Presentation by Eddy Wymeersch, Professor of Law, University of Ghent; Chairman, Belgian Banking, Finance and Insurance Commission; ECGI Fellow

I understand I have to kick off this presentation by introducing the subject of regulatory competition in European company law.

The issue of company law - regulatory competition has been on the agenda for a very long time, in fact since the early years of the European Community. In 1968, it should be reminded, a treaty was proposed between the original six member states.
It was never approved because one of the member states refused to ratify. The Netherlands refused because they changed their domestic legal system from a "real seat" system into an "incorporation" system. The grounds for this change are not very clear: some say it has to do with the country's important multinationals (Shell, Unilever) that wanted to enjoy the same benefits as their US and UK competitors. As a consequence, the treaty, which provided for mutual recognition of companies, fell through. In fact the question of recognition of companies originating from other EU member states has obviously never been a major problem except quite recently with the cases that will be referred to briefly hereafter.

Two cross border issues were more difficult to solve: transferring a company from one jurisdiction to another was considered invalid in several states, although not in all. Cross border mergers – raising the same fundamental questions – remained blocked, although the Commission had tabled a proposal for a so-called 10th company law directive already in 1985 (see note 1 below). In both cases there are important political interests at stake: if companies could emigrate they could free themselves from the strictures imposed by national law. This was especially important for German law, where co-determination and rules on groups of companies could have been evaded by moving the company to some of its neighbouring, more liberal states, Luxembourg for example. Although many states considered the transfer invalid, some allowed the seat to be transferred – both actively and passively - but this obviously remained a matter of limited importance, at least in terms of regulatory competition. Also, while the transfer would be allowed in principle in case law, this did not take account of the numerous technical details that have to be dealt with upon such a transfer: what about registration? Who should decide, when does one jurisdiction stop to be competent, etc… Unless these matters were addressed, the subject remained full of uncertainties.

Among the lawyers, the subject remained very controversial and was mainly translated in terms of the opposition between the incorporation doctrine and the real seat doctrine, the former being followed mainly in the northern states, the latter in the southern ones. Symposia where organised where the conflict between the two systems were exposed in rather antagonistic terms.

Alongside came the question of harmonisation. The need for harmonisation has been based on several grounds: at least in some cases, harmonisation has been advocated to avoid regulatory underbidding. There is some evidence that in the 1960s the five member states were rather jealous about the more flexible corporate law system of one of the member states and imposed harmonisation to avoid that member state to become too assertive in terms of competition. This could be identified as negative charter competition. The situation remained stable until the late 90s as a consequence of the ECJ cases I will report on later. It's interesting to notice that nor the politicians, nor the Commission, in fact nobody has been able to agree on a workable system. In the late 90s, there was a work document from the Commission spelling out the technical prerequisites for moving the seat, but obviously it did not find sufficient support in the Member States, and did not deal with the above mentioned controversy.

Then came the four court cases. In fact there are more but the four most significant cases are the following:

"Daily Mail" is the first one and concerns the emigration attempt of a UK company to the Netherlands to take advantage of the more favourable tax treatment in that country. The court rendered a very complicated decision – I will refer to the attached summary for details – but at that time obviously people were very confused about the outcome which seemed to plead for the status quo with respect to the two mentioned doctrines – although you feel that the court was very sympathetic with the UK Treasury's position saying that the company had to pay its taxes before it leaves the jurisdiction.
The next more important case was Centros. Centros is a case in which a UK company – once more – opened an office in Denmark, its main and only office, and wanted to be registered with the Danish authorities. They refused the registration, unless the company complied with local Danish requirements, especially to show a legal capital complying with the Danish minimum capital rules, which are much higher than the UK ones. One should know that, according to the UK law, you can incorporate a private company limited with £1 capital, while in Denmark, as in many other EU states, one has to put up considerable amounts of capital, while other organisational requirements (e.g, to have a board of directors) are applicable. The case was brought before the European Court of Justice: it held the Danish position contrary to EU law. Companies created in one EU state are free to establish themselves in any other state without any additional obligation being imposed. This was analysed by many as the endorsement of the incorporation doctrine in EU law. The argument of the Danish government - based on the "general good doctrine" - that the capital requirement was necessary to protect creditors as had been recognised in the Second European Company Law directive on capital was rejected: if a UK company had established a branch in Denmark, freedom of establishment would have prevented the Danish law to impose any local capital requirement. Hence the creditors in this case should not enjoy a better protection in Denmark. This reasoning has been read by some as a serious criticism of the doctrine of legal capital, keeping in mind that the UK imposes no minimum requirement for private companies limited.
The next decision is known as Überseering. This was a referral by the German Supreme Court. German company law adheres to a rather strict reading of the real seat doctrine: foreign companies establishing themselves in Germany should either reincorporate according to German law, or will be denied existence, including ability to act as a legal person. They would be considered as unincorporated entities resulting in indefinite liability of their members. There was some shift in recent case law stating that this company might be qualified as an Offene Handelsgesellschaft, a company type with restricted legal personality.

The case concerned a Dutch company that had moved its seat to Germany: it was denied access to German justice by the German judiciary. The ECJ, using a quite harsh formulation, considered the German legal reasoning incompatible with the Treaty's fundamental freedom of establishment. A company legally incorporated in one jurisdiction is free to move its headquarters to any other jurisdiction in the Union and the other states should recognise it

according to the law in accordance with which it has been created. There was some discussion whether that company should be considered according to Dutch law or whether the company should adapt its organisation to German law, as its seat was henceforth located in Germany. Although there is some controversy about it, this point was decided by the court in its second holding: created in one state, the company can move to another state and should be recognised according to the law where it has been created.
The most recent of the four cases is Inspire Art. Inspire Art is dealing with so-called letterbox companies or "formally foreign companies" under Dutch law. The Netherlands follow the incorporation doctrine, and admit companies created in other EU states without restrictions. However, in order to combat letterbox companies entering from abroad, but in fact managed in the Netherlands, legislation was passed imposing additional disclosures on these companies, while holding their directors liable in case of wrongful trading according along the same rules as applicable to domestic companies. Also these companies should be identified e.g. in their letterheads by adding that they are "formally foreign companies". The Court held once more that these provisions of Dutch law were not compatible with the Treaty's provision on free establishment, provided these companies had been formed in the Union.
In all three most recent cases, - Centros, Überseering and Inspire Art – the holding of the European Court is clear: companies enjoy free movement in Europe. The prerequisite is that these companies have been formed in their state of origin, somewhere in the European Union. The latter point is important as it refers to the Union as a whole, not to any particular state. This corresponds to article 48 of the Treaty according to which "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States". Some have identified this holding as if the court had adhered to the traditional incorporation doctrine. This is not the right reading of these cases: they only deal with matters of cross border establishment, not with conflict of law techniques. The Court states that companies that have been created according to the law of one of the states of the union, whether this is an incorporation state or a real seat state, can freely move to any other state within the Union. The court essentially applied article 48 of the Treaty.

The last mentioned three cases all dealt with immigration. Whether immigration and emigration should be dealt with separately is controversial.

In case of immigration, the case law holds that the host state cannot restrict entry by EU companies by imposing additional requirements. Companies coming from another EU state should be free to enter any other EU jurisdiction, without being exposed to local requirements, except on the basis of the "general good exception". The question arises what will be the effect of a transfer of the company into a "real seat" state: should it be obliged to adapt itself to the legal environment of the host state? Adopt a local charter as would be flowing from the "real seat" doctrine? Should it comply with other local requirements? Will it enjoy all privileges recognized in the host state? The second holding in Überseering clarifies that this company continues to exist according to its original legal regime. The host state may not impose any additional requirements, except based on the "general good". Hence it would continue to function under its original charter, enjoy the privileges recognized under its home regime, and so on. EU Treaty law supersedes national rules on conflicts of laws. Although these points can be deducted from the case law mentioned, they will remain controversial until further decisions are rendered.

The case of emigration has not been settled clearly. Emigration was first dealt with in the Daily Mail case: it was held to be a matter of essentially domestic concern. Therefore the home state can forbid the company to leave its jurisdiction except after having paid all taxes that might arise according to the home state's tax law. Indeed, the home state, granting the privileges of incorporation, can decide how far this privilege reaches and under what conditions it will be granted or withdrawn. Some held that being essentially a domestic matter, the Treaty rules on freedom of establishment would not apply. This looks very controversial: the Treaty's freedom would be largely theoretical if home states could impose hurdles, that would be so burdensome as to practically exclude any possibility to emigrate. Excessive restrictions might flow from tax provisions e.g. relating to taxes that would only be due in case of emigration.

The matter has received renewed attention following a recent tax case decided in March 2004 by the ECJ (see note 2 below): it involved a French citizen, seeking to establish his domicile abroad. According to French tax law, he had to paid taxes even on unrealised profits. This was considered contrary to the Treaty and to free establishment. Although both cases are different on several points (e.g. physical person v. legal entity), one may consider that in both cases the court based its reasoning essentially on a freedom of establishment perspective, and in that sense one can defend that Daily Mail does not stand anymore.

If the ECJ has by now stated the general principles relating to company mobility, the technicalities remain to be worked out. Under what conditions can companies move to another jurisdiction? How will the transfer be organised technically in terms of registration and disclosure? What will be the rules applicable under the new jurisdiction? These questions will have to dealt with in a future European directive, the proposal for which was recently adopted by the Commission. The same applies to the cross border merger, for which the mechanics also have to be detailed in a future directive.

It is clear that once cross border mobility has been achieved, there will be a certain number of companies that will avail themselves of it: at present one sees UK limited liability companies being offered on the market especially designed for cross border activities. The relative advantages in terms of minimal capital and formation expenses are mentioned in the advertisements. These relate to small companies: the larger ones will have to weigh the numerous pros and cons that would be triggered by a cross border transfer. Inevitably the pressure on national legislators will increase. The spectrum of the "race to the bottom" will certainly be raised. Some more exceptional features of company law of certain jurisdictions will come under threat: co-determination may have to separated from company law, and considered part of "enterprise law". Legal capital is also likely to be a "victim" of this development.

Notes:

1. Proposal of 14 January 1985 for a Tenth Council Directive based on Article 53 (3) (g) of the Treaty concerning cross-border mergers of public limited companies, COM(84) 727, OJ C 23, 25.1.1985, 11-15.

2. ECJ, 11 March 2004, Hughues Lasteyrie du Saillant, C-9/02.