P+P Pöllath + Partners
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P+P

Chancen in der Krise

2009

CHANCEN IN DER KRISE

Der vorliegende Tagungsband fasst die Vorträge und Diskussionen des **9. P+P-Private-Equity-Wochenendes im Kloster Seeon** für interessierte Mandanten, Kollegen und Freunde zusammen. Das P+P-Private-Equity-Wochenende fand dieses Jahr am 31. Januar und 1. Februar 2009 statt und stand ganz unter dem Thema „*Chancen in der Krise*“. In Ergänzung zur laufenden internen Ausbildung dient dieses jährlich stattfindende Private-Equity-Wochenende dem fachlichen Austausch sowohl im Kreise der P+P-Anwälte als auch mit P+P freundschaftlich verbundenen Hochschullehrern, Doktoranden, Referendaren und anderen Gästen. Den Beiträgen der Mitarbeiter von P+P vorangestellt ist die Abschrift einer Begrüßungsrede von Prof. Dr. Reinhard Pöllath anlässlich des Abendempfangs in unserem Berliner Büro vom 3. Februar 2009 im Rahmen der SuperReturn International 2009 Conference. Für Fragen, Anmerkungen und Diskussionen stehen alle Autoren gerne zur Verfügung.

P+P Pöllath + Partners gilt als „die“ auf Private Equity spezialisierte Rechts- und Steuerberatungs-Praxis in Deutschland. P+P war von Anfang an dabei: sowohl bereits in den 80er Jahren mit der Gründung der ersten deutschen und auf Deutschland gerichteten Private Equity-Fonds (PE-Fonds) für Buy-Outs und Venture Capital als auch mit der Betreuung der ersten großen deutschen Private Equity-Anleger, aber auch heute noch täglich mit Beratung, Gestaltung und Durchführung von Transaktionen für Käufer und Verkäufer. P+P betreibt darüber hinaus zum einen aktiv **Ausbildung** für Private Equity (z.B. mit **MUPET/**Munich Private Equity Training, welche im Juni 2009 zum 9. Mal stattfindet oder mit den **Postgraduierten-Studiengängen** (LL.M./MBA) M&A/Mergers & Acquisitions, Steuerwissenschaften, Real Estate und Private Wealth Management an der Westfälischen Wilhelms-Universität Münster). Zum anderen fördert P+P die **Aufklärung** über Private-Equity (z.B. mit der gemeinnützigen Stiftung DVCI/Dt. VC-Institut oder mit Gutachten und Symposien zur Versachlichung der Diskussion zum Private-Equity; beispielsweise für Bundes- und Länderfinanzminister).

Zu Private Equity berät P+P rechtlich und steuerlich („integriert“) auf allen Ebenen:

- bei der Strukturierung von **PE-Fonds** durch Initiatoren,
- bei der **Prüfung und Auswahl** von PE-Fonds durch institutionelle und private **Anleger**,
- bei kleinen und großen **Transaktionen** (Kauf, Verkauf, Umstrukturierung) für und gegen PE-Fonds und andere Marktteilnehmer,
- bei Spezial- und Größt-Transaktionen und -Strukturierungen, z. B. Wohnungs- und andere Immobilien-Bestände und

- bei **Management**-Beteiligungsprogrammen für Management und für Verkäufer, Käufer oder Fonds.

Charakteristisch für P+P ist die Verbindung von **Recht und Steuern** und von **Unternehmenskauf (M&A) und Private Equity (Fonds und Manager)**.

Im jüngsten Ranking z. B. von Who's Who Legal 2008 hat P+P mit insgesamt zehn die meisten Nominierungen von herausragenden Anwälten aller Kanzleien in diesen drei Bereichen in Deutschland und wird als eine von nur zwei Firmen in allen diesen Bereichen als führend eingestuft. Zudem ist P+P in diesem Top-Segment die kleinste Firma mit einem besonders hohen Anteil persönlicher Beratung.

Hinweise zu aktuellen Entwicklungen im Bereich Private Equity finden Sie auch auf unserer Homepage www.pplaw.com unter der Rubrik „News“.

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Die Herausgeber

Recent Developments of Corporate Restructuring in Germany

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Among the fundamental freedoms guaranteed by the EC Treaty is the freedom of establishment, set out in articles 43 and 48 EC. The principle of freedom of establishment enables an economic operator (whether a person or a company) to carry on economic activities in a stable and continuous way in one or more Member States. One of the practically most relevant, but until recently not fully answered questions is whether this freedom includes a company's right to transfer its actual centre of administration (place of effective management) to another Member State (the freedom to "emigrate"). On 16 December 2008, the European Court of Justice delivered a largely unexpected judgment, declining this freedom in the *Cartesio* case (C-210/06). However, this decision will not affect the mobility of German corporations.

1. Decisions of the European Court of Justice

The transfer of a company's actual centre of administration to another Member State has been subject to numerous decisions of the European Court of Justice. The Court's judgments in *Centros* (Case C-212/97, 1999 E.C.R. I-1459), *Überseering* (Case C-208/00, 2002 E.C.R. I-9919) and *Inspire Art* (Case C-167/01, 2003 E.C.R. I-10155*)* have caused considerable excitement and are rightly regarded as milestones in the development of freedom of establishment.

In these decisions, the Court has made clear that Member States must allow companies that have been incorporated in another Member State to freely enter their territory, and to continue to exist according to the rules under which they have been formed in their state of origin. As a consequence of these decisions, legal restrictions concerning the moving in of foreign European Union companies are regarded as invalid. This means that, for example, a German entrepreneur can found a private limited company in England for the purpose of carrying out business in Germany or in any other Member State.

However, this does not entitle any company founded under the laws of any Member State to move its actual centre of administration anywhere within the European Union. In the example above, an English company was chosen for good reason. English private international law follows the so-called incorporation theory, according to which a company is governed by the law of the state in which it was incorporated. English law therefore allows the company to retain its legal personality when transferring its center of administration to another country.

1.1. Daily Mail case

The first case decided by the European Court of Justice concerning restrictions on the free movement of a company's actual centre of administration was the *Daily Mail* case in 1988 (C-81/87, 1988, E.C.R. 5483). In this decision the Court held that Articles 43 EC and 48 EC confer no right on a company incorporated under the legislation of a Member State and which has its

registered office there to transfer its actual centre of administration to another Member State while retaining its status as a company under the legislation of its state of origin. This meant that the European Court of Justice approved the sovereignty of the Member States to deny domestic companies the freedom to move to another jurisdiction.

1.2. Cartesio case

Recently the European Court of Justice had the opportunity to overrule restrictions on outbound transfers in the *Cartesio* case (C-210/06). However, contrary to expectations, the Court declared such restrictions to be compatible with European Community law.

Cartesio is a Hungarian limited partnership incorporated under the laws of Hungary and registered with the commercial register in Baja (Hungary). The company intended to transfer its actual centre of administration from Hungary to Italy while remaining registered with the commercial register in Hungary and thus remaining subject to Hungarian company law. *Cartesio* therefore submitted an application to the commercial court to amend its registration in the local commercial register so as to record an address in Italy as its new actual centre of administration. The commercial court, however, refused to enter the new address in the local register on the grounds that the transfer was not possible under Hungarian law. The commercial court held that Hungarian law did not offer companies the possibility of transferring their actual centre of administration to another Member State while retaining their legal status as a company governed by Hungarian law. Therefore, in order to change its actual centre of administration, *Cartesio* would first have to be dissolved in Hungary and then be reconstituted under Italian law. *Cartesio* brought an appeal against this decision before the Court of Appeals in Szeged, which referred preliminary questions in relation to this case to the European Court of Justice.

On 22 May 2008, Advocate General *Poiares Maduro* issued his opinion that national rules allowing a company to transfer its actual centre of administration only within the national territory clearly treat cross-border situations less favorably than purely national situations, and therefore constitute a discrimination against the exercise of freedom of movement. *Maduro* emphasized that the case law on the freedom of establishment of companies has developed since the ruling in *Daily Mail* and that the Court's approach has become more refined. In the present state of EC Law, restrictions "on entering" or "on leaving" national territory were prohibited. The Member States' freedom to determine the "life and death" of companies incorporated under their domestic law was limited by the right to freedom of establishment. Otherwise, Member States would have "carte blanche" to impose a "death sentence" on a company just because it had decided to exercise freedom of establishment. According to the Advocate General's opinion, any domestic rules restricting the transfer of a company's actual centre of administration from one EU Member State to another are incompatible with EC law. Restrictions on the 'emigration' of a company were

permissible only if they were justified on grounds of general public interest, such as the prevention of abuse or fraudulent conduct, or the protection of the interests of, for instance, creditors, minority shareholders, employees or the tax authorities. Therefore, *Maduro* suggested that the European Court of Justice should state in its decision that Articles 43 EC and 48 EC preclude national rules which make it impossible for a company constituted under national law to transfer its actual centre of administration to another Member State.

On 16 December 2008, the Court decided differently and affirmed the judgment made in the *Daily Mail* case. The Court held that companies were creatures of national law and existed only by virtue of the national legislation which determined their incorporation and functioning. Referring to the Daily Mail judgment, the Court stated that Community law had taken account of the variety in national legislation regarding both the factor providing a connection to the national territory required for the incorporation of a company and the question of whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. In defining the companies that enjoy the freedom of establishment in Article 48 EC, the connecting factors used in national legislations – like the registered office, central administration and principal place of business of a company – were placed on the same footing. Without a uniform Community law definition of the companies that enjoy the freedom of establishment on the basis of a single connecting factor, the question of whether this freedom applies to a company is a preliminary matter that, as Community law now stands, can only be resolved by the applicable national law.

The Court therefore acknowledges a Member State's power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the freedom of establishment, and that is required if the company is to be able to subsequently maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganize itself in another Member State by moving its seat to the territory of the latter, thereby severring the connecting factor required under the national law of the Member State of incorporation. Nevertheless, according to the Court, this power does not include the right to prevent a company from converting itself into a company governed by the law of the other Member State, if permitted by such law.

2. Recent Developments in Germany

On 1 November 2008 important amendments to the German Limited Liability Company Act (GmbHG) entered into force. One of the purposes of the MoMiG (German Act to Modernize the Law Governing Private Limited Companies and to Combat Abuses) was to strengthen the international competitiveness of the German private limited liability company (GmbH). Therefore § 4a

subsection 2 German Limited Liability Company Act was deleted. The new § 4a GmbHG allows a German limited liability company to relocate its actual centre of ad-ministration to a different jurisdiction from that of its registered office, which must be – in any case – located in Germany. This amendment enables German limited liability companies to move their actual centre of administration to any other country without any corporate restrictions; this is not restricted to the European Union. The possibility to operate abroad in the familiar legal form of a limited liability company might be an especially attractive option for German groups and their foreign subsidiaries. Furthermore, in January 2008, the Federal Ministry of Justice presented a draft of a private international law for corporations, which codifies the incorporation theory for all German corporations and partnerships. The implementation of this draft would mean a basic change in the system of German private international law.

Without a doubt, these recent developments are a huge step forward, particularly with regard to the rather surprising decision in the *Cartesio* case. A transfer of the actual centre of administration might be a simple and effective way of engaging in economic activities in another Member State without having to bear the costs and the administrative burdens inherent in first having to wind up the company in its state of origin and then having to resurrect it completely in the state of destination, in particular for smaller-sized companies.

3. Tax Issues

Whether German corporations make use of this new corporate mobility opportunity may inter alia depend on the tax consequences of doing so. Therefore a significant question will be whether the transfer will result in a realization of hidden reserves pursuant to section 12 of the German Corporate Income Tax Act. However, regarding the Courts judgment in *Hughes de Lasteyrie du Saillant* (C-9/02) there is no proper justification for exit taxes on the transfer of a company's effective place of management. At any rate, exit taxes may be regarded as disproportionate. To ensure taxation of hidden reserves accrued in a Member State, a deferral of taxation until their actual disclosure would be a less severe but equally effective means. Such a system might cause a high administrative burden. However, according to the judgement of the European Court of Justice, considerations of an administrative nature cannot justify the derogation by a Member State from the rules of Community law. That principle applies with even greater force where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law. Furthermore, under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, authorities can always contact the authorities of another Member State to obtain any information which proves necessary for determining the tax to be paid by a taxpayer.

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