never decided that minimum capital requirements were against EU law, the reform was initiated by its judicature indirectly. Without these judgements the competition of systems would not have been possible. And it was this competition that led to a competitive disadvantage of the GmbH, its rivalry with the Limited and ultimately to the

¹⁷⁰ Wachter (n 141) marginal number 80.

¹⁷¹ Schürnbrand (n 82) 81.

reform. This background was also officially mentioned as an explanation for the need of reforms.¹⁷²

However, not just because of the official explanatory notes on the MoMiG this influence was obvious. As described, the competitiveness with foreign legal forms, and of course particularly with the Limited, was pointed out in the reasoning of experts that were in favour of the abandoning as well as the reducing of the legally prescribed minimum capital. Finally, it was also referred to in the literature concerning the introduction of the UG.

To conclude, the reforms carried out in Germany in relation to the minimum capital requirement for private limited companies illustrate vividly what indirect influence the CJEU's judicature can have on national legislations.

This influence is still very strong even post *Cartesio* and *VALE*, which can be demonstrated by the example of Austria. Five years after the German system has been modified due to the competition of systems Austria is in the process of changing its rules governing the legal instrument of minimum capital now in 2013 as well. Therefore, in the next part this forthcoming reform will be discussed.

¹⁷² Seibert, 'GmbH-Reform: Der Referentenentwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen' (n 91) 1158.

3.4 Austria

Austria still, as already mentioned, obtains the highest minimum capital requirement, namely € 35.000,00 for private limited companies in the European Union.¹⁷³

This situation is about to change. It is planned to reduce the legally prescribed minimum capital to € 10.000,00. A draft concerning a change in Austrian company law, which entails a modification of the GmbH and is therefore also named *GmbH-Reform*, the so called *Gesellschaftsrechts-Änderungsgesetz 2013* (“GesRÄG”) where the GmbHG next to other laws, like insolvency law and tax law will be modified, has been issued and shall enter into force on the 01.07.2013.¹⁷⁴

Five years after the German legislator decided to change its GmbHG, the Austrian legislator has finally brought itself to do as well - at least it looks like this at the moment.

Examining the proposed modification is quite interesting since Austrian company law and especially the GmbHG have always been shaped by German law.¹⁷⁵ At the end of the day, Austria plans to take a different step now in the forthcoming reform of the GmbH than Germany has done: it is intended to lower the legally prescribed minimum capital and not to introduce a “GmbH-light” without the requirement of any such capital.¹⁷⁶

The Court’s judicature on the freedom of establishment still plays a crucial role in Austria’s decision to change the system now. The indirect impact of the CJEU’s judicature and other European influences that have affected Austria’s choice will be examined in this section.

3.4.1 Competition of systems in Austria - SPE

While in Germany the discussions about changing the minimum capital requirement were carried out after the judgements in *Centros*, *Überseering* and *Inspire Art*¹⁷⁷, now, when the Austrian reform is going to be implemented, the CJEU had time to develop its “opinion” on the freedom of establishment further.

¹⁷³ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9.

¹⁷⁴ Heinz Krejci, ‘Das GmbH-Mindestkapital soll noch in dieser Legislaturperiode auf EUR 10.000 gesenkt werden’ [2013] GES 113.

¹⁷⁵ Straube, ‘Einführung’ in Straube (ed), *GmbHG online – Wiener Kommentar zum GmbH-Gesetz* (Manz 2009) <<http://www.rdb.at>> accessed 22.05.2013 marginal number 23.

¹⁷⁶ Krejci (n 174) 113.

¹⁷⁷ Schürnbrand (n 82) 81.

Even though some scholars argue that the Court has abandoned its former reasoning with *Cartesio* and *VALE*, the mobility of companies in the European Union is still given and consequently the competition of system continues to be a threat to some Member States.¹⁷⁸ Every company established lawfully in its home Member State can still move freely within the EU, unless the home state has imposed restrictions on the emigration of companies.¹⁷⁹

So, the CJEU's judicature on the freedom of establishment, with *Cartesio* and *VALE* being the last judgements in line, still allows entrepreneurs to establish a company in one Member State but to have the only seat in another one – with the home Member State's permission. In Austrian literature these companies are called *Scheinauslandsgesellschaften*.¹⁸⁰ This name indicates that entrepreneurs use the foreign legal forms because of their advantages like no minimum capital requirement but want to carry out their business exclusively in Austria. Of course this would not have been possible before the CJEU's judgements. Hence, Austria as a country following the real seat doctrine and obtaining the highest minimum capital in the Union still experiences the competition of systems as a consequence of the Court's judicature on the freedom of establishment to this day.¹⁸¹

It has to be mentioned in this context that in Austria even though Limiteds have been established the feared huge mass of Limited-foundations has not happened. However, when founders, who chose this legal form, have been asked why they have done so, the main reason is the absence of a minimum capital requirement.¹⁸²

In addition to this, it has to be kept in mind that the competition for Austria is not just composed by completely different foreign legal forms like the Limited, but also by the UG, whose regulatory scheme is not so different from the one governing the Austrian GmbH.¹⁸³ The Austrian authorities are therefore afraid that more entrepreneurs might decide not to use the GmbH but another legal form.¹⁸⁴

¹⁷⁸ Winkler, 'Vom Mythos eines Regulierungswettbewerbes im Europäischen Gesellschaftsrecht' (n 78) 423.

¹⁷⁹ Winkler, 'Vom Mythos eines Regulierungswettbewerbes im Europäischen Gesellschaftsrecht' (n 78) 423.

¹⁸⁰ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9.

¹⁸¹ Viktoria Robertson, 'Gesellschaftsrechts-Änderungsgesetz 2013- eine „kleine“ GmbH-Reform' [2013] *GesRZ* 68.

¹⁸² *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9, 10.

¹⁸³ Krejci (n 174) 113.

¹⁸⁴ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 10.

What has enhanced the discourse in Austria even more is not just the already existing competition of systems because of the CJEU's judicature but also the proposal of the European Commission to introduce the *Societas Privata Europaea* ("SPE").

The SPE should allow to establish a Union - wide corporation with limited liability that would require just € 1,00 as minimum capital which can function as an alternative next to the national GmbH.¹⁸⁵ The SPE is intended to be used for small and medium sized enterprises but could also be applied by bigger companies as well as concerns. It should convince entrepreneurs with its low minimum capital requirement and its easy establishment. This legal form should be governed by the same provisions in every Member State based on its own regulation.¹⁸⁶ On the basis of its supra-nationality, the SPE will be in direct competition with the national legal forms.¹⁸⁷

The Member States have not come to a decision as far as the introduction of the SPE is concerned till now. Also in this context the biggest problem is the determination of its minimum capital requirement. The initial proposal of € 1,00 is heavily rejected by some Member States. Now, the alternatives of € 8.000,00 or setting up framework conditions within those the states can decide themselves are discussed. Today, it is not sure when and if the SPE will really be established.¹⁸⁸ Nevertheless, some Member States, like Austria, consider the SPE to be a – future – alternative to the national GmbH.¹⁸⁹

In view of the fact that Austria considers the competition of systems to have a tremendous influence on the competitiveness of the GmbH and due to the possible introduction of the SPE in addition to this already existing competition, it is not surprising that discussions about the maintenance of the minimum capital requirement have been started.

3.4.2 Austrian view on the minimum capital requirement

In order to be able to examine the upcoming reform, a look has to be taken at the current opinions on the legally prescribed minimum capital in Austria.

¹⁸⁵ Bruckbauer (n 113) 4.

¹⁸⁶ Bruckbauer (n 113) 7.

¹⁸⁷ Peter Hommelhoff, 'Die europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH' [2008] GesZR 337.

¹⁸⁸ Claudia Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' [2011] GES 164, 165.

¹⁸⁹ Bruckbauer (n 113) 4.

The Austrian GmbH has been established in 1906 after the model of the German GmbH. Over the years there have been some modifications and additional laws¹⁹⁰ but the legal instrument of demanding minimum capital has not been changed.

The Austrian law governing the GmbH, the GmbHG, is based on the German one. When discussing the advantages or disadvantages of the minimum capital requirement this close relationship becomes obvious. Austrian and German scholars basically use the same argumentation for and against this legal instrument.

In Austria the voices for the maintenance of the minimum capital requirement are very strong. Principally, a similar argumentation for its preservation is used as in Germany. The view that it has to be considered as an indicator of seriousness is quite popular: the legally prescribed minimum capital is regarded as the least possible form of a founder's commitment. Just if entrepreneurs have to pay a noticeable amount of money the economy can be prevented from careless undertakings. Hence, the system as it is at the moment should not be changed.¹⁹¹ Otherwise the good reputation of the Austrian GmbH which had performed so well in over 100 years¹⁹² would be lost.¹⁹³ Certainly these loyal proponents of the minimum capital requirement are rejecting any changes of the system.

For some of the proponents of the existing system a solution like in Germany seems to be the best one. By introducing a "GmbH light", which is not demanding any minimum capital, the reputation of the regular GmbH is not endangered and the level of attractiveness of the Austrian system for new founders could be enhanced at the same time.¹⁹⁴ Moreover, those in favour of such an approach state that a competition with the Limited or any other foreign legal form, that requires just € 1,00 as minimum capital, cannot be won by just reducing the actual minimum capital requirement.¹⁹⁵

¹⁹⁰ Straube (n 175) marginal number 23 ff.

¹⁹¹ Bruckbauer (n 113) 12, 13.

¹⁹² Bruckbauer (n 113) 12.

¹⁹³ Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' (n 188) 169.

¹⁹⁴ Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' (n 188) 169.

¹⁹⁵ Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' (n 188) 168 .

While for some scholars the introduction of a “GmbH-light” seems to be the perfect solution, others consider this as the worst case scenario. Firstly, they argue that this is not a real solution to the problem. Secondly, they state that if such a legal form should be established anyhow, the whole system of creditor protection would have to be changed.¹⁹⁶

A lot of experts seem to prefer a reduction to € 10000,00. The supporters of this opinion want to stick to the legal instrument of minimum capital requirements and note that paying this amount at the beginning of the economic activity can be regarded as a suitable indicator of seriousness and guarantee a better position in the competition of systems at the same time.¹⁹⁷

The minimum capital requirement is a sensitive issue since it constitutes the core provision of creditor protection. The discussion in Austria is as far reaching and controversial as it has been in Germany some years ago. In all the opinions about this topic one thing was fascinating: the general tenor for a legally prescribed minimum capital is positive. The majority of scholars wants to keep this legal instrument. However, even the majority of the experts that argues in defence of the maintaining of the highest minimum capital requirement in Europe acknowledges that reforms have to be made. Most scholars agree that the competition of systems, enhanced by the probable introduction of the SPE, requires a proper response, also from Austria.¹⁹⁸ In the end, this response is about to be made but will look differently than the one Germany chose.

3.4.3 Planned Reform

Germany wanted to defeat the spreading of the Limiteds in its territory with the MoMiG in 2008, by which it introduced the UG next to keeping up its former minimum capital requirement for the regular GmbH.¹⁹⁹ In Austria firstly, reforms were considered because of the fear that Limiteds would spread as rapidly as in Germany, too. Secondly, later on, it should also be avoided that too many UGs would be established.²⁰⁰ Moreover, it was feared that also the SPE could become a threat to the Austrian GmbH.²⁰¹

¹⁹⁶ Bruckbauer (n 113) 14 ff.

¹⁹⁷ Bruckbauer (n 113) 14 ff.

¹⁹⁸ Winkler, ‘Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch’ (n 188) 169.

¹⁹⁹ Bruckbauer (n 113) 4.

²⁰⁰ Krejci (n 174) 113.

²⁰¹ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9.

Like in Germany the process of reforming the GmbHG, particularly the parts governing the minimum capital requirement, could not be carried out hasty. It took quite some time to make the reform plans as concrete as they are now.

In 2006, at a time when Germany was in the middle of the process of finding the right way to realise its reform, also discussions in Austria started. At the 16. Austrian Juristentag, the scholars agreed, that the inflow of Limiteds required a reaction, which should be constituted by the reduction but not the abolishment of the current minimum capital requirement.²⁰² In 2009, the first draft for the reform was presented. The core provision contained the reduction of the legally prescribed minimum capital to € 10.000,00. The implementation of the reform was planned to take place until mid 2010.²⁰³ However, it did not and three more years passed until the presentation of the next plan. Finally, the draft for the GesRÄG has been sent to assessment on 22.03.2013 and shall enter into force in the 01.07.2013.²⁰⁴

The main aim of the GesRÄG is to enhance the attractiveness of the Austrian GmbH in the existing competition with foreign legal forms and the possible competition with the SPE.²⁰⁵

In the explanation to the draft of the GesRÄG, it is stated that there exist too possibilities to make the GmbH more attractive to founders of new businesses and to enhance its competitiveness: the reduction of the minium capital or the introduction of a new legal subform of the GmbH without bascially any minimum capital requirement like the UG in Germany.²⁰⁶

The Austrian experts responsible for this draft agreed with the European commission that demanding a minimum capital can no longer be regarded as a suitable means of creditor protection.²⁰⁷ Still, they could not bring themselves to abandon this legal institute totally. Although it can be seen in the discussion described, that lot of experts were in favour of the introduction of a "GmbH-light", the argumentation that the minimum capital requirement is needed as an indicator of seriousness prevailed.²⁰⁸ The amount of € 10.000,00 was chosen,

²⁰² Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' (n 188), 165.

²⁰³ Winkler, 'Die Reform des österreichischen GmbH-Rechts im europäischen Trend: langsam, aber doch' (n 188) 167.

²⁰⁴ Robertson (n 181) 68.

²⁰⁵ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9.

²⁰⁶ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 10.

²⁰⁷ Robertson (n 181) 69.

²⁰⁸ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 10.

because a legal comparison has shown that this is a useful amount to indicate this seriousness. Moreover, it was also considered an amount that is affordable for founders.²⁰⁹

3.4.4 Assessment of the planned changes

In the end, the Austrian experts responsible for the draft of the GesRÄG considered the reduction of the minimum capital requirement to € 10.000,00 to be more suitable for maintaining the function as an indicator of seriousness than introducing another legal form.²¹⁰

As expected, the reactions to the draft of the GesRÄG have been controversial. The ones that are in favour of the introduction of a “GmbH-light” for sure do not consider the lowering of the minimum capital to go far enough. The other ones, that have been supporters of the reduction, are certainly pleased. The Austrian chamber of commerce for example appreciates the proposed modifications and considers them to be the right answer to the existing competition of system, especially with relation to Germany and England.²¹¹

3.4.5 Indirect Influence

Still, in 2013 the influence of the CJEU’s judgements on the freedom of establishment on national legislations is intense. Although some scholars argued that with VALE everything has changed, like it was described in Chapter 2, this view cannot be supported when taking a look at the example of Austria now.

Countries following the real seat doctrine continue to be put in a different situation than they have been before the Court’s judicature on the freedom of establishment. The competition of systems is still the “motivator” of changes in laws governing limited liability companies especially concerning the provisions on minimum capital requirement. Even in the explanations to the GesRÄG it is stated the main argument for the need to modify the Austrian system is the CJEU’s judicature on the freedom of establishment.²¹²

²⁰⁹ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 10.

²¹⁰ *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 10.

²¹¹ Robertson (n 181) 70.

²¹² *Vorblatt und Erläuterungen zum Ministerialentwurf der GmbH-Reform* (n 75) 9.

The SPE of course contributed to this competition. It even seemed for a moment that the planned introduction of the SPE would stop the reform effort.²¹³ In the end the SPE did not stop the reform but influenced it. Some Austrian scholars for example considered the introduction of a "GmbH-light" as a waste of time and energy since it would be at the same level as the SPE.²¹⁴

It is obvious that the SPE had some impact on the discussion about minimum capital requirements in Austria because it is regarded as a future potential competitor. However, according to me, this planned new legal form is not the main issue in and definitely not the impulse for the discourse. For me, it added just another factor that has to be evaluated in the discussion.

To sum up, the discourse about the minimum capital requirement for private limited companies started because of the CJEU's judicature on the freedom of establishment and as the example of Austria demonstrates also keeps going on because of it.

²¹³ Bruckbauer (n 113) 4.

²¹⁴ Bayer and Hoffmann 'Erfahrungen mit der Unternehmergeellschaft in Deutschland- Exempel für Österreich?' (n 165) 109.

4 Conclusion

The influence of the CJEU is wide and far-reaching. How immense the effects of its judgements really are, is often not so clearly recognisable. Nevertheless, not just its direct statements on or rather decisions about national laws but also the indirect impact of its judicature possess the power to change national legislations.

In order to demonstrate this indirect influence the Court's judgements on the freedom of establishment were examined more closely, particularly concerning their impact on countries following the real seat doctrine. The example of minimum capital requirements for private limited companies in Germany and Austria has been used to demonstrate the indirect impact of the Court's judicature.

As is clear from the discussions described, minimum capital requirements are considered core provisions for creditor protection in some countries, like Austria and Germany. The CJEU's judicature on the freedom of establishment exposed these countries and their legal forms to a competition of systems which led to discussions about the maintaining of this legal instrument.

I do not know whether it is possible to find the right answer in the debate about the necessity of minimum capital requirements. At least, it appears to me that there is no solution that is able to please all experts.

However, according to me, what is particularly interesting about this legal discourse is not its outcome. I regard the question why such a discussion about a core provision could start at all to be more interesting. Germany and Austria basically had, respectively have to deal with the same problem: very high minimum capital requirements for their limited liability companies in comparison to the other EU Member States.

As described before, this has not been an issue for a very long time. Both countries had their GmbHs for over 100 years without changing the legal instrument of minimum capital requirements per se. However, obtaining a high minimum capital requirement turned into a problem after the CJEU's rulings on the freedom of establishment. Germany and Austria who are both following the real seat doctrine suddenly felt exposed to a competition of systems which did not exist before. Their national GmbHs had to compete with foreign legal forms

that did not demand any minimum capital and therefore seemed more attractive to some entrepreneurs. This situation was the initiator for the discourse about minimum capital requirements.

In Centros, Überseering and Inspire Art it seemed that the CJEU would abandon the seat theory completely. The competition of systems started after these judgements and Germany began to evaluate the need for a minimum capital requirement as a reaction to this new situation. Finally, the discussion led to a modification of the GmbHG by the establishment of the UG.

Five years later, also Austria is about to change its law governing the private limited companies although the CJEU's judicature has developed further and some scholars consider Cartesio and VALE as turning points as far as the maintaining of the real seat theory is concerned. However, even if the CJEU seems to rule more in favour of this doctrine the impact on real seat countries is still the same. The Court's later judgements on the freedom of establishment did not lead to the abandonment of the competition of systems. It is still this competition - which is actually a little bit more enhanced than at the time of the German reforms - that made Austria decide to reduce its minimum capital requirement.

So, even if both countries found, or rather are going to find a different solution to the problem, it was caused by the same fact. Hence, no matter if pre-Cartesio or post-VALE, the indirect influence of the CJEU's judgements on minimum capital requirements in real seat Member States seems to be the same.

The power of the Court's direct influence on national legislations is obvious and nobody would doubt it. However, not just the direct but also the indirect impact of the CJEU's judgements should not be underestimated by anyone. The example of the modifications concerning minimum requirements in Germany and Austria illustrates vividly how immense even this kind of influence of the CJEU's judicature can be and especially remains to be over time.

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