T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ
AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

CORPORATE MOBILITY

IN THE EUROPEAN INTERNAL MARKET

DOKTORA TEZİ

İLHAN DİNÇ

İstanbul – 2014

T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA BİRLİĞİ ENSTİTÜSÜ
AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

CORPORATE MOBILITY

IN THE EUROPEAN INTERNAL MARKET

DOKTORA TEZİ

İLHAN DİNÇ

Danışman: PROF. DR. MERİH KEMAL OMAĞ

İstanbul – 2014

T.C.
MARMARA ÜNİVERSİTESİ
Avrupa Birliği Enstitüsü

ONAY SAYFASI

Enstitümüz AB Hukuku Dalı Doktora öğrencisi İlhan DİNÇ'in," ***CORPORATE MOBILITY IN THE EUROPEAN INTERNAL MARKET***" konulu tez çalışması ile ilgili ...28 Mart 2014... tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğ~~u ile başarılı bulunmuştur.

Onaylayan:

Prof. Dr. Merih Kemal OMAĞ	Danışman	....
Doç.Dr. Mustafa T. KARAYİĞİT	Jüri Üyesi	....
Y. Doç. Dr. Murat Yusuf AKIN	Jüri Üyesi	....
Yrd. Doç. Dr. Fatih AYDOĞAN	Jüri Üyesi	....
Yrd. Doç. Dr. Gerçek ŞAHİN YÜCEL	Jüri Üyesi	....

Onay
Prof. Dr. Muzaffer DARTAN
Müdür

22/04/2014...tarih ve 2014/V... Sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

ÖZET

Sınıraşırı hareketlilik, Avrupa Birliği'nin temel anlaşmalarında düzenleme altına alınan hizmetlerin, malların ve sermayenin serbest dolaşımı ile yerleşim serbestisi şeklindeki dört temel serbesti ile güvence altına alınmıştır. Şirketlerin serbest dolaşımı da bu anlaşmalarda açıkça tanınan bir hak olup, Avrupa Birliği'nin temel serbestilere gereken önemi vermemesi düşünülemez. Şirketler hukuku bakımından yerleşim serbestisi özellikle önemlidir. Ancak, gerçek kişilerin aksine, şirketler bakımından yerleşim serbestisi henüz tam anlamıyla sağlanamamış olup; bu hususta çeşitli düzenlemelere ihtiyaç bulunmaktadır. Hâlihazırda şirketlerin merkezlerini nakline imkân veren düzenlemelerin bulunduğu hususu tartışmasız olmakla birlikte; buna ilişkin mevcut yöntemlerin önemli dezavantajları bulunmakta olup, şirket merkezlerinin naklinin hususî bir direktifte düzenlenmesi halinde bu tür sakıncalar olmayacaktır. Bu nedenle, şirketlerin merkezlerinin nakli konusundaki müstakil bir düzenleme, şirketleri Avrupa Şirketi Tüzüğü ve Sınıraşırı Birleşmeler Direktifi ile getirilen masraflı, birkaç aşamalı ve dolambaçlı sistemden kurtaracaktır. Öte yandan ABAD tarafından yaratılan içtihat hukuku, şirketlerin ulusal sınırların dışında faaliyette bulunma haklarının gelişimi bakımından büyük katkılar sağlamıştır. Ancak Mahkeme bir kanun koyucu olmadığından, Mahkemenin görevi hukuku vaz' etmek değil, onu yorumlamak ve uygulamaktır. Bu nedenle merkezlerini nakletmek isteyen şirketler bakımından, tür değiştirerek Avrupa Şirketi'ne dönüşmek ya da sınıraşırı birleşme işlemine girişmek gibi daha masraflı ve dolambaçlı yollar yerine, maliyet etkin ve daha basit bir yöntem öngören müstakil bir düzenlemeye ihtiyaç bulunmaktadır. Sonuç olarak vurgulamak gerekirse, Avrupa Birliği'nde şirketlerin sınıraşırı hareketliliğinin tam olarak sağlanmasına ihtiyaç bulunmakta olup, bunun için de 14. Şirketler Hukuku Direktifi'nin yürürlüğe girmesi gereklidir.

ABSTRACT

Cross–border mobility is secured by the four freedoms enshrined in the Treaties: the freedoms of establishment, of services, of goods and of capital. Free movement of companies is a clearly given Treaty right and the EU should not subscribe to a *de minimis* approach to the fundamental freedoms. Within company law, the freedom of establishment is particularly important. However, in respect of companies the freedom of establishment remains incomplete and in need for reform. While it must be acknowledged that the transfer of a company's registered office can already be carried out, the methods currently available for such transfers have important disadvantages that the transfer of a company's registered office under a specific directive would not have. Accordingly, the economic added value of such a directive would derive from the fact that such transfers could be carried out at a lower cost than is currently the case using the SE solution or the CBMs Directive. The CJEU case–law has greatly contributed to enhance the companies' right to move beyond the national borders. However, as far as a judge is not a legislator, its job is to interpret, and not to write, the law. Hence Companies wishing to move their registered office should be able to use a much more cost–effective procedure than the more expensive and circuitous routes of first having to become a SE or undertake a cross–border merger. Consequently, the European Union needs the 14th Company Law Directive because it needs corporate mobility.

TABLE OF CONTENT

INTRODUCTION

CHAPTER ONE
CONFLICT OF LAWS THEORIES AND
FREEDOM OF ESTABLISHMENT OF COMPANIES

§1. CONFLICT OF LAWS THEORIES RELATING *LEX SOCIETATIS*

§2. FREEDOM OF ESTABLISHMENT OF COMPANIES

CHAPTER TWO

CORPORATE MOBILITY AND

TECHNIQUES FOR MOBILITY OF COMPANIES ACROSS EUROPE

§3. CORPORATE MOBILITY

§4. TECHNIQUES FOR CORPORATE MOBILITY

CHAPTER THREE

PROPOSALS FOR A CORPORATE MOBILITY DIRECTIVE

§5. KPMG STUDY ON TRANSFER OF HEAD OFFICE OF A COMPANY

§6. THE PROPOSAL OF FOURTEENTH COMPANY LAW DIRECTIVE

ABBREVIATIONS

AG	:	Advocate General
AktG	:	Aktiengesetz (German Stock Corporation Act)
Art(s).	:	Article(s)
BGH	:	Bundesgerichtshof (German Supreme Court)
CFC	:	Controlled Foreign Company
CJEU	:	Court of Justice of the European Union
CBMs	:	Cross–Border Mergers
CBMs Directive	:	Cross–Border Merges Directive
CPIL	:	Swiss Federal Code on Private International Law
Directive 89/666/EEC	:	Eleventh Council Directive 89/666/EEC of 21 December 1989 Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Company Governed by the Law of Another State
Directive 2001/86/EC	:	Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company With Regard to the Involvement of Employees
Directive 2005/56/EC	:	Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross–Border Mergers of Limited Liability Companies
Directive 2009/101/EC	:	Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009
Directive 2011/35/EU	:	Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 Concerning Mergers of Public Limited Liability Companies
Directive 2012/30/EU	:	Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the

		European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent
DG	:	Directorate General
EAVA	:	European Added Value Assessment
ECGI	:	European Corporate Governance Institute
ECHR	:	European Convention on Human Rights
ECJ	:	European Court of Justice
ECR	:	European Court Reports
ECS	:	European Cooperative Society
ed(s).	:	Editor(s)
EEA	:	European Economic Area
EEC	:	European Economic Community
EEIG	:	European Economic Interest Grouping
EEIG Regulation	:	Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)
EGBGB	:	Einführungsgesetz zum Bürgerlichen Gesetzbuche (The Introductory Law of the German Civil Code)
EPC	:	European Private Company
ETUI	:	Eropean Trade Union Institute for Research, Education, Health and Safety
EU	:	European Union
EUR	:	Euro
FCN Treaties	:	Friendship Commerce and Navigation Treaties
GmbH	:	Gesellschaft mit Beschränkter Haftung (The German Limited Liability Company)
GmbHG	:	Gesetz betreffend die Gesellschaften mit beschränkter Haftung (German Act on Private Limited Companies)
IPRax	:	Praxis des Internationalen Privat und Verfahrensrechts

KPMG Study	:	Study on Transfer of the Head Office of a Company from one Member State to Another, carried out by KPMG European Business Centre
LG	:	Landgericht (Regional Court in Germany)
MBCA	:	The Model Business Corporation Act
MNEs	:	Multinational Enterprises
MoMiG	:	Gesetz zur Modernisierung des GmbH–Rechts und zur Bekämpfung von Missbräuchen
NYU	:	New York University
OECD	:	The Organisation for Economic Co–operation and Development
OGH	:	Oberster Gerichtshof (Austrian Supreme Court)
OJEU	:	Official Journal of the European Union
OLG	:	Oberlandgericht (Higher Regional Court in Germany)
p.	:	Page
para.	:	Paragraph
PIL	:	Private International Law
Reflection Group	:	Reflection Group on the Future of EU Company Law
SCE	:	Societas Cooperativa Europaea (The European Cooperative Society)
SCE Regulation	:	Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)
SE	:	Societas Europaea (The European Company)
SE Regulation	:	Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute of European Company (SE)
SMEs	:	Small and Medium–Sized Enterprises
SPE	:	Societas Privata Europaea (European Private Company)
SPE Regulation Proposal	:	Proposal for a Council Regulation on the Statute for a European Private Company, COM (2008) 396 final.
SSRN	:	Social Science Research Network
TEC	:	Treaty Establishing the European Community

TEU	:	The Treaty on European Union
TFEU	:	The Treaty on the Functioning of the European Union
UmwG	:	Umwandlungsgesetz (German Law on Transformations)
U.S.	:	United States
Winter Report	:	A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts
WCC	:	Wet Conflictenrecht Corporaties (Dutch Conflict of Laws Act of Corporations)
WFBV	:	Wet op de Formeel Buitenlandse Vennootschappen (Dutch Law on Pseudo–Foreign Companies)
VAT	:	Value–Added Tax
Vol.	:	Volume

INTRODUCTION

I. PRELIMINARY REMARKS

Corporations are an economic, political, environmental and cultural force that is unavoidable in today's globalized world economy and multinational enterprises (the 'MNEs')[1] become indispensable actors of international commerce. Besides, corporations have replaced states as the important makers of waves in the world's economy. It is also firmly established that with the increasing globalization of that economy corporations operate in many cases far beyond the borders of the country that presided over their birth[2].

It is very rare nowadays for corporations to confine their activities within one jurisdiction. Corporations' cross–border activities may occur based on various justifications such as tax purposes, low–cost production, to benefit from commercial and industrial advantages of the host state. For these purposes, enterprises carry out commercial activities in foreign countries by way of transfer their central administrations, incorporate new companies and establish branches or agents.

While the cross–border activities of enterprises in economic area provides to the access to the economics of the states, it also poses a host of complicated Private International Law and Commercial Law problems. In other words, while states endeavor to provide full freedom for establishment and cross–border transactions for companies, there would be serious legal hurdles in cases of nationality, recognition and conflict of laws of companies on the other hand.

---

1 For general information about MNEs see **Muchlinski, Peter:** Multinational Enterprises and the Law, Oxford 1996, p. 3 *et seq.*; **Tzouganatos, Dimitris:** Private International Law as Means to Control the Multinational Enterprise, Vanderbilt Journal of Transnational Law, Vol. 19, No 3, 1986, p. 477 *et seq.*; **Hadari, Yitzhak:** The Structure of the Private Multinational Enterprise, Michigan Law Review, Vol. 71, 1973, p. 729 *et seq.*; **Wallace, Cynthia:** The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization, Kluwer Law International, The Hague 2002, p. 9 *et seq.*; **Dunning, John H./Lundan Sarianna M.:** Multinational Enterprises and the Global Economy, Edward Elgar Publishing, Cheltenham 2008, p. 3 *et seq.*

2 **Drury, Robert R.:** The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome", Cambridge Law Journal, Vol. 57, Issue 1, 1998, p. 165.

One of the important legal problems which a country faces when it deals with foreign corporations is which national law it should apply to various aspects of the life of such corporations. Should a country apply its municipal law, particularly regulatory one, or the law of another jurisdiction?[3] In other words, a court dealing with such a company may have to ascertain which law is, or should be, the law which regulates its affairs. Or, the company may have internal disorders or may be experiencing difficulties in its external relations[4]. In seeking to grapple with these problems, states put into force some regulations to organize cross–border activities of the companies. By these regulations, states make a distinction between foreign and domestic companies. At that point, this question should be discussed: What is the essential difference between a foreign and domestic company? This question leads us to the concept of 'nationality' of companies.

II. NATIONALITY OF CORPORATIONS

Historically, the legal notion of 'nationality' appeared as an exclusive attribute of a given person or individual. The question of whether or not 'nationality' can be attributed to juristic persons, once very much in debate[5], is now settled since today 'nationality' is attributed to corporations for various legal purposes. As a result, for analogical or practical reasons, nationality, as a legal notion, has also applied to certain legal entities such as companies.

Corporate 'nationality' is not a unified concept. In the broadest sense of the concept, it serves a basis for subjecting a corporation or certain of its business activities to national laws and to the economic and fiscal powers exercised by a state[6]. The law determining corporate 'nationality' indicates the rules concerning company's 'birth'; *i.e.*, creating a connection –the connecting factor– between the company and national and the rules on maintaining the connection. In other words, the meaning of nationality of a corporation

[3] **Hadari, Yitzhak:** Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises, Duke Law Journal, Vol. 1974, Issue 1, 1974, p. 2.

[4] **Drury,** *Recognition of Foreign Corporations*, p. 165.

[5] **Hadari,** *Choice of Law and Nationality,* p. 3. See for arguments that reject the 'nationality' of companies **Arat, Tuğrul:** Ticaret Şirketlerinin Tâbiiyeti, Ankara 1970, p. 31; **Niboyet, Peter** (Translated by **Fişek, Hicri):** Şirketlerin, Hakikaten, Bir Tâbiiyeti Mevcut Mudur?, Ankara Law Review, Vol. IX, No. 3–4, 1952, p. 97.

[6] **Hadari,** *Choice of Law and Nationality,* p. 3.

is which law of a state applicable to corporation in terms of personal law, i.e., incorporation, corporate relation and dissolution as a legal entity[7].

There have been suggested various solutions for determining the 'nationality' of companies. For example, some authorities alleged that a companies' nationality should be determined by the nationality of its members'. According to this argument, a company is domestic in the state in which its members, or a majority of them (or the owners of the greater part of its capital), are domestic[8]. But it is beyond to dispute that this argument is not acceptable. The existence of 'corporate veil' has to do with the distinct legal personality of the corporation. The company is legal entity separate from its shareholders with its own rights and obligations under the law since separate legal personality is common feature of modern companies. The other arguments suggest that a commercial association is domestic in the state in which its capital was subscribed[9], in the country in which the contract of association was made[10], in the state in which public formalities attendant upon its constitution were performed[11], in the state in which it is domiciled[12].

Today, aforementioned solutions are not enforceable for determining the 'nationality' of companies. States prefer two dominant concepts; the 'Incorporation Theory' (*Gründungs=İnkorporationstheorie*)[13] and the 'Real Seat Theory' (*Sitztheorie*)[14]. A company's nationality results from creating the connection between a company and a national law. While under incorporation theory, the connection is created solely by incorporation, under the real seat theory the connection between a national law and a

7 **Moroğlu, Erdoğan:** Anonim Ortaklıkların Tâbiiyeti ve Tanınması, Public and Private International Law Bulletin, Year 22, No: 1–2, 2002, Dedication to Prof. Dr. Ergin Nomer, p. 413.

8 **Young, E. Hilton:** The Nationality of a Juristic Person, Harvard Law Review, Vol. 22, No. 1, 1908, p. 2; **Arat,** p. 64.

9 This theory has received considerable support from authors on the subject, but it has never been judicially accepted or practically applied. Because shares in a stock commercial association are frequently issued, and its capital subscribed in several states. In this case, a corporation must be considered to be domestic in every state in which an appreciable part of its capital is subscribed. See **Young,** p. 9, **Arat,** p. 65.

10 **Young,** p. 9.

11 **Young,** p. 12.

12 **Young,** p. 13.

13 See below §1, No II.

14 See below §1, No III.

company is determined by the place of the centre of administration. Thus, in the latter case the ‘nationality’ of the company is preserved only on the territory of the real seat, not abroad. As a consequence, incorporation theory and real seat theory have different implications when it comes to emigration and immigration of a company. A company’s emigration, according to the incorporation theory regime, results in maintaining its ‘nationality’. On the other hand, a company’s emigration, according to the real seat theory regime, results in loss of nationality. A company’s immigration, seen from the incorporation theory regime, should have no company law implications, as no connecting factor is created. On the other hand, immigration to the country following the real seat theory regime might be perceived as creating the connecting factor by setting up the center of administration.

In Turkish Law, it has been debated that is it possible to talk about the ‘nationality’ of legal entities, accordingly companies, or shall we mention about ‘law applicable to companies’?[15] Under the Article 388 of the Turkish Commercial Code numbered 6762[16] changing the ‘nationality’ of a joint–stock company is possible only by unanimity of all shareholders. Pursuant to the Provisional Act dated 1330 on Foreign Joint Stock Companies[17], branches of foreign companies in Turkey do not exist as separate legal entities, in other words, they remain as a part of the foreign entity. Foreign companies can carry out their transactions about the registration process by a fully authorized representative who has to be resided in Turkey. Since the term ‘nationality’ mentioned obviously in these two Acts, we should talk about the ‘nationality’ of legal entities, accordingly companies in Turkish Law.

---

[15] For opinions that argue ‘nationality’ can be attributed to juristic persons see **Tolun, Osman:** Türk Hukukunda Sermaye Şirketlerinin Tâbiiyeti, III. Banka ve Ticaret Hukuku Haftası, Ankara 1963, p. 473; **Birsen, Kemalettin:** Sermaye Şirketlerinin Tâbiiyetini Tayinde Türk Hukuk Sistemi, III. Banka ve Ticaret Hukuku Haftası, Ankara 1963, p. 503; **Donay Süheyl:** Devletler Hususi Hukukunda Şirketlerin Tâbiiyeti Meselesi, Banking and Commercial Law Review, Vol. 5, No: 2, p. 206; **Arat,** p. 54. For the opinions that it should be mentioned about ‘law applicable to companies’ see **Güral, Jale:** Hususi Hukuk Tüzel Kişilerinin Milletlerarası Mevcudiyeti, Ankara 1949, p. 20; **Erdener, Nihal:** Genel Olarak Şirketlerin Tâbiiyeti III. Banka ve Ticaret Hukuku Haftası, Ankara 1963, p. 457.

[16] The Code repealed by the Turkish Commercial Code numbered 6102 (published in Official Journal dated 14.02.2011 and numbered 27846) at the date of 01.07.2012.

[17] Ecnebi Anonim ve Sermayesi Eshama Münkasim Şirketlerle Ecnebi Sigorta Şirketleri Hakkında Kanunu Muvakkat. This Act also repealed by the Code numbered 6103 (published in Official Journal dated 14.02.2011 and numbered 27846) at the date of 01.07.2012.

III. CORPORATE NATIONALITY AND CHOICE OF LAW QUESTIONS

The study of the 'foreign' corporation traditionally has three primary aspects: (i) recognition of the corporation as a legal entity, (ii) determination of the governing of the law with respect to various internal corporate issues, and (iii) qualification and right of entry to do business in a foreign country[18]. Since first two of them are basically choice of law (conflict of laws or private international law) issues, discussed below shortly.

A. Recognition of Foreign Corporations

1. The Basis for Recognition

The term 'recognition' has many meanings. We speak in family law 'recognized child', in public international law of recognition a newly emerged state of newly installed government, and in private international law (conflict of laws) of recognition of foreign judgments or legal persons[19].

Corporations are artificial legal persons and unlike natural persons owe their existence to the state which is their home country. In order to be recognized, a foreign company must have been established in accordance with the provisions applicable under the governing conflict rules. And then the company must be 'recognized' as a legal entity in the host country, before it can legally enter a market as a foreign corporation. If not recognized, it will not have all the corporate attributes in the foreign country, such as the right to make a contract and to sue and be sued as a corporation[20]. In this context, the concept of recognition can be used in a narrow or a broad sense. If used in a narrow sense, then it is limited to the acceptance of the foreign company as a legal subject *simpliciter*. In other words, it is only accepted as a bearer of rights and duties. If used in a broad sense, then both the company as a legal subject and its *lex societatis,* which is possibly foreign proper law, are accepted. Whether or not a foreign company is recognized in the broad or narrow sense can only be delineated after extensive

18 **Hadari,** *Choice of Law and Nationality,* p. 12.

19 **Stein, Eric:** Conflict–of–Laws Rules by Treaty: Recognition of Companies in a Regional Market Michigan Law Review, Vol. 68, No. 7, 1970, p. 1327.

20 **Hadari,** *Choice of Law and Nationality,* p. 13.

examination of the legal context in the State in which the issue arises. Such legal context could encompass legislation, case law, international conventions and even customary principles[21]. These two different senses bring the discussion whether the recognition and *lex societatis* should be determined together or separately[22].

There has been a debate about whether states ought to recognize foreign corporations at all[23]. It is generally agreed that there is no obligation under public international law for states to recognize the legal personality of a foreign corporation[24]. But the imperatives of increasing capitalism and the demands of international commerce have led the way towards a more open attitude to the recognition of foreign corporations. *Rabel* states that recognition signifies that the authorities of a state affirm a foreign created legal person as existent for all purposes, applying the law considered to be the personal law[25]. According to *Stein,* in private international law, the recognizing nation–state agrees to extend to its own system certain legal effects attributed to a fact situation in the legal system of another nation–state system[26].

Most European jurisdictions follow the theory of *ipso iure* recognition of companies as legal entities[27], so that legal personality is granted to foreign corporate bodies, in particular to foreign companies limited by shares. Under this system, if a corporation is

---

[21] **Rammeloo, Stephan**: Corporations in Private International Law–A European Perspective, Oxford University Press, 2001, p. 10; **Drury,** *Recognition of Foreign Corporations*, p. 165.

[22] For details, opponents and advocates of this discussion see **Aygül, Musa:** Milletlerarası Özel Hukukta Şirketlere Uygulanacak Hukukun Tespiti, Ankara 2007, pp. 42–54.

[23] According to the Concession Theory, a company being a creature of the legal system which created it, can have no existence outside the ambit of that law. This argument has been replaced by the International Theory based upon the idea that corporations are analogous to individuals, and if created by a competent state they need no particular recognition in other states. For these arguments see **Drury,** *Recognition of Foreign Corporations*, p. 176.

[24] **Güral,** p. 57; **Ebenroth, Carsten Thomas:** Gaining Access to Fortress Europe–Recognition of U.S. Corporations in Germany and the Revision of the Real Seat Rule, The International Lawyer, Vol. 24, 1990, p. 461.

[25] **Rabel, Ernst:** The Conflict of Laws: A Comparative Study, Vol. II: Foreign Corporations, Torts, Contracts in General, 2nd Ed., Michigan University Press, 1960, p. 132.

[26] **Stein,** *Recognition of Companies,* p. 1327.

[27] **Guillaume, Florence:** The law Governing Companies in Swiss Private International Law, Yearbook of Private International Law, Vol. 6, 2004, p. 259; **Tekinalp, Gülören:** Yabancı Tüzel Kişilerin Tanınması, Halil Arslanlı'nın Anısına Armağan, İstanbul 1978, p. 187; **Zimmer, Daniel:** Legal Personality, in: VOC 1602–2002: 400 Years of Company Law (Ella Gepken–Jager, *et al*. eds.), Kluwer Legal Publishers, Deventer 2005, p. 271–272; **Ebenroth,** *Recognition of US Corporations,* p. 463; **Drury,** *Recognition of Foreign Corporations*, p. 176;

duly formed in accordance with its *lex societatis*, recognition will follow *ipso iure*[28]. The concept of *ipso iure* recognition does not determine whether foreign companies have to fulfill certain requirements set for domestic companies which can lead in the result to the failure of the company's recognition. At this point of the analysis is it necessary to examine the below–mentioned major conflict of laws rules to determine the applicable company law, and to analyze the effect of these concepts on the recognition policy of a jurisdiction[29].

Today, corporations are generally recognized upon two distinct bases[30]. Some countries use the concept of the real seat to determine the suitability of the foreign corporation for recognition. If the corporation is validly established according to law of its real seat, then, subject sometimes to certain conditions, it will be recognized. The other school of thought, beginning perhaps in the common law world, uses the concept of the place of incorporation. If a company is validly formed in accordance with the law of its place of incorporation, then it will be recognized[31]. The latter rule brings certainty to the basic question of recognition that there is only one country of incorporation, and its law should be consulted.

2. The Place of Incorporation Approach

As it will be discussed in succeeding chapter, under the incorporation theory, the law governing the activities of a company is the law of the state in which the company has been incorporated. Founders of a company are therefore able to choose the law that will regulate the company's statute.

In common law countries, there has been a liberal tradition of recognition of foreign corporations. Under this belief, corporation duly created in a foreign country is to be recognized as a corporation in host state. In these countries the place of incorporation is

---

28 **Roth, Wulf–Henning:** Recognition of Foreign Companies in *Siège Réel* Countries: A German Perspective, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, p. 29.

29 **Zimmer,** *Legal Personality*, p. 272.

30 **Tekinalp, Gülören:** Milletlerarası Özel Hukuk Bağlama Kuralları, 11th Ed., Istanbul 2011, p. 106; **Ansay, Tuğrul** Yabancı Şirketlerin Serbest Yerleşimi ve Tanınması, Public and Private International Law Bulletin, Year 23, No: 1–2, 2003, Dedication to Prof. Dr. Gülören Tekinalp, p. 3.

31 **Drury,** *Recognition of Foreign Corporations*, p. 176.

the key factor linking a company to a system of law. It follows therefore that if a company has been properly formed in accordance with the law of its place of incorporation, will also be attributed with a legal personality, and all the rights and liabilities of a corporate existence, in other states. Thus, if the administrative center or the statute seat of a company were relocated to a state that applied the incorporation theory, this company would be fully recognized there.

3. The Real Seat Approach

Some countries, primarily Germany and France, use the concept of the real seat of the company to determine the link between the company and its system of law. What seems to be required is that in order to be recognized, there must be an appropriate link between the company and the country[32].

The "real seat" theory does not apply the law of the state where a company was founded, but stipulates that the law of the state where the company actually has its head office or real seat is authoritative. It is based on the consideration that the law of the state economically and politically most affected by the company's activities should apply. Proponents of the real seat theory argue that the incorporation theory facilitates the creation of mere letterbox companies with the consequence that government authorities cannot control business transactions properly.

4. Treaties and Conventions

There are many treaties and conventions extant under which one nation agrees to recognize companies legally formed upon the other nation's territory, either absolutely or upon certain conditions, such as there being nothing in the company's constitution or objects which is contrary to the other nation's public policy.

The problems created by the cross–border operation of companies could be minimized in a number of ways. If all states adopted the same criterion for a connecting factor linking companies to a particular jurisdiction, then it would not matter where a company was located, because it would be treated in the same way by all jurisdictions.

[32] **Drury,** *Recognition of Foreign Corporations*, p. 177.

Alternatively, if all states agreed to recognize companies created in any other state (regardless of that state's adopted connecting factor) there would again be no discrimination. But many of these ideas and others like them already been tried, either alone or as compromises between the two main approaches[33].

One attempt to regulate the recognition of companies is The Hague Convention of 1951 on the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions which was signed by several of the participating states at the Hague Conference on Private International Law of 1956[34]. The Convention extends to all contracting states the legal personality of such organizations as possess (in one of the contracting states) the power to sue and be sued, to own property, and to enter contracts.

Under the Article 1 of the Convention "Legal personality, acquired by a company, association or foundation under the law of the contracting State where the formalities of registration or publication have been complied with and where its charter seat is located, should be recognized as of course in the other contracting States, provided that, in addition to the capacity to proceed in court, it imports at least capacity to hold property and to enter into contracts and other legal acts." By this article, in principal, the Convention aims to bring the *ipso iure* recognition of companies[35]. The efforts to unify have not succeeded to date. The Convention did not enter into force because of the small number of ratifications[36].

The Institute of International Law adopted certain rules on the systems of law governing companies and their places of business in 1965, and recommended "to all States to adopt the rules in order to resolve the conflicts of law with regard to companies formed under a municipal law[37]." The recommended rules fall into four groups: (i) rules on the

---

33 **Drury,** *Recognition of Foreign Corporations*, p. 181.

34 The Draft Convention available at: <http://www.hcch.net/upload/conventions/txt07en.pdf> (French version), See for English version, American Journal of Comparative Law, Vol. I, 1952, p. 277.

35 **Tekinalp,** *Bağlama Kuralları*, p. 110.

36 As per date, only three states had ratified the Convention (Belgium, France, and Netherlands); although two others signed it (Luxembourg in 1962, and Spain in 1957). The current status of the Convention is available at: <http://www.hcch.net/index_en.php?act=conventions.status&cid=36>.

37 The Institute of International Law Rules of 1965 is available at American Journal of International Law, Vol. 60, No. 3, 1960, p. 523 *et seq*.

law governing the company; (ii) rules on recognition; (iii) rules on place of business. Under the Article 1 of these Rules, "A company is governed by the law under which it has been incorporated". Article 2 sets out the general principle. It stipulates that "Any company established in accordance with the law mentioned in the First Article will be recognized in all other States"[38].

Also the Council of Europe has promoted several conventions in the field of law of international trade. One of them is the European Convention of 20 January 1966 on Establishment of Companies[39], which is not yet in force[40].

Another attempt in this line is Convention on the Mutual Recognition of Companies and Bodies Corporate[41]. This Convention has been produced on the basis of article 220 of the Rome Treaty[42] and signed on 29 February 1968 in Brussels by the original six EC Member States, following negotiations started in 1962. On the same day, in Luxembourg, the same Contracting States had signed a Protocol which referred the Convention to the Court of Justice of the European Communities for interpretation[43]. The reason for drafting the Convention was the Member States felt that in the meantime a more liberal recognition practice was necessary[44]. However, the Netherlands has

---

[38] For detailed information about the recognition system stipulated by The Institute of International Law Rules of 1965 see **Drucker, Thomas C.:** Companies in Private International Law, International & Comparative Law Quarterly, Vol. 17, Issue 1, 1968, p. 33 *et seq*.

[39] The Convention is available at: <http://conventions.coe.int/Treaty/en/Treaties/Word/057.doc>.

[40] For comments on this Convention and other unifications promoted by the Council of Europe on private law see **Krüger, Hans Christian:** The Council of Europe and Unification of Private Law, The American Journal of Comparative Law, Vol. 16, No: 1/2, Winter/Spring 1968, pp. 127–148.

[41] Published in the Bulletin of the European Communities, Supplement No: 2–1969 pp. 7–16. Online version of the Convention is available at: <http://aei.pitt.edu/5610/1/5610.pdf>.

[42] Article 220 EEC (Article 293 of TEC) was requiring the Member States to enter into negotiations with each other, *inter alia*, on the following company law subjects: (i) the mutual recognition of companies and or firms, (ii) the retention of legal personality in the event of transfer of the seat between the countries, and (iii) the possibility of merger between companies or firms governed by the laws of different countries. But now, the Article 293 of TEC repealed by the Lisbon Treaty. For consolidated versions of the TEU and TFEU see OJEU (C 326), 26.10.2012, p. 13.

[43] Published in the Bulletin of the European Communities, Supplement No: 4/71, pp. 6–16. Online version of the Protocol is available at: <http://aei.pitt.edu/5609/1/5609.pdf>.

[44] **Stein,** *Recognition of Companies,* p. 1335–1336; **Tzouganatos,** p. 492.

consistently refused to ratify, neither that Brussels Convention, nor the Protocol annexed to it ever came into effect[45].

The Convention tried to affect a classic compromise[46] between the place of incorporation and the real seat theories. It provided that companies established in accordance with the law of a member state and which have their registered office within the Community, must be recognized as of right in the other member states[47]. The Brussels Convention of 1968 should have allowed identity–preserving company law changes.

However the other provisions seem to have a different approach. First of all, the Convention permitting member states not to apply the Convention to companies which have their real seat outside the Community, and which do not have an effective link with the economy of a member state. The second, derogation from the place of incorporation approach permitted member states, by a unilateral declaration, to apply their own mandatory legal provisions to companies incorporated in another member state, but having their real seat in the host state[48].

The Convention provided, as a general rule, that it would have been for the law of incorporation to govern a company. However, room would have been left to the host state to apply its national legislation, provided that the company's real seat was located

---

45 **Tekinalp, Gülören:** AET'de Tüzel Kişilerin Tanınması, Dedication to Prof. Ernst Hirsch, Istanbul University Law Faculty Review 1977, p. 310; **Tekinalp,** *Bağlama Kuralları*, p. 110–111.

46 **Drury,** *Recognition of Foreign Corporations*, p. 182; **Rammeloo,** *Corporations in PIL*, p. 35.

47 Recognition mentioned in this Convention refers the acceptance of its legal personality. See **Rammeloo,** *Corporations in PIL*, p. 25; **Roth,** *Recognition of Foreign Companies*, p. 30.

48 See on this Convention: **Goldman, Berthold:** The Convention between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons, Common Market Law Review, Vol. 6, Issue 1, 1969, pp. 104–128; **Vossestein, Gert–Jan:** Modernization of European Company Law and Corporate Governance: Some Considerations on Its Legal Limits (European Company Law Series), Kluwer International Law, 2010, p. 164; **Drury,** *Recognition of Foreign Corporations*, p. 181; **Diephuis, J. H.:** Recognition of Foreign Companies and Bodies Corporate: The Concept of Recognition: A Short Historical Review and a Critical Analysis of the Main Provisions of the EEC Recognition Convention, Netherlands International Law Review, Vol. 27, Issue 3, 1980, pp. 347–356. **Timmermans, Christiaan:** Recognition of Foreign Companies and Bodies Corporate: The Convention of 29 February 1968 on the Mutual Recognition of Companies and Firms: A Few Comments from the European Law Point of View, Netherlands International Law Review, Vol. 27, Issue 3, 1980 pp. 357–361; **Santa Maria, Alberto:** European Economic Law, Kluwer International Law, Alphen aan den Rijn 2009, p. 9.

within its territory. Moreover, a Member State would have had the possibility to deny recognition to a foreign company for public order reasons.

In many instances recognition of foreign companies is assured by bilateral treaties, most of which are known as Friendship Commerce and Navigation ("FCN") Treaties[49]. The modern FCN treaties define the treatment each country owes the citizens of the other, and provide protection for companies and their property[50]. These treaties are concluded between the States as bilateral. These treaties provide, as a general rule, for the mutual recognition of companies in accordance with the law of either party to the treaty. There were several bilateral FCN Treaties between Turkey and other countries including provisions on recognition of companies[51].

B. The Governing Law of Foreign Corporations

After recognition, the question of what law should govern the corporation's internal and external affairs must be answered. The answer is again dependent on each country's private international law (conflict of laws) rules[52]. As a general rule, the law of the country of the company's nationality not only determines the existence of a corporation but also governs its internal affairs[53]. According to the common law, such governing law, the so–called personal law of the company, is the law of the country of incorporation while according to Continental law, it is the law of the country of the Seat[54].

---

49 **Hadari,** *Choice of Law and Nationality,* p. 14.

50 **Walker, Herman:** Modern Treaties of Friendship, Commerce and Navigation, Minnesota Law Review, Vol. 42, 1957/58, p. 806; **Silver, Gerald. D.:** Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice", Fordham Law Review, Vol. 57, Issue 5, 1989, pp. 767–768.

51 See for example, Article 8 of the Commerce and Navigation Treaty between Turkey and Sweden (Official Journal dated 28.01.1929, numbered 1104); Article 8 of the Establishment, Commerce and Navigation Treaty between Turkey and Norway (Official Journal dated 05.07.1932, numbered 2142).

52 **Stein,** *Recognition of Companies,* pp. 1327–1328.

53 **Rabel,** p. 69.

54 **Hadari,** *Choice of Law and Nationality,* p. 15.

Under the Theory of Differentiation (*Differenzierung*), corporate affairs fall into two groups as 'internal affairs' and 'external affairs'[55]. However, the dividing line between the external and internal affairs of a corporation is not clear. In other words, there is no clear cut line between internal and external affairs. It has been suggested that 'internal affairs' of a corporation are relations *inter se* of the corporation, its shareholders, directors, officers or agents[56]. In accordance with this distinction, the organization of a corporation, its articles and bylaws, as well as the rights and duties of shareholders and of the organs, and dissolution matters belong to the internal affairs[57]. The rationale for the internal affairs rule is that corporations should not be faced with conflicting demands regarding matters peculiar to the relationship among or between the corporation, and its current officers, directors, and shareholders[58].

According to the Theory of Differentiation the issues including the raising and maintenance of capital, legal capacity, representation through corporate organs, and publicity are included in the external affairs[59].

IV. AIM, SCOPE AND OUTLINE OF THE THESIS

Ever since the founding of the EU one of the main aims has been to create an internal market in order to promote development, economic growth and social progress (Art. 3 TEU). This goal is to be fulfilled under Art. 26(2) TFEU that provides the Internal Market shall include the free movement of goods, person, services and capital.

Art. 54 TFEU provides companies with the same freedom of establishment as natural persons. The article stipulates that: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or

---

55 **Rammeloo,** *Corporations in PIL*, p. 21.

56 **Hadari,** *Choice of Law and Nationality,* p. 15; **Beveridge, Norwood P.:** The Internal Affairs Doctrine: The Proper Law of a Corporation, The Business Lawyer, Vol. 44, Issue 3, 1988/89, p. 698.

57 **Tzouganatos,** p. 493; **Rammeloo,** *Corporations in PIL*, p. 21. For further matters that have been held to involve internal affairs of foreign corporations by jurisdictional purposes in the UK and US law see **Hadari,** *Choice of Law and Nationality,* p. 16.

58 **Kersting, Christian**: Corporate Choice of Law–A Comparison between the United States and European Systems and a Proposal for a European Directive, Brooklyn Journal of International Law, Vol. 28, Issue 1, 2002, p. 3, footnote 13 and accompanying text.

59 **Tzouganatos,** p. 493.

principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States". The article is regulated under Title IV Chapter 2 with the heading "Right of Establishment"; since the free movement of companies is one of the most important elements of the Internal Market. The author considers that the notion of corporate mobility is essential for the free movement of companies. On these grounds, the author desires to prepare this thesis on the corporate mobility in the EU Internal Market.

Corporate mobility is a common theme in the area of globalization. The purpose of the thesis is to examine how the notion of corporate mobility in the European Union has developed and its importance on the functioning of the European Internal Market. From this point of view, the purpose of the thesis covers (i) current legal position for companies on the freedom of establishment, with focus on corporate mobility, and (ii) legal problems for harmonization or unification of the Member States' legislation with regard to freedom of establishment of companies.

It is possible to define the notion of 'corporate mobility' in generally speaking the freedom of a company to operate in different countries and to choose the company law model that best fits its entrepreneurial needs. The concept of corporate mobility finds its origin in the United States, where corporations are in principle free to choose their state of incorporation, and where corporations are subject to the corporate law of the state in which they have chosen to be incorporated. Corporate mobility could appear in a number of guises. First of all, it could take the form of a company conducting some transactions in a foreign jurisdiction, without any actual presence there. Alternatively, the company could conduct a greater amount of activities abroad through an agency or a branch. Lastly, a company could set up a subsidiary abroad.

The concept of corporate mobility is subject of actual and controversial issue in academic circles of European company law. The concept of corporate mobility is not an actual debate for the Turkey. But it is interesting as one of the developing aspects of the company law. The author considers that, by way of transfer of registered office and cross–border merges, corporate mobility may become actual for Turkey in the near future as part of the membership negotiations between Turkey and the EU.

The notion of corporate mobility is connected with the several disciplines of the law i.e. company law, private international law, and European Union law.

Chapter One considers the conflict of laws theories for companies; namely, the incorporation theory and the real seat theory and right of establishment of companies. There are two different conflicts of law theories for determining the connecting factor for the *lex societatis* existing in the EU. Some of Member States of the EU (*inter alia* United Kingdom, Ireland, Denmark and the Netherlands) adopted the incorporation theory. Under this theory, a company is governed by the laws of its place of incorporation or registration. On the other hand, some of other Member States (*inter alia* Germany, France, Spain, Portugal, Greece, Luxembourg and Belgium) adopted the real seat theory. According to this theory, a company is formed under and governed by the laws of the country where it has its "real seat". This Chapter looks at the rationale behind these theories and the long–standing dichotomy between 'incorporation' states and 'real seat' states. It will be examined in this Chapter how the application of the incorporation theory and the real seat theory affect corporate mobility in a number of scenarios in which there is a transfer of registered office and/or transfer of administrative seat. Because of absence of harmonization at European Union level, Member States' theories of conflicts of laws should be taken into account for solving the problems that may emanate from corporate mobility. In other words, in the absence of community harmonization measures the success of a cross–border transfer of the registered office and/or of the real seat of an existing company, from one Member State to another in the EU ultimately depends on Member States companies' Private International Law rules.

Chapter Two considers corporate mobility in the European Community context. This part examines the techniques for mobility of companies across Europe within the framework of current provisions of the TFEU regarding cross–border corporate movement and relevant secondary legislation. Also limitations of the current legislative on corporate mobility will be examined under this part. This chapter will also discuss the company law aspects of the notion of the corporate mobility (i.e. is there any need harmonization of unification of member states' company law on that issue, types of corporate mobility, shareholders' rights, minority shareholders' rights, creditor protection in the event of corporate mobility).

In Chapter Three, attempts to enact legislation dealing with corporate mobility will be examined. Because, from the year of 1993 there were several draft proposals on this issue. Also there were several reports, public consultations, resolutions and other attempts from EU bodies and company law scholars. These attempts should be evaluated.

Chapter Four examines the case–law of the CJEU. The effects of the following cases on cross–border transfers of seat are considered. Because corporate mobility is a development that deeply affected the European company law, and created by the case–law of the CJEU not by the secondary legislation. In other words, in a series of landmark cases, the CJEU has shaped European company law by exploring the scope of the freedom of establishment with regard to companies. As it will be discussed in following chapters, it is worth to note that the case–law of the CJEU seems to have had more impact on companies' mobility and freedom of establishment than the EU secondary legislation. The cases of Daily Mail (Case 81/87), Centros (Case C–212/97), Überseering (Case C–208/00), Inspire Art (Case C–167/01), Sevic (Case C–411/03), Cartesio (Case C–210/06) and VALE (Case C–378/10) of the CJEU almost redefines the notions of "seat" and "branch" and enables the company, that incorporated in one Member State but does not pursue any economic activity within that state, to concentrate its whole economic activities in another Member States by way of establishment of an agency or branch.

CHAPTER ONE
CONFLICT OF LAWS THEORIES AND FREEDOM OF ESTABLISHMENT OF COMPANIES

§1. CONFLICT OF LAWS THEORIES RELATING *LEX SOCIETATIS*

I. PRELIMINARY REMARKS

Private International Law ('PIL') rules establish the connecting factors employed to ascertain the law governing companies (*lex societatis*). Law applciable to companies governs existence, capacity, internal structure, external legal relations, modifications of the charter and dissolution of the legal entity[60]. PIL rules decisively determine whether a company may be recognized in another Member State and whether it may transfer its registered office and/or its real seat from one Member State to another.

There are a number of concepts which have been used by conflict of laws rules in different countries as a connecting factor. A first distinction "indeterminate" and "determinate" connecting factors offered according to their ability or inability to directly determine the governing law of companies. Indeterminate connecting factors are nationality, domicile and residence. Determinate connecting factors are the place of incorporation, the place of registration, the registered office, the legal (statutory) seat as defined in the articles[61]. But under today's private international law of companies, there are two competing and irreconcilable conflicts of laws theories that have come to the fore in relation to companies seeking to transnationalise their sphere of operations: the incorporation theory and the real seat theory[62]. Although there were several attempts to reconcile these two theories, notably in German law, states generally prefer one of them to determine governing law of companies.

---

60 **Rabel,** p. 3.

61 **Behrens, Peter:** General Principles on Residence of Companies–A Comparative Analysis of Connecting Factors Used for Determination of the Proper Law of Companies, in: Residence of Companies under Tax Treaties and EC Law (Guglielmo Maisto eds.), Amsterdam 2009, pp. 5,7.

62 The divide between Member States about the appropriate rules of private international law for companies is a "fundamental chasm". See **Wymeersch, Eddy:** The Transfer of the Company's Seat in European Company Law, Common Market Law Review, Vol. 40, Issue 3, 2003, p. 661.

In effect, these two theories are not actually living together in harmony in the EU. The discrepancy between the incorporation and the real seat theories poses considerable obstacles to the migration of companies in the EU and renders extremely difficult the adoption of legal instruments capable of effectively bridging the gap between these theories[63].

II. THE INCORPORATION THEORY

The Incorporation Theory (*Lex Incorporatinis*)[64] which is based on a formal criterion is emerged and predominantly applied in Anglo–American countries and subsequently some of Continental states[65] adopted this principle. Under the Anglo–American conflict of laws concept a corporation is the creation of the state or country of incorporation[66]. This theory based upon the concept that a corporation should abide by the law of the country from which it derives its existence without regard to its contacts with a second country[67]. Since corporations are the creatures of the place or incorporation, all the legal matters corresponding them should be determined by the law of the State in which they properly incorporated[68]. The governance of a company by its place of incorporation is reasonable and rational result, because companies owe their existence to place of incorporation[69]. Since the law of the place of incorporation shall determine

---

63 **Sousa, Antonio Frada de:** Company's Cross–Border Transfer of Seat in the EU After Cartesio, NYU School of Law Jean Monnet Working Paper Series, Working Paper No: 07/09, New York 2009, p. 3.

64 This theory is called as "*Gründungstheorie*" in German law and "*Siège Statuaire*" in French law. See **Rammeloo,** *Corporations in PIL*, p. 16, footnote 34.

65 The Netherlands used to apply the Real Seat theory but abandoned it and accepted incorporation theory by a law of 25 July 1959. See **Drury,** *Recognition of Foreign Corporations*, p. 179; **Rammeloo, Stephan:** Recognition of Foreign Companies in "Incorporation" Countries: A Dutch Perspective, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, pp. 52–55. See also below §1–II–D–1. This theory also accepted in Switzerland. See **Karrer, Pierre A./Arnold, Karl W./Patocchi, Paola M.:** Switzerland's Private International Law: Private International Law Statute, Lugano Convention, and Related Legislation, Kluwer Law and Taxation Publishers, Zurich 1994, p. 132 *et seq*. See also below §1–II–D–2.

66 **Rabel,** pp. 32–33; **Hadari,** *Choice of Law and Nationality,* p. 3.

67 **Tzouganatos,** p. 479.

68 **Rammeloo,** *Corporations in PIL*, p. 16, **Kozyris, P. John:** Corporate Wars and Choice of Law, Duke Law Journal, Vol. 1985, No. 1, February/1985, p.3.

69 **Reese, Willis/Kaufman, Edmund:** The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit, Columbia Law Review, Vol. 58, No. 8, 1958, p. 1125.

whether the company duly incorporated or not, and the internal affairs of a company should be governed by this law[70].

This theory originated from nations that were keen to adopt a liberal approach to trade[71]. Under this theory the existence and dissolution of a company are determined by the state of incorporation. Furthermore, the internal affairs of the company such as matters of legal status, standing, rules on corporate governance, relationship between company, directors and shareholders, dissolution, liquidation are regulated by the law of the state of incorporation[72]. Therefore, once a company has satisfied the formation requirements in its state of incorporation, than it is recognized everywhere[73].

In U.S. law, this theory referred as 'internal affairs doctrine'[74] and accepted that 'internal affairs' of a corporation should be governed by the law of the state in which the corporation is incorporated. U.S. corporations can freely choose the state law governing their internal affairs[75]. As mentioned above, the notion of 'internal affairs' assumes that only one state, almost always the state of incorporation, should be authorized to regulate the relationships, among a corporation and its officers, directors, and shareholders. To many corporate lawyers, the internal affairs doctrine is irresistible

---

70 **Aygül,** p. 89.

71 **Drury,** *Recognition of Foreign Corporations*, p. 182.

72 **Ebke, Werner F.** The "Real Seat" Doctrine in the Conflict of Corporate Laws, The International Lawyer Vol. 36, Issue 3, 2002, p. 1016; **Panayi, Christiana H.J.I.:** Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths, Yearbook of European Law (2009), Vol. 28, Issue 1, Oxford University Press 2010, p. 125.

73 **Rammeloo,** *Corporations in PIL*, p. 16; **Drury,** *Recognition of Foreign Corporations*, p. 182.

74 See on this doctrine **Notes:** The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy, Harvard Law Review, Vol. 115, No. 5, 2002, p. 1480 *et seq.*; **Notes:** The "Internal Affairs" Doctrine in State Courts, University of Pennsylvania Law Review Vol. 97, No. 5, 1949, p. 666 *et seq.*; **Tung, Frederick:** Before Competition: Origins of the Internal Affairs Doctrine, available at SSRN: <http://ssrn.com/abstract=686592>, p. 1 *et seq.*; **Stevens, Matt:** Internal Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations, Boston College Law Review, Vol. 48, Issue 4, 2007 p. 1047 *et seq.*; **Segal, Bruce L.:** The Internal Affairs Doctrine–Rights and Duties of Shareholders, Directors, and Officers of Foreign Corporations Doing Business in Michigan, The Michigan Business Law Journal, Vol. 27, Issue 1, 2007, p. 48 *et seq.*; **Majchrzak, David M.:** Note, Corporate Chaos: Who Should Govern Internal Affair? Thomas Jefferson Law Review, Vol. 24, Issue 1, Fall 2001, p. 83 *et seq.*; **Beveridge,** p. 698.

75 **Dammann, Jens:** A New Approach to Corporate Choice of Law, Vanderbilt Journal of Transnational Law, Vol. 38, No. 1, 2005, p. 53.

it not logically inevitable since the corporation owes its legal existence to the law of the place of incorporation[76].

According to the incorporation theory, the connecting factor is the place of incorporation of the company. For this reason, the law of state of incorporation will be applied irrespective of any activities, minimal or substantial, pursued in other States and regardless of the fact that the company located its centre of admnistration[77] in elsewhere. Additionally, it is not important where the directors and shareholders of the company is located or domiciled[78]. Under this system, a company can transfer its actual centre of adminitration in another State without losing its legal personality. In this case, the law of the place of incorporation remains as governing law of the company. The transfer of administrative seat does not affect the law applicable to the company and its legal personality.[79] So long as the registered office remains in the state of incorporation, the emigrating company remains subject to the laws of that state[80].

Under this theory, it is not necessary the actual connection between the company and place where is was incorporated. This allows a company to pursue activities abroad that is the most appropriate also less restrictive company law regime. In the event of the company concentrates its business activities in a state other than it was formed, the law of the place of the incorporation would not create problems[81]. The incorporation theory, therefore, promotes the idea of simplicity, predictability and legal certainty[82]. It is, however, also argued that the incorporation theory encourages, at least allows, the creation of 'letterbox companies', with little substance in the state of incorporation. The

---

76 **DeMott, Deborah A.:** Perspectives on Choice of Law for Corporate Internal Affairs, Law and Contemporary Problems, Vol. 48, No: 3, 1985, p. 161.

77 In this thesis, the terms '*centre of administration*', '*actual centre of administration*', '*administrative seat*', '*head office*' and '*real seat*' are used interchangeably. They refer to the place where most, if not all, of the important functions and operations of a company are concentrated. See **Panayi,** *Corporate Mobility in PIL*, p. 126, an footnote 8.

78 **Aygül,** p. 90, and footnote 187.

79 **Reindl, Andreas:** Companies in the European Community: Are The Conflict of Rules Ready for 1992?, Michigan Journal of International Law, Vol. 11, 1989/90, p. 1274.

80 **Panayi,** *Corporate Mobility in PIL*, p. 126.

81 **Gravir, Gaute Simen:** Conflict of Laws Rules for Norwegian Companies after the *Centros* Judgment, European Business Law Review, Vol. 12, Issue 7/8, 2001, p. 146; **Aygül,** p. 90.

82 **Rammeloo,** *Corporations in PIL*, p. 17; **Drury,** *Recognition of Foreign Corporations*, p. 168 *et seq.*; **Panayi**, *Corporate Mobility in PIL*, p. 126.

advantages and downsides of this theory will be discussed in detail in the following pages[83].

A. Historical Background of the Theory

This theory was developed in the 18th century in England for the economic needs of the colonial power. Great Britain intended for the doctrine for the permit the 'export' of British Law its colonies, and to provide both certainty of law as well as enforcement of the corporation's interests when such interests conflicted with those of the host state[84]. In other words, the emergence of this theory in England was apparently determined by the needs of English companies engaged in overseas trading around the world[85]. It has been argued that, even today, the incorporation theory principally works to faciliate the activities of the investors in overseas markets[86].

England Courts mentioned this theory first time in the case of *Dutch West India Co.* *v Van Moses*[87]. This case confirms that the English courts will recognise the existence of any corporation duly created under the law of a foreign country[88]. For this reason, a foreign corporation may sue in its corporate name[89] in the English Courts[90]. In the cases

---

83 See below §1–II–C.

84 **Tzouganatos,** p. 479; **Pannier, Mathias:** Nationality of Corporations under Domestic Law: A Comparative Perspective, in: Investment Treaty Law –Current Issues Volume II– Nationality and Investment Treaty Claims Fair and Equitable Treatment in Investment Treaty Law (Federico Ortino, *et al*. eds.), London 2007, p. 11; **Zimmer,** *Legal Personality*, p. 276; **Werlauff, Erik:** Common European Company Law: Status 1998(1): Equal Treatment of Companies, Domicile under Company Law and Related Concepts, European Business Law Review, Vol. 9, Issue 5/6, 1998, p. 174.

85 **Edwards, Vanessa:** EC Company Law, Oxford University Press, 1999, p. 335; **Sousa,** p. 4.

86 **Tzouganatos,** p. 479, footnote 11 and accompanying text.

87 The case called in error as *Henriques v. Dutch West India Co.* in literature. On this argument see **Beale, Joseph H.:** Jurisdiction of Courts over Foreigners, Harvard Law Review, Vol. 26, No. 4, 1912/13, p. 290 and footnote 25; on this case see **Rammeloo,** *Corporations in PIL*, p. 16, footnote 35.

88 **O'Brien, John/ Smith, Raymond:** Conflict of Laws, Cavendish Publishing, London 1999, p. 85.

89 By this case, the Dutch company was permitted to sue in the King's Bench on evidence being given "*of the proper instruments whereby by the law of Holland they were effectually created a corporation there*."

90 **Nelson, Horace B.:** Selected Cases, Statutes and Orders Illustrative of the Principles of Private International Law as Administered in England, With a Commentary, London 1889, p. 231.

of *Baroness Wenlock v River Dee Company*[91] and *Lazard Bros v Midland Bank*[92] this theory also mentined by the English Courts.

Also the case of *C. L. Dreyfus v. Commissioners of Inland Revenue, L. L. Dreyfus v. Commissioners of Inland Revenue* indicates that the English Courts first examine, as a question of fact, what the precise status of a foreign legal entity is under the system of law under which that entity was formed. As mentioned by Lord Hanworth in this case: "Now we have here upon the facts … a clear finding that there was an entity apart from these partners constituted by French law, and we have to recognise that entity so established, and treat the body so set up as having had attributed to it the status ought to be recognized over here… we must respect the foreign entity so established in because it is not a mere matter of the *lex fori*…"[93]. In English law, the Companies Act of 1948 embraces the incorporation theory by following English Courts' established case–law[94].

The incorporation theory is also the conventional connecting factor in the United States[95]. In the United States, a corporation is generally recognised as being governed in many things by the laws of its domicile. This concept refers to the law prevailing at the place of incorporation[96]. This rule emerged in U.S. by the law of States. Because company law in the U.S. is state law. Since there are no pertinent federal rules on conflict of laws, state law also governs a conflicts situation in corporate law. However,

---

91 See **Robson, Hugh A./Hugg, J. B.:** Cases on Company Law, Sweet & Maxwell, London 1916, p. 214 *et seq.*; **Rammeloo,** *Corporations in PIL*, p. 129 and footnote 148.

92 **Rammeloo,** *Corporations in PIL*, p. 129 and footnote 149; **Milman, David:** National Corporate Law in a Globalised Market: The UK Experience in Perspective, Edward Elgar Publishing, Cheltenham 2009, p. 93; The Court declared that a dissolution under the law of the country of incorporation must be recognised in England: "*English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the their creation and continuance under and by that law*…" See **Mann, Micheal:** The Dissolved Foreign Corporation, *The Modern Law Review*, Vol. 18, No. 1, 1955, p. 8.

93 **Drucker,** p. 29; **Rammeloo,** *Corporations in PIL*, p. 129 and footnote 151.

94 **Rammeloo,** *Corporations in PIL*, p. 129; **Güral,** p. 65; **Aygül,** p. 92.

95 **Kozyris,** p. 15; **Aygül,** p. 92.

96 **Drury,** *Recognition of Foreign Corporations*, p. 182.

the states in the U.S. have a uniform collision rule and apply the laws of the state of incorporation to a foreign corporation[97].

The application of the incorporation theory by U.S. courts date backs to beginning of 1800s. This theory has been applied especially by the reason of companies under federated states. There were examples of such application in 1807 and starting in mid 19th century[98]. But the theory applied in the U.S. in today's sense starting from the end of the 19th century and beginning of the 20th century[99].

In the U.S., The Model Business Corporation Act (the 'MBCA') has been enacted for unification of the corporate laws of the States. The MBCA is a model set of law prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and followed by the corporate codes of twenty–four states[100]. The Revisied Model Business Corporations Act specifically endorses the state of incorporation rule. The MBCA §15.05(c) regulates that "This Act does not authorize this state to regulate the organizations or internal affairs of a foreign corporation authorized to transact business in this state"[101]. Additionally, the incorporation theory as called in the U.S. 'the internal affairs rule' is replicated by the Restatement (Second) of Conflict of Laws[102]. Also the U.S. Supreme Court emphasized that "a corporaiton –

---

97 **Kersting, Christian:** Corporate Choice of Law–A Comparison between the United States and European Systems and a Proposal for a European Directive, Brooklyn Journal of International Law, Vol. 28, Issue 1, 2002, p. 2.

98 For more information see **Carney William J.:** The Political Economy of Competition for Corporate Charters, The Journal of Legal Studies, Vol. 26, No. 1, 1997, p. 303 *et seq*.

99 **Charny, David:** Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the Race to the Bottom in the European Communities, Harvard International Law Journal, Vol. 32, No. 2, 1991, p. 423 *et seq*.

100 **Bebchuk, Lucian:** The Case for Increasing Shareholder Power, Harvard Law Review, Vol. 118, No. 4, 2005, p. 844.

101 See **American Bar Association,** Model Business Corporation Act Annotated, 4th Ed., Chicago 2008, §15.05(c); **American Bar Association,** Model Business Corporation Act: Official Text with Official Comments and Statutory Cross–References Revised through December 2010, Chicago 2011, §15.05(c); **Beveridge,** p. 703.

102 Restatement §302 "Other Issues with Respect to Powers and Liabilities of a Corporation (1) Issues involving the rights and liabilities of a corporation, other than those dealt with in §301 are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in 6. (2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship

except in the rearest situations– is organized under, and governed by, the law of the single jurisdiction, traditionally the corporate law of the state of its incorporation"[103].

B. Application of the Law of Incorporation

1. Determination of Place of Incorporation

As mentioned earlier, the incorporation theory promotes the idea of simplicity, predictability and legal certainty[104]. As a general rule, corporations should be registered in commercial registry. In most states, such registration is neccesary and prerequisite to acquire the legal personality[105].

It has been suggested three connecting factors in terms of determining the law of incorporation. One of them is the law of incorporation. The law that the company established in accordance with it should be deemed as the connecting factor. The second one is the place of incorporation. The company should be governed by the law in force where the company was incorporated. The last one is the place of commercial registry that the company was registered[106].

There is no uniform application to use one of these three connecting factors among states adhering the incorporation theory. For example, Switzerland and Spain prefer the place of commercial registry as connecting factor for the application of the incorporation theory. Denmark, on the other hand, uses the place of incorporation as connecting factor. It is beyond doubt that the England and the Netherlands apply the incorporation theory, but there is an ambiguity about the preference of these three connecting factor[107].

---

to the occurrence and the parties, in which event the local law of the other state will be applied." See **Kersting,** p. 3.

103 See **Kersting,** p. 4 and footnote 14.

104 **Rammeloo,** *Corporations in PIL*, p. 17–18; **Drury,** *Recognition of Foreign Corporations*, p. 165.

105 **Arat,** p. 72; **Güral,** p. 28, **Aygül,** p. 94.

106 **Aygül,** p. 94.

107 **Aygül,** p. 94.

Companies are not authorized to incorporate more than one state in States adhering the incorporation theory[108]. But in some jurisdictions any state or any number of states may incorporate an association without regard to the place of its activity or the domicil of its members. Where several states incrorporate the same association, that body has several legal personalities. The question then arises as to whether there is one or more corporations. In this case, there is a company that has been incorporated more than one state and this situation called 'multiple incorporation'. In the event of multiple incorporation, it has been argued different suggestions for determining the law applicable[109].

2. Pseudo–Foreign Companies

As mentioned earlier, under the incorporation theory, corporations are governed by the law of the state of incorporation, regardless of where corporation's headquarters are located[110]. Incorporation states accept companies which are formed in other states but which have their actual management in their jurisdiction. The legal capacity and legal personality of such companies are recognised, without a need to reincorporate. It can be, sometimes, abusive activities by way of creation of 'letterbox companies', with little substance in the state of incorporation. Founders and directors in bad faith, sometimes, use this nature of the theory for *fraude â la loi* and circumvention of the national law. For this reason, in these countries, there are exemptions to protect persons dealing with overseas companies carrying on business in their jurisdiction. Such companies have been coined as '*pseudo–foreign corporations*'[111]. The concept of pseudo–foreign corporations has been developed in the United States and is also applied in the Netherlands[112].

---

108 **Aygül,** p. 96.

109 **Foley, Henry E.:** Incorporation, Multiple Incorporation, and the Conflict of Laws, Harvard Law Review, Vol. 42, No 4, 1929, p. 519–520; **Smart, P. St. J.:** Corporate Domicile and Multiple Incorporation in English Private International Law, The Journal of Business Law, 1990, p. 127; **Aygül,** p. 96.

110 **DeMott,** p. 163.

111 These corporations sometimes called as '*quasi–foreign', 'formally foreign'* or *'pro forma foreign'* corporations.

112 **Behrens,** *Residence of Companies*, p. 22. For pseudo–foreign corporations in the Netherlands see below §1–II–D–2. See also **Sturmfels, Kai F.:** "Pseudo–Foreign Companies" in Germany–The

Pseudo–foreign corporations are enterprises essentially local in character, but incorporated in a foreign state[113]. In other words, these corporations are corporations that incorporated in another jurisdiction but has no significant contacts with that other jurisdiction. If a foreign corporation[114] has its headquarters and all or most of its shareholders in the host state where it also conductss all of its business, it is not really foreign corporation, but a pseudo–foreign corporation. In this situation, the corporation is technically foreign but essentially domestic[115].

There were several justifications on exempting pseudo–foreign corporations from local law and arguing that these corporations should be governed by the law of the chartering state, i.e. the state of incorporation[116]. Other arguments have pointed out that these companies should be considered to be domestic companies. Because in this case, the corporation is technically foreign but essentially domestic since all of their activities are in host country and there is no genuine link to the foreign country[117].

Pseudo–foreign corporations are subjected to distinctive treatment in states adhering the incorporation theory, since these corporations circumvent the national law by concentrating their activities in that state. These treatments fall into two categories: (i) application of *lex fori* to pseudo–foreign corporations in specified matters and (ii) application of special company law regimes to these corporations[118].

Centros, *Überseering* and *Inspire Art* Decisions of the European Court of Justice, in: Key Aspects of German Business Law: A Practical Manual (Michael Wendler *et al*. eds.) Berlin/Heidelberg 2006, pp. 63–68.

113 **Latty, Elvin R.:** Pseudo–Foreign Corporations, The Yale Law Journal, Vol. 65, No. 2, 1955, p. 137 *et seq*.; **Carney, William J.:** The Political Economy of Competition for Corporate Charters, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, p. 249 *et seq*.

114 The term 'foreign corporation' refers corporation that are incorporated in other jurisdiction. On foreign corporations see **Kaplan, Stanley A.:** Foreign Corporations and Local Corporate Policy, Vanderbilt Law Review, Vol. 21, 1967/68, p. 433 *et seq*.

115 **Kersting,** pp. 1, 13.

116 On this arguments see **Latty,** pp. 138–143.

117 **Andersen, Paul Krüger/Sorensen, Karsten Engsig:** Free Movement of Companies from a Nordic Perspective, Maastricht Journal of European and Comparative Law, Vol. 6, Issue 1, 1999, p. 57, and footnotes 34, 35.

118 **Aygül,** p. 99.

a. Application of the *Lex Fori*

Some of countries adhering the incorporation theory apply certain features of local corporation law to pseudo–foreign corporations on a selective basis. In this situation, *lex fori* will be applied to these corporations for specified corporate matters instead of law of the place of incorporation. Since a primary characteristic of the pseudo–foreign corporation is that its main activity takes places locally, this application offers alternative applicable law instead of law of the place of incorporation. It has been argued that restriction of the incorporation theory by way of this application does not constitute a decline from the theory[119].

If the corporation is technically foreign, but essentially domestic, activities of this corporation affects the state's and its citizens' interests. Thus, the host state will need to obtain the same information on this pseudo–foreign corporation that it has on domestic corporations. The state would, for example, want a pseudo–foreign corporation to publish annual account statements just like domestic corporations[120].

There are two justifications of applying *lex fori* to these corporations for specified corporate matters. Firstly, incorporating in another state, although all significant contacts are within the forum state, could be considered a fraudulent circumvention of the laws of the forum state. Secondly, applying forum law could be justified by a necessity to treat like cases alike. Since a pseudo–foreign corporation is technically foreign, but essentially domestic, this corporation should be governed by rules same as domestic corporations[121].

Jurisdictions that apply the liberal state of incorporation doctrine sometimes feel a need to apply some or all of their local internal affairs rule to these corporations carrying on most or all of their business within their territory[122]. For example, §2115 of California Corporations Code applies (to the exclusion of the law of the jurisdiction in which the corporation is incorporated) to corporations with "specified minimum contacts" in

---

119 **Kozyris,** p. 55; **Aygül,** p. 99; **Latty,** p. 160.

120 **Kersting,** p. 13.

121 **Kersting,** p. 14.

122 **Ebke,** *Real Seat Doctrine*, p. 1029.

California to comply with designated provisions of the Code:[123] among others, sections dealing with cumulative voiting, directors' standard of care, indemnification of directors, officers and others, limitations on distributions, inspection rights of shareholders, and dissenters' rights[124]. New York also takes a similar line with pseudo–foreign corporations[125]. New York Business Corporations Law §1317–1320 mandates the application of local law to specified internal affairs questions in corporations[126]. New York and California are not the only states that subject foreign corporations under certain conditions to provisions of their own law. Other states have similar statutes[127].

Under the Article 159 of the Switzerland's Federal Code on Private International Law[128], if the business of a company formed under foreign law is conducted in or from Switzerland, the liability of the persons acting on behalf of the company should be governed by Swiss law[129].

b. Application of Special Company Law Regimes

Another system on pseudo–foreign corporations is application of special company law regimes. Some of countries adhering the incorporation theory enacted separate laws for pseudo–foreign corporations. These laws also aimed to prevent the circumventing the national law. As mentioned earlier, it is not important for the Incorporation Theory the genuine link between the company and the place where it was incorporated.

---

123 Corporate matters that California law should be applied for foreign corporations are listed in §2115(b). Some of them listed as: (i) annual election of directors, (ii) removal of directors without cause, (iii) removal of directors by court proceedings, (iv) filling of director vacancies, (v) directors' standard of care, (vi) indemnification of directors, officers, and others. For the full list see **Kersting**, pp. 27–28.

124 **Oldham, J. Thomas:** California Regulates Pseudo–Foreign Corporations–Trampling Upon the Tramp, Santa Clara Law Review, Vol. 17, 1977, p. 85; **Newman, John Hugh:** Pseudo–Foreign Corporation in California, Hastings Law Journal, Vol. 28, 1976/77, p. 119.

125 **Kersting,** p. 25–26, and footnotes 150, 151, 152.

126 **Drury,** *Recognition of Foreign Corporations*, p. 190; **Ebke,** *Real Seat Doctrine*, p. 1029.

127 For details of these laws see, *inter alia*, **Beveridge,** p. 693 *et seq.*; **Kersting,** p. 28, footnote 155 and accompanying text; **DeMott,** p. 161.

128 English version is available at: <http://www.umbricht.ch/pdf/SwissPIL.pdf>.

129 **Karrer/Arnold/Patocchi,** p. 138; **Drury,** *Recognition of Foreign Corporations*, p. 192, footnotes 96–97 and accompanying text.

Law on Pseudo–Foreign Companies of 17 December 1997 (*Wet op de Formeel Buitenlandse Vennootschappen*) (the "WFBV") is a European example of a legislation on these companies. This statute defines pseudo–foreign corporation as capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed[130]. The WFBV imposes on these companies various obligations concerning the company's registration in the commercial register, the minimum share capital, the drawing–up, production and publication of the annual documents[131] that will be discussed in the following pages[132].

Another example is the legislation of Companies Act 2006 in the UK. Under the Act, 'overseas company' means a company incorporated outside the United Kingdom. For example, in the UK, non–incorporated companies with significant presence through a place of business or a branch, have to register in the Companies Registry and under certain reporting and disclosure obligations to ensure minimum information is provided to persons dealing with them[133]. Registration does not recreate the company; it merely subjects it to some legal obligations in the UK[134].

---

130 Article 1 of the WFBV, see Case C–167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] ECR I–10155, §22.

131 See Case C–167/01 *Inspire Art*, § 23–33.

132 See below §1–II–D–1.

133 See Part 34 (Articles 1044–1059) of Companies Act 2006. Full version of the Companies Act 2006 is available at: <http://www.legislation.gov.uk/ukpga/2006/46/data.pdf>. Part 34 of Companies Act 2006 is supplemented by the Overseas Companies Regulation 2009 No. 181. The Regulation is available at: <http://www.legislation.gov.uk/uksi/2009/1801/pdfs/uksi_20091801_en.pdf>. Similar provisions were contained in Part 13 of the Companies Act 1985. See **Prentice, Dan D.:** The Incorporation Theory–The United Kingdom, European Business Law Review, Vol. 14, Issue 6, 2003, pp. 635–641.

134 **Smart,** p. 127.

C. Advantages and Downsides of Incorporation Theory

1. Advantages of the Theory

a. Legal Certainty and Ease of Application

The incorporation theory is highly attractive for legal as well as economic reasons. But the exclusive supremacy of the law of the state of incorporation may be suggested as the only rule of certainty and easy application[135]. It is a relatively simple matter to discover where a corporation has been incorporated, and upon proof that this incorporation was validly carried out, the court of the forum applying this conflicts rule can feel free to recognize the entity[136]. It has been argued that it cannot be denied this supremacy of this theory[137]. For this reason, the law applicable to companies can be determined easily in this theory.

Supporters of the incorporation theory underline that it provides legal certainty and encourage companies to operate internationally[138]. This is another advantage of this connecting factor from private international law perspective. Also, this doctrine enables the promoters to register a corporation in the country where the company law is regarded as most favourable and in this way to choose the law that will govern the company[139].

The theory also offers predictability of the law applicable to companies for firms and their investors[140]. Through this doctrine directors, shareholders and creditors of the company can foresee which law will be applied in the event of emergence of a dispute

---

135 **Latty,** p. 139; **Rammeloo,** *Corporations in PIL*, p. 17–18; **Panayi,** *Corporate Mobility in PIL*, p. 126.

136 **Drury,** *Recognition of Foreign Corporations*, p. 168–169.

137 **Latty,** p. 140.

138 **Siems, Mathias M.:** Convergence, Competition, *Centros* and Conflicts of Law: European Company Law in the 21st Century, European Law Review, Vol. 27, Issue 1, 2002, p. 47 *et seq*.

139 **Gravir,** p. 146; **Zimmer,** *Legal Personality*, p. 277.

140 On this argument see **Reimann, Mathias:** Conflict of Laws in Western Europe: A Guide Through the Jungle, Transnational Publishers, New York 1995, pp. 15–16; **Tung,** p. 7; **Zimmer,** *Legal Personality*, p. 276.

with regard to company. Aside from this, economic trade is fostered by the lenient and liberal character of the incorporation theory[141].

b. Party Autonomy/Freedom of Choice

In corporation theory, party autonomy in corporate matters is also respected. States that support the notion of party automony in corporate law matters, in principle, favor this theory or similarly liberal choice of law doctrines[142]. This theory effectively allows the founders of a company to choose the most appropriate and less restrictive company law regime[143]. In other words, the original subscribers are free to choose where to register their company for the purposes such as minimum capital requirements, directors' liability, and employee participation. This rule signals a broadly contractual approach to company law in which the majority of its provisions aimed at assissting incorporators[144].

It must be pointed out that party autonomy in this respect is different from the party authonomy in contracts. Party autonomy is a choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern their contract that involves two or more jurisdictions[145]. In other words, contracting parties are generally free to decide the law for solving their disputes. But party autonomy in corporate law refers that founders of the company is free to choose the place of the incorporation. Founders cannot choose another law applicable to company, after establishment of the corporation in a place[146].

---

141 **Rammeloo,** *Corporations in PIL*, p. 17.

142 **Ebke,** *Real Seat Doctrine*, p. 1029.

143 **Panayi,** *Corporate Mobility in PIL*, p. 126, footnote 15; **Benedettelli, Massimo V.:** Conflicts of Jurisdiction and Conflicts of Law in Company Law Matters within the EU 'Market for Corporate Models': Brussels I and Rome I after *Centros*, European Business Law Review Vol. 16, Issue 1, 2005, p. 56.

144 **Johnston, Andrew:** EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition, Journal of Corporate Law Studies, Vol. 6, No 1, 2006, p. 74.

145 See **Note,** Conflict of Laws: "Party Autonomy" in Contracts Columbia Law Review Vol. 57, No. 4, 1957, pp. 553–576; **Zhang, Mo:** Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law, Emory International Law Review, Vol. 20, Issue 2, 2006, pp. 511–562.

146 **Aygül,** p. 105.

c. Possibility of Cross–Border Transactions

It has been accepted that the incorporation theory is more liberal than the real seat doctrine, since the former permits cross–border activities for a corporation. As mentioned earlier, a company can transfer its actual centre of administration in another State without losing its legal personality. In this prospect, the law applicable to company will not change and the law of the place of incorporation shall remain as governing law. There is no difference between outbound migration (*emigration*) and inbound migration (*immigration*) of companies in terms of the incorporation theory. The law of place of incorporation shall remain as applicable law in both of these two situations[147].

2. Downsides of the Theory

a. Delaware Effect

Under U.S. law, a company can be incorporated under the laws of any state, irrespective of where its headquarters are located. Once U.S. business owners decide to incorporate, they must select an attractive state of incorporation. The existence of a company and its dissolution are governed by the law of the state of incorporation. This law also applies to the internal affairs of the company. In other words, companies have freedom to choose where to incorporate and, as a corollary, which state law would govern their internal affairs. At the same time, companies can change the state law which applies to them by reincorporating[148] elsewhere. Foreign companies (especially out–of–state companies) are recognized according to their place of incorporation. As a result of this freedom of choice, it is argued that states compete for corporate charters in order to maximize their revenues from incorporation fees, by lowering their regulatory standards and diminishing investor protection. Delaware is one of the most attractive

[147] **Aygül,** p. 105.

[148] The concept of "reincorporation" appears to be used by American scholars as a general term for a transaction, which eventually results in the continuance of corporate activities in a corporation subject to the laws of another state. One of the most widely used methods of reincorporation appears to be when a corporation incorporates a subsidiary in another state and subsequently merges into it. See **Romano, Roberta:** The Genius of American Corporate Law, Washington D.C. 1993, p. 33–34.

destinations for companies[149]. The option to shop for corporate charters has created a competition for charters among the States[150]**.** This phenomenon is described as the Delaware Effect[151].

States profit from incorporations under their law and therefore try to attract reincorporations by repeatedly adapting their laws[152]. In the U.S., there has been debate on whether this effect is beneficial or detrimental to shareholders. Two prominent views that have evolved are the "*race to the bottom*" and "*race to the top*" views[153]. Both of two views assume that states compete for corporate charters in order to maximize the revenues derived from incorporation fees. But they differ as to the direction that such competition takes[154].

According to the "*race to the bottom*" view or race to laxity is more sceptical as to the effect produced by the competition. Proponents of this school of thought believe States compete for corporate charters not by making their corporate law more efficient, but by making it more lenient and more management friendly[155]. Founders may prefer to establish the company in a State where the most appropriate company law regime in force. For this reason, States set forth corporate law regimes in fovur of managers and

---

149 **Panayi,** *Corporate Mobility in PIL*, p. 127, footnote 22.

150 **Kersting,** p. 11.

151 **Birkmose, Hanne Sondergaard:** The Fear of the Delaware Effect–the American Demon?, in: The Internationalisation of Companies and Company Laws (Mette Neville and Karsten Engsig Sorensen eds.), DJOF Publishing, Copenhagen 2001, p. 243 *et seq.*; **Bermann, George A.:** Regulatory Federalism: A Reprise and Introduction, Columbia Journal of European Law, Vol. 2, Issue 3, 1996, p. 400.

152 **Kaplan,** p. 433 *et seq.*; **Kersting,** p. 11.

153 For a discussion on these arguments see **Cary, William L.:** Federalism and Corporate Law: Reflections Upon Delaware, The Yale Law Journal, Vol. 83, No. 4, 1974, p. 666 *et seq.*; **Bebchuk, Lucian Arye:** Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, Harvard Law Review Vol. 105, No. 7, 1992, p. 1444 *et seq.*; **Fischel, Daniel R.:** The 'Race to the Bottom' Revisited: Reflections Upon Recent Developments in Delaware's Corporation Law, Northwestern University Law Review, Vol. 76, No. 6, 1981/82, p. 913; **Winter, Ralph K.:** The "Race for the Top" Revisited: A Comment on Eisenberg, Columbia Law Review, Vol. 89, No. 7, 1989, pp. 1526–1529; **Fluck, Zsuzsanna/Mayer, Colin:** Race to the Top or Bottom? Corporate Governance, Freedom of Reincorporation and Competition in Law, ECGI Working Paper Series, WP–090/2005, p. 1, available at: <http://www.rieti.go.jp/jp/events/05091301/pdf/5–1_mayer_paper.pdf>.

154 **Dammann, Jens C.:** Freedom of Choice in European Corporate Law, Yale Journal of International Law, Vol. 29, No 2, 2004, p. 478.

155 **Dammann,** *Freedom of Choice*, p. 478.

directors of company but disadvantageous for shareholders to attract incorporations. Thus, the Delaware corporate law described as the pro–managerial law[156].

By contrast, the "*race to the top*" view, competition leads to a race for quality as corporations tend to migrate to States where the law maximizes shareholder value. According to this view, the desire to attract incorporation motivates States to adopt better law (i.e. law that develops and provides corporate arrangements that enhance shareholder value). Under this belief, at the time of initial incorporation corporations have strong incentives to choose corporate law rules that maximize shareholder welfare[157].

It is possible to come into existence of the U.S. Delaware Effect in the countries adhering the incorporation theory[158]. Corporations may prefer to be established in a state where the most appropriate company law regime in force, especailly taking into consideration the race to the bottom effect.

As it will be discussed in succeeding pages[159], by the decisions *Centros* and *Uberseering*, the CJEU made it clear that real seat is incompatible with the freedom of establishment guaranteed by TFEU. But the real seat is traditionally applied by many Member States of the EU after these decisions and there is still no uniform connecting factor for determination of law applicable to companies among them.

Recently, notably after the aforementioned decisions, there has been much debate among European states (and legal scholars) in the corporate law field regarding the possible emergence of a 'Delaware of Europe'[160]. In other words, incorporation theory

---

156 **Barzuza, Michal:** Price Considerations in the Market for Corporate Law, Cardozo Law Review, Vol. 26, No 1, 2004, p. 132, 134.

157 **Choi, Stephen J./Guzman, Andrew T.:** Choice and Federal Intervention in Corporate Law, Virginia Law Review, Vol. 87, Issue 5, 2001, p. 961–962, and footnote 4; **Birkmose,** p. 248.

158 **Drury,** *Recognition of Foreign Corporations*, p. 188.

159 See §7–II–B and §7–III–A.

160 **Charny,** p. 423 *et seq.*; **Ryan, Patrick S.:** Will There Ever Be a Delaware of Europe? Case C–167/01 Kamer van Koophandel en Fabrieken Voor Amsterdam v. Inspire Art Ltd. (E.C.J. September 23, 2003), Columbia Journal of European Law, Vol. 11, 2004/05, p. 187; **McCahery, Joseph A./Vermeulen, Erik P. M.:** Does the European Company Prevent the 'Delaware Effect'?, European Law Journal, Vol. 11, No. 6, 2005, p. 785 *et seq.*; **Dammann,** *Freedom of Choice*, p. 477–544;

involves the "risk" that it may in turn lead to competition among the Member States in terms of introducing the most permissive corporate law rules with a view to attracting as many corporations as possible. Although this phenomenon will be discussed succeeding chapters[161], it should be noted that 'Delaware Effect' will be limited, since the lack of uniform rules on determination of law applicable to companies among Member States and application of real seat in many them[162].

b. Circumvention of National Company Laws

The question of circumvention of national company law rules, especially the rules of required minimum capital, tax avoidance and employee participation plays an important role for the free movement of companies and conflict of law issues[163].

It has been argued that the incorporation theory facilitates, at least allows, the circumvention through the creation of 'letterbox companies'[164], with little substance in the state of incorporation. Such companies tend to be set up in the state of incorporation purely for tax reasons[165] or lenient company law regimes but the principal business is run outside of that state[166]. This could leave creditors and affected third parties exposed, especially if there is lack of information relating to the law applicable to a company incorporated abroad[167].

Siclari, Domenico: A Renewed "Delaware Effect" for Company Regulation in EU? The Case of European Company (SE), The Columbia Journal of European Law, Vol. 17, Issue 1, 2011, pp. 1–4.

161 See §7–II–B–3 regarding commentaries on the case law of the CJEU.

162 **Aygül,** p. 105.

163 **Andersen/Sorensen,** p. 56

164 **Teichmann, Christoph:** European Company Law–Common Principles of Competition Between Legislators?, in: European Private Law–Current Status and Perspectives (Reiner Schulze and Hans Schulte–Nolke eds.), Sellier European Law Publishers, Munich 2011, pp. 155–156; **Sasso**, **Lorenzo:** The European Company–Right of Establishment and Incorporation in the EU, in: The European Company Statute: A New Approach to Corporate Governance (Micheal Gold *et al*. eds.), Bern 2009, p. 283, **Zimmer,** *Legal Personality*, p. 277.

165 **Weber, Dennis:** Tax Avoidance and the EC Treaty Freedoms: A Study of the Limitations under European Law to the Prevention of Tax Avoidance, Kluwer Law International, The Hague 2005, p. 78.

166 **Rammeloo,** *Corporations in PIL*, p. 16; **Ebke,** *Real Seat Doctrine*, p. 1015; **Siems,** *EC Company Law in the 21st Century,* p. 55.

167 **Vaccaro, Enrico:** Transfer of Seat and Freedom of Establishment in European Company Law, European Business Law Review, Vol. 16, Issue 6, 2005, p. 1349; **Kuehrer, Norbert:** Cross–Border

The proponents of the incorporation theory have discussed the problem of circumvention, but no agreement on the solution to the problem appears to have reached. Some writers reject the need for a doctrine of circumvention or abuse of rights because the consequences of applying such doctrine are unpredictable. Others argue that the problem of circumvention should be solved by adopting foreign law rules which ensure that part of national company legislation applies to such companies[168].

D. Countries Adhering the Incorporation Theory

1. The Netherlands

The Netherlands used to apply the real seat theory. Before 1959, Dutch law had an ambivalent attidue towards governing law principles, with case law and academic writings showing adherence to both the real seat and place of incorporation doctrines[169].

Today, in the Netherlands, the principle of incorporation dominates choice of law with regard to corporate bodies. By the Act of 25 July 1959, implementing the provisions of the Hague Convention on the Recognition of Legal Entities of 1956, the Dutch legislature expressly rejected the principle of the real seat[170]. Although the Netherlands signed the Convantion on 20 September 1956 and ratified it 23 October 1959, the Convention did not enter into force because of the small number of ratifications[171]. But it must be noted that the Netherlands precisely accepted the incorporation theory by the law that ratifies the Convention. After 1959, the incorporation theory applied explicitly and unconditionally by the courts of the Netherlands[172].

Company Establishment between UK and Austria, European Business Law Review, Vol. 12, Issue 5/6, 2001, p. 111; **Panayi,** *Corporate Mobility in PIL*, p. 127.

168 **Andersen/Sorensen,** p. 57.

169 **Rammeloo,** *Recognition of Foreign Companies*, pp. 52–53

170 **De Boer, Th.M./Kotting, R.:** Chapter 15–Private International Law, in: Introduction to Dutch Law (Jeroen Chorus *et al.* eds.), 4th Revised Ed., Kluwer Law International, Alphen aan den Rijn 2006, p. 291; **Drury,** *Recognition of Foreign Corporations*, p. 179.

171 As per date, only three states had ratified the Convention (Belgium, France, and Netherlands); although two others signed it (Luxembourg in 1962, and Spain in 1957). The current status of the Convention is available at: <http://www.hcch.net/index_en.php?act=conventions.status&cid=36>.

172 **Drury,** *Recognition of Foreign Corporations*, p. 180, footnote 49.

The decision to go ahead with a national codification of private international law was taken at the end of the 1970s. For twenty–five years, Belgium, Luxembourg and the Netherlands had been trying to reach an agreement on a Uniform Benelux code of private international law (conflict of laws)[173]. There were several drafts on this issue, but none of them came into force[174].

In 1998, Conflict of Laws Act of Corporations (*Wet Conflictenrecht Corporaties*) (the 'WCC') entered into force by the date of 1 January 1998**,** replacing the 1959 Act but confirming the incorporation theory[175]. Art. 2 of WCC provides the main rule. It states that a corporation which, under its agreement or deed of establishment, has its corporate seat or registered office, or, in the absence thereof, its external centre of activities on the date of establishment in the territory of the state under the laws of which it is established, is governed by the law of that state[176].

In order to avoid abuse of the law of incorporation and circumvention of important rules of Dutch corporate law, Law on Pseudo–Foreign Companies (the 'WFBV')[177] was enacted at the same time, as complementary of WCC[178]. The aim of this Act is to prevent abuse of 'foreign' companies by choosing a 'liberal'corporation regime in order to circumvent the more strict Dutch company law. Art. 1 of WFBV provides a definition of a pseudo foreign company[179]. Arts. 2 to 6 of WFBV declare certain rules of Dutch company law applicable to corporations that fit this description. These relate to the registration of the pseudo foreign company in the Dutch commercial register, the way the company presents itself, the issued capital and equity capital, the liability of directors for debts of the company, the publication of annual accounts and reports, and

173 **Boele–Woelki, K./van Iterson, D.:** The Dutch Private International Law Codification: Principles, Objectives and Opportunities, Electronic Journal of Comparative Law, Vol. 14, No. 3, 2010, p. 1, available at: <http://www.ejcl.org/143/art143–3.pdf>.

174 **Rammeloo,** *Corporations in PIL*, p. 101.

175 **De Boer/Kotting,** p. 292.

176 **Kramer, Xandra E.:** Dutch Private International Law: Overview 1998–August 2002, Praxis des Internationalen Privat und Verfahrensrechts (*IPRax*) 2002, No. 6, p. 540.

177 **Rammeloo,** *A Dutch Perspective,* p. 57.

178 **Kramer, Xandra E.:** Dutch Private International Law: Overview 2002–2006, Praxis des Internationalen Privat und Verfahrensrechts (*IPRax*) 2007, No. 1, p. 57.

179 This means a company with legal personality incorporated under a foreign law, which conducts its business entirely or almost entirely in the Netherlands without having any further real tie with the state under whose law is was incorporated. See **Kramer,** *IPRax 2002*, p. 540.

the liability for the annual report[180]. It must be noted that for all other topics, the law of incorporation remains applicable on the basis of Art. 2 of WCC.

As a result of the *Inspire Art* ruling of the CJEU, the scope of WFBV is restricted. The Court ruled that the requirements regarding the registration in the Dutch commercial register and the minimum capital according to Dutch law for the establishment of a company with limited liability violate the freedom of establishment provided in TFEU and incompatible with Community law[181]. Seven moth later a draft for an amended version of this Act was sent to the Dutch Parliament. Since 1 June 2005, Art. 1 of WFBV stipulates that the provisions of this act are not applicable to EU Member States or a state that is party to the Agreement on the European Economic Area of 1992[182].

2. Switzerland

a. Applicable Law, Its Scope and Limitations

Switzerland also follows the incorporation theory, but used to use the criterion of the real seat of a company as its connecting factor prior to 1989[183]. Before the new private international law statute came into effect in 1989, in situations where the statutory seat of a company was different from its administrative seat, there was a tendency to declare the statutory seat (or registered office) a "fiction", and in consequence the law applicable at the administrative office was applied[184].

Later, the private international law of Switzerland is codified in the Federal Code on Private International Law (*Bundesgesetz über das Internationale Privatrecht*) (the 'CPIL') of 18 December 1987, which become effective from 1 January 1989[185]. Art. 21

---

180 **Kramer,** *IPRax 2002*, p. 540; Case C–167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] ECR I–10155, § 23–33; **Wooldridge, Frank:** The Advocate General's Submissions in *Kamer van Koophandel*: Further Emphasis on the Right of Establishment, European Business Law Review, Vol. 14, Issue 5, 2003, p. 499.

181 Compatibility of provisions of the WCC and WFBV with EU law will be discussed subsequent chapters. See §7–2–C–3.

182 **Kramer,** *IPRax 2007*, p. 57.

183 **Panayi,** *Corporate Mobility in PIL*, p. 125, footnote 2.

184 **Drury,** *Recognition of Foreign Corporations*, p. 172.

185 English (online) version of CPIL is available at: <http://www.umbricht.ch/pdf/SwissPIL.pdf>; for the English (printed) version see **Karrer, Pierre A./Arnold, Karl W.:** Switzerland's Private

of CPIL regulates ‘corporate domicile’ and ‘place of business’. Under the article, the registered office should be deemed to be the domicile in the case of companies. The registered office of a company is the place specified in the certificate of incorporation or the deed of partnership. In the absence of such designation, the registered office of the company should be the place where it is administered in fact[186].

Art. 154(1) of CPIL accepts the law of the place of incorporation as governing law of companies. It envisages that companies should be governed by the law of the state under which they are organized if they satisfy the publication or registration requirements of that law or, if there are no such requirements, if they are organized according to the law of that state. According to the Art. 154(2) of CPIL, if a company fails to meet these conditions it should be governed by the law of the state in which it is administered in fact[187].

Although the place of incorporation theory predominates, Swiss law has a number of protective devices[188]. For example, claims arising from the public issuance of equity and debt instruments by means of a prospectus, circular, or similar publications should be governed by the law applicable to the company or that of the state in which the issuance is made (Art. 156 of CPIL).

In the event of disputes emanating from company name matters, CPIL accepted the *lex fori*, i.e. the Swiss law, as governing law. The protection against infringement in Switzerland of the name or the style of a company registered in the Swiss Register of Commerce should be governed by Swiss law. In the absence of registration in the Swiss Register of Commerce, the protection of the name or the style should be governed by the law applicable to unfair competition (Art. 136) or to infringement of personality rights (Art. 132, 133 and 139) (Art. 157 of CPIL).

International Law Statute 1987–The Swiss Code on Conflict of Laws and Related Legislation, Kluwer Law and Taxation Publishers, Deventer 1989, p. 1 *et seq.*

186 **Karrer/Arnold,** p. 47.

187 **Karrer/Arnold/Patocchi,** p. 135; **Samuel, Adam:** The New Swiss Private International Law Act, International and Comparative Law Quarterly, Vol. 37, Issue 3, 1988, p. 681; **Maraia, Jean–Frederic:** Companies and Private International Law, in: Residence of Companies under Tax Treaties and EC Law (Chapter 21) (Guglielmo Maisto eds.), Amsterdam 2009, p. 795.

188 **Drury,** *Recognition of Foreign Corporations*, p. 191–912.

Art. 158 of CIPL, another protective measure, regulates that a company may not invoke restrictions on the representative power of a director, officer, or agent which are unknown under the law of the place of business or habitual residence of the other party unless the other party knew or should have known of the restrictions[189].

There is another provision that restricts the application of the law of the place of incorporation. Art. 159 of CIPL provides that if the business of a company formed under foreign law is conducted in or from Switzerland, the liability of the persons acting on behalf of the company should be governed by Swiss law[190]. This provision aims to protect Swiss creditors against the misuse of a pseudo–foreign corporation[191].

Art. 160 of PIL regulates the conditions of opening a branch of foreign corporation in Switzerland. Under the article, a company which has its registered office abroad may have a branch in Switzerland. The branch should be governed by Swiss law. Swiss law shall govern the power to represent such branch. The article also regulates the minimum legal requirements for foreign corporations to conduct business in Switzerland by way of branch. At least one person authorized to represent the branch must be domiciled in Switzerland and be registered in the Register of Commerce. The Federal Council shall fix the requirements of the mandatory registration in the Register of Commerce (Art.160 of CPIL).

b. Transfer of Companies to/from Switzerland

Transfer of companies' administrative seat regulated by CPIL in terms of two diferent ways, i.e. inbound migration (*immigration*) and outbound migration (*emigration*). Arts. 161 and 162 of CPIL regulates the inbound migration, i.e. transfer of a foreign company to Switzerland.

A foreign company may, without liquidating and reincorporating, submit itself to Swiss law if the governing foreign law so permits. The company must satisfy the

---

189 **Karrer/Arnold,** p. 143.

190 **Karrer/Arnold,** p. 143. It is worth to note that although Switzerland is not a member of the EU, the rules on freedom of establishment should also be applied to Swiss companies, in accordance with the general agreement between Switzerland and the European Community of 23 June 1999.

191 **Drury,** *Recognition of Foreign Corporations*, p. 192.

requirements fixed by the foreign law and must be able to adopt one of the forms of organization of Swiss law. The Federal Council may authorize the submission to Swiss law even if the requirements fixed by the foreign law are not met, particularly if important Swiss interests are involved (Art. 161 CPIL).

Art. 162 determines when the migrating company should be governed by the Swiss law. A company which, pursuant to Swiss law, is required to be registered in the Register of Commerce should be governed by Swiss law as soon as it proves that its center of business activities has been transferred to Switzerland and that it has adopted one of the forms of organization under Swiss law. A company which, pursuant to Swiss law, is not required to be registered in the Register of Commerce should be governed by Swiss law as soon as it has clearly chosen to be governed by Swiss law, has a sufficient relationship wit h Switzerland, and adopts one of the forms of organization under Swiss law (Art. 162 of CPIL).

Art. 163 of CPIL regulates the outbound migration, i.e. transfer of a company from Switzerland to a foreign country. Therefore, a Swiss company may, without liquidating and reincorporating, submit itself to a foreign law if the conditions fixed by Swiss law (both substantive law and conflict rules) are satisfied and if the country of arrival permits such identity–preserving reincorporation.

III. THE REAL SEAT THEORY

The real seat theory which is based on a material criterion dates back to the middle of nineteenth century and is adopted by a number of European civil law countries[192]. The theory finds its basis on nation state theories developed in France and Germany[193] primarily to keep French companies from reincorporating in Britain and Belgium[194]. In nineteenth century, courts and scholars in Germany and other European countries a

192 **Rammeloo,** *Corporations in PIL*, p. 11; **Panayi,** *Corporate Mobility in PIL*, p. 128; **Cerioni, Luca:** EU Corporate Law and EU Company Tax Law, Edward Elgar Publishing, Cheltenham 2007, p. 70; **Tzouganatos,** p. 480.

193 **Werlauff, Erik:** The Main Seat Criterion in a New Disguise–An Acceptable Version of the Classic Main Seat Criterion?, European Business Law Review, Vol. 12, Issue 1/2, 2001, p. 2.

194 **Cheffins, Brian R.:** Company Law: Theory, Structure and Operation, Clarendon Press, Oxford 1997, p. 430; **Charny,** p. 428–456.

wide variety of principles and rules to solve conflict corporate laws problems. It has been suggested the place of formation, the nationality of the controlling shareholders or of the directors, the company's central management and control, the central administration, the company's business establishment[195].

The real seat doctrine (*Sitztheorie*) recognizes the incorporation or formation and the accompanying legal status by reference to the law of the jurisdiction where the entity maintains its real seat (*siège réel*)[196]. These jurisdictions are essentially based on the idea that the company should have a genuine link with the state of whose legal system it claims application[197]. If no such link exists, the company will not be allowed to qualify under its jurisdiction[198]. Because the real seat doctrine is based upon the assumption that the state in which an entity has its real seat is typically the state that is most strongly affected by the activities of the entity and, therefore, should have the power to govern the internal affairs of that entity[199]. In other words, the real seat theory looks for a real connection between the corporation and the legal system upon which it depends for formation and the establishment of legal personality[200]. Under this regime, a corporation must be incorporated in, and be subject to the laws of, the state where it has its "real seat"[201].

Under this doctrine, a company has to register or incorporate in the country where it has its centre of administration in order to be recognized[202]. In jurisdictions adhering the real seat system, it is not possible for a company incorporation/registration and centre of administration in different places. A company which is incorporated in one state but

---

195 **Ebke,** *Real Seat Doctrine*, p. 1021.

196 **Fibbe, Gijsbert Karel:** EC Law Aspects of Hybrid Entities, Amsterdam 2009, p. 25.

197 **Rammeloo,** *Corporations in PIL*, p. 14

198 **Wymeersch,** *Transfer of the Seat*, p. 667; **Werlauff,** *Common European Company Law*, p. 171.

199 **Ebke, Werner F.:** Not–for–Profit Organisations, Conflicts of Laws and the Right of Establishment under the EC Treaty, in: Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts (Pieter Bekker *et al*. eds.) Cambridge University Press, New York 2010, p. 304; **Zimmer,** *Legal Personality*, p. 275; **Roth,** *Recognition of Foreign Companies*, p. 31; **Panayi,** *Corporate Mobility in PIL*, p. 128; **Tzouganatos,** p. 480.

200 **Drury,** *Recognition of Foreign Corporations*, p. 182.

201 Thus, a company that is incorporated in England and maintains its registered office in London, for example, but moves its head office or centre of administration to Bonn will be governed by German law since Germany follows the real seat theory.

202 **Johnston,** p. 72; **Panayi,** *Corporate Mobility in PIL*, p. 128.

which has its administrative seat in another state that adheres the real seat theory may not be recognised as a company in the real seat state. As a result, limited liability may not be available and members of that company may be personally liable for the debts of the company[203]. This theory affects both companies incorporated under a foreign system of law but having their real seat on domestic territory, and companies incorporated under domestic law having their management and control office abroad[204].

A. Determination of the "Real Seat"

The criteria for determining the "real seat" of a corporation may differ among jurisdictions. For this reason, it is important to determine the concept of the real seat. But it is sometimes difficult to determine the company's real seat, especially if the company has no active business at the time of the relocation. However, under this theory, a company can have only one head office, or seat.

It has been offered different criterias to determine the theory. For example, the real seat can be defined such as the center of the administration (the "headquarters") of the corporation, the place where the directors are located (which might be a way to define the headquarters), or the place where the "majority" of the business activities are conducted[205].

Another argument defines the seat in two alternative ways. The first regards the corporation is centered at the place at which it carries on the manufacturing, trading, or other commercial activities (*siège d'exploitation*). The second focuses on the corporation's place of central administration (*siège réel*)[206]. But generally accepted that the term refers the center of the administration and/or the place where most of the corporate affairs are performed[207]. In this sense, "centre of administration" became the

---

203 **Rammeloo,** *Corporations in PIL*, pp. 11–12.

204 **Rammeloo,** *Corporations in PIL*, p. 12.

205 **Ventoruzzo, Marco:** "Cost–Based" and "Rule–Based" Regulatory Competition: Markets for Corporate Charters in the U.S. and the EU, New York University Journal of Law and Business, Vol. 3, Issue 1, 2006, p. 134.

206 **Tzouganatos,** p. 480.

207 **Rothe, Nicole:** Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the *Überseering* Case, American University

determinate connecting factor with regard to determining the law applicable to a company[208]. In other words, the term 'real seat' (*siège réel*) usually corresponds to the centre of administration.

The real seat or centre of the administration of the company is not the place provided in the bylaws or any of the statutory documents of the company. In the event of the statutory seat and centre of the administration of the company in same place, it would not any problem for determining this connecting factor. If there is no real link between the company and the place mentioned in the statutes of company, determination of real centre of administration of the company become crucial. Because under this theory, there must be a genuine link between the company and jurisdiction[209].

As mentioned previously, the concept of "seat" with regard to the real seat theory refers the centre of administration of the company. In this sense, this question must be answered: Where is the actual/real centre of administration of the company? The real seat of a company has been described as connection of a company to the jurisdiction where the company has its "headquarters"[210], to the place where the "final decisions"[211] are taken or to the location of "brain of the enterprise"[212].

Law Review, Vol. 53, No 5, 2004, p. 1110; **Wymeersch,** *Transfer of the Seat*, p. 661; **Ventoruzzo,** p. 96, footnote 10; **Johnston,** p. 71.

208 **Ebke,** *Real Seat Doctrine*, p. 1022; **Drury,** *Recognition of Foreign Corporations*, p. 174; **Werlauff,** *Main Seat Criterion*, p. 2.

209 **Hopt, Klaus J. *et al.*:** The European Foundation: A New Legal Approach, Cambridge University Press 2006, p. 190; **Blumberg, Phillip I. *et al.*:** Blumberg on Corporate Groups–2009 Supplement, Aspen Publishers 2009, No. 48–7; **Wymeersch,** *Transfer of the Seat*, p. 667; **Werlauff,** *Common European Company Law*, p. 171.

210 **Stith, Clark D.:** Federalism and Company Law: A "Race to the Bottom" in the European Community, Georgetown Law Journal, Vol. 79, 1991, p. 1600, and footnote 78. For example under Belgian Companies Act (*Code des Sociétés*), a company the real seat of which is in Belgium is subject to the Belgian law, even it has been incorporated abroad. Belgium subscribes the real seat theory and the real seat theory connects a company to the jurisdiction where the company has its headquarters. The headquarters is the place where the important decisions are taken, the board of meets, the general meeting is convened and the offices are located. See, **van der Elst, Christoph.:** Belgium, in: The European Company–all over Europe: A State–by–State Account of the İntroduction of the European Company (Krzysztof Oplustil and Christoph Teichmann (Eds.), De Gruyter Recht, Berlin 2004, p. 38.

211 **Stith,** p. 1600.

212 **Stith,** p. 1600.

The concept of real seat has been described in different forms by different jurisdictions. As it will be discussed in the next pages, German courts defined the term real seat as referring to the place where "the fundamental business decisions by the managers are being implemented effectively into day to day business activities"[213].

The actual/real centre of administration can be regarded as the place where the board of directors, general meetings, the boards of auditors congregate and perform their duties and decisions concerning the internal affairs of the company. In other words, it is possible to define the real seat as the place where the basic decisions of the management are effectively implemented into business.

As to the scope of the applicable law, there is not much discrepancy between the real seat theory and the incorporation theory: once the proper law of the company is determined, this legal system should be applied whenever possible[214].

Another important aspect of this theory is determination of the real seat in case of groups of companies and particularly in multinational groups. Because multinational corporations (i.e. companies increasingly getting involved with several legal orders) are organized and pursuing commercial activities by way of parent–subsidiary relationships in many countries. The flexibility of the multinational enterprise requires the consideration of various factors in order to avoid results which do not reflect economic reality. Therefore, courts of the same country may operate with different criteria, depending upon the facts of each particular case[215]. Because a multinational enterprise is not simply a single local or foreign company, but rather it is a group of affiliated entities[216].

---

213 **Drury,** *Recognition of Companies*, p. 175; **Ebke,** *Real Seat Doctrine*, p. 1022, footnote 53; **Ryan,** p. 189, footnote 10; **Ebke,** *Conflict of Corporate Laws*, p. 121, footnote 10; **Roth,** *Recognition of Foreign Companies*, p. 32; **Ebke,** *Not–for–Profit Organisations*, p. 304; **Behrens, Peter:** Centros and the Proper Law of Companies, in: Capital Markets in the Age of the Euro: Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague 2002, p. 506; **Stith,** p. 1605.

214 **Rammeloo,** *Corporations in PIL*, p. 241.

215 **Tzouganatos,** p. 480.

216 **Hadari,** *Choice of Law and Nationality,* p. 34.

B. Advantages and Downsides of Real Seat Theory

1. Advantages of the Theory

a. Protection of Stakeholders' Interests

There are different certain interest groups that can affect or be affected by the actions of the company. States need to protect these certain interests, such as the interests of minority shareholders, employees, creditors or other stakeholders, especially in the context of large publicly–held corporations[217]. It has been argued that the real seat theory reconciles interests of these different stakeholders[218] and states that recognize these protective measures will favor this doctrine[219].

Application of the real seat theory protects the rights of minority shareholders, especially in publicly–held corporations, creditors and employees of the company. Because the aim of the real seat theory is to effectuate material, economic and social values of the country having the most significant relationship with a particular company[220]. In the view of the advocates of the real seat theory, the incorporation theory facilitates the creation of mere "letterbox companies" with the consequence that public authorities are not able to control activities properly[221].

It has been claimed that the 'real seat' doctrine prevents a "Delaware Effect"[222] in Europe by applying the jurisdiction which is most concerned by the activities of the company. As mentioned earlier, "Delaware Effect" allows circumvention of statutory national legislation and choice of law less restrictive with regard to protection of certain interest groups. Thus the freedom to choose the law applicable to a company is restricted by the real seat theory and it hinders circumvention of national company

---

217 **Ebke,** *Real Seat Doctrine*, p. 1028; **Lowry, John**: Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company Law, Cambridge Law Journal, Vol. 63, No 2, 2004, p. 332.

218 **Tekinalp,** *Tanınma*, p. 211.

219 **Ebke,** *Real Seat Doctrine*, p. 1028.

220 **Ebke,** *Real Seat Doctrine*, p. 1028.

221 **Wymeersch,** *Transfer of the Seat*, p. 662.

222 **Aygül,** p. 84.

laws. For this reason, many European countries have used the real seat doctrine in order to prevent corporations from circumventing their domestic company law.

The real seat doctrine is also important for the system of co–determination of workers in German law. German scholars often cite the rules on employee participation as the main argument for the real seat theory. While shareholders and managers tend to resent codetermination, the real seat doctrine does not allow them to easily avoid the relevant laws by reincorporating elsewhere[223].

b. Protection of Public Interest

While the incorporation theory is subordinated to the principle of party autonomy, the real seat is not. Contrary to the incorporation theory, this doctrine excludes party authonomy by using the real seat as an objective and mandatory connecting factor[224]. Countries adhering the real seat theory are able to exercise more effective control over the entities that pursuing activities in their jurisdictions[225]. Therefore this theory tends to be preferred by countries that recognize a political, or even a constitutional, need to protect public interests[226]. The real seat rule reflects more regulatory rationale for company law[227] and countries apply this connecting factor in order to prevent incorporators from circumventing their mandatory rules on company law.

The real seat theory is often characterized a *protection theory*[228] for local interests. The policiy behind the doctrine is not only to safeguard the interests of stakeholders abovementioned, but also the public interest and interests of the state in general where the company's real seat is located[229]. Since the state in which a company has its real

---

223 **Dammann, Jens C.:** The Future of Codetermination after Centros: Will German Corporate Law More Closer to the U.S. Model?, Fordham Journal of Corporate and Financial Law, Vol. 8, Issue 2, 2003, p. 611.

224 **Mäntysaari, Petri:** Comparative Corporate Governance: Shareholders as a Rule–Maker, Springer, Berlin/Heidelberg 2005, p. 53.

225 **Wymeersch,** *Transfer of the Seat*, p. 662; **Vaccaro,** p. 1350; **Rammeloo,** *Corporations in PIL*, p. 12.

226 **Panayi,** *Corporate Mobility in PIL*, p. 130.

227 **Johnston,** p. 74.

228 **Roth,** *Recognition of Foreign Companies*, p. 31.

229 **Zimmer,** *Legal Personality*, p. 275.

seat is typically the state that is most strongly affected by the activities of the company, the protection of public interest should be considered. Thus, the real seat doctrine gives effect to the law of the state that has the most significant relationship to a corporation[230].

There are many imperative company law rules that must be followed by the founders of the company. As mentioned above, the principle of party autonomy is not valid for establishment dealings of the company. Every state has their own statutory rules on company law matters and founders may not go beyond these limitations. There rules are shaped in accordance with the States their own legal, economic and social principles connected to public interest.

c. Equal/Uniform Treatment and Fair Competition

The real seat theory stands for equal/uniform treatment and the protection of fair competition towards companies[231]. This doctrine requires that all corporations having their principal place of business, or real seat, in particular state be incorporated under that state's law. It has been argued that the doctrine creates level playing field by imposing the same company law rules on all companies and especially rules aimed at protecting shareholders, creditors, employees and other stakeholders[232]. Also it prevents companies from evading that state's legal controls through incorporation with lenient company law regimes. By adopting the real seat doctrine a state ensures that equal treatment is given to all companies having their real seat within its jurisdiction with regard to principles and rules on company law[233].

---

[230] **Ebke,** *Real Seat Doctrine*, p. 1016; **Rothe,** p. 1111; **Ebke,** *Not–for–Profit Organisations*, p. 306; **Rammeloo,** *Corporations in PIL*, p. 14.

[231] **Ebke,** *Real Seat Doctrine*, p. 1027; **Rammeloo,** *Corporations in PIL*, p. 14.

[232] **Kuehrer,** p. 112; **Stein,** *Recognition of Companies,* p. 1333; **Rothe,** p. 1111.

[233] **Ebke,** *Real Seat Doctrine*, p. 1028; **Panayi,** *Corporate Mobility in PIL*, p. 130

2. Downsides of the Theory

a. Ambiguity on the Determination of 'Real Seat'

The real seat theory has been criticized because of difficulties for determining the real seat of a corporation[234]. It has been argued that the ambiguity[235] of the real seat (or head office) was one of the major disadvantages of the real seat theory[236]. As mentioned previously, different concepts exist in different countries and different terms are used to determine the real seat such as head office, central management, control of residence[237]. If the company has no active business at the time of the relocation, it would be also difficult to determine the company's real seat. For this reason, the application of the real seat theory may cause legal uncertainty and unpredictability for the law applicable to companies.

The application of the theory is further complicated, because the EU Member States applying the real seat theory interpret the concept differently. Today, most Member States applying the real seat theory appear to define the head office as the management seat. In the event of all the administrative and supervisory bodies situated within the same country of the statutory seat and real seat of a company located in the same place it seems to be no problems. But in a world of multi–state activities, the abovementioned real seat rule implies a certain degree of impresicison, especially where there is a de facto double–seat of administration[238].

---

234 See "A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts", Chapter 3.5. Corporate Restructuring and Mobility, pp. 32–33, available at: <http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf>.

235 This ambiguity of the concept of "seat" can be found also in other fields; for instance, the English version of the Takeover Directive uses the wording "registered office"; on the contrary, the German version of the same directive adopts the wording "*Sitz*" (Seat). [Article 4(2) of the Directive 2004/25/EC on Takeover Bids], See OJEU (L 142), 21.4.2004, p. 12. See **Mucciarelli, Federico M.:** Seat's Transfer and State of Origin–Imposed Limits to Companies' Mobility, available at SSRN: <http://ssrn. com/abstract=982238>, p. 3, and footnote 8.

236 **Rammeloo,** *Corporations in PIL*, p. 14.

237 **Pannier,** p. 13.

238 **Roth, Wulf–Henning:** From Centros to Überseering: Free Movement of Companies, Private International Law, and Community Law, International and Comparative Law Quarterly, Vol. 52, Issue 1, 2003, p. 181, footnote 22.

b. Hindrance for the Mobility of Companies

As it will be discussed in subsequent pages, transfer of seat of companies in the EU is one of the most controversial issues. It has been argued that the real seat theory foreclose the mobility of companies in the Internal Market of the EU and it constitutes an obstacle to the free movement of corporations[239]. The real seat theory was buttressed by two constraints on corporate mobility. In the entry case, if a corporation moved into a real seat jurisdiction without reincorporating under that jurisdiction's law, the organization is no longer considered to be a legal subject and would be treated as a partnership[240]. The second possible consequence is that the managers are deprived of the most important company benefit, namely restricted/limited liability[241]. Moreover, the company could even be confronted with nullity, when 'real seat' State denies its existence[242].

For existing corporations seeking to reincorporate (the exit case), the real seat doctrine was even more burdensome because transfers of place of incorporation were treated as liquidations of the corporation, meaning that all capital gains built up in its stock became immediately taxable to the shareholders[243]. Problems relating real seat theory on the issue of corporate mobility will be discussed subsequent pages in context of the case–law of the CJEU.

---

239 **Rammeloo,** *Corporations in PIL*, p. 13, and footnote 21; **Johnston,** p. 72; See also "A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts", p. 32–33, available at: <http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf>.

240 For example, in Germany, the loss of legal personality does not mean that the corporation is non–existent according to German law. Such foreign companies are treated and may qualify as general partnerships and the members (shareholders) are personally liable for the company's debts. These foreign companies tend to be classified as entities which under German law do not require registration for their existence; for example, non–commercial partnerships (*Gesellschaft bürgerlichen Rechts*), commercial partnerships (*offene Handelsgesellschaft*) or pre–incorporation companies (*Vorgesellschaft*). See **Roth,** *From Centros to Überseering*, p. 183.

241 **Rammeloo,** *Corporations in PIL*, p. 11.

242 **Rammeloo,** *Corporations in PIL*, p. 15.

243 **Angelette, Benjamin:** The Revolution That Never Came And The Revolution Coming–*de Lasteyrie du Salliant, Marks & Spencer, Sevic Systems* and the Changing Corporate Law in Europe, Virginia Law Review, Vol. 92, Issue 6, 2006, p. 1194; **Dammann,** *Freedom of Choice*, p. 483; **Roth,** *From Centros to Überseering*, p. 179; **Ebke,** *Real Seat Doctrine*, p. 1016; **Fibbe,** p. 41; **Rammeloo,** *Corporations in PIL*, p. 15.

C. Countries Adhering the Real Seat Theory

1. Germany

a. Current Approach

In Germany, there is no statutory regulation on which law should apply to foreign companies. In other words, the conflict of corporate laws is not regulated by domestic or international statute. The Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*) (the 'EGBGB') that provides rules on determining the applicable law in private law matters does not contain any provision on conflicf of corporate laws[244].

Additonally, there is no any international treaties multiliteral or bilateral that require Germany to apply specific conflict of corporate laws principle. The Hague Convention of 1951 on the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions was not signed by Germany and it has not entered into force for other states either[245]. Although the FCN Treaties, to which Germany is a party, has provisions on mutual recognition of companies but do not require German courts to apply a certain choice of law corporate law rules. For example, the Friendship Treaty of October 29, 1954 between Germany and United States do not adress the any rules on conflict of corporate laws. Under the Treaty, Germany recognizes a U.S. corporation when it moves its head office from one U.S. state to another, as well as when the corporation moves its head office to Germany[246]. In recent years German courts began to recognize that the Friendship Treaty of 1954 may have an impact on the conflict of laws principles of the contracting states[247].

---

244 **Ebke,** *Real Seat Doctrine*, p. 1017.

245 **Ebke,** *Real Seat Doctrine*, p. 1018, footnote 27. The current status table of the Convention is available at: <http://www.hcch.net/index_en.php?act=conventions.status&cid=36>.

246 It has been argued that the treaty makes the real seat theory inoperative. See **Ebenroth, Carsten Thomas:** Gaining Access to Fortress Europe–Recognition of U.S. Corporations in Germany and the Revision of the Real Seat Rule, The International Lawyer, Vol. 24, 1990, p. 469.

247 **Ebke, Werner F.:** Conflicts of Corporate Laws and the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, in: Balancing of Interests: Liber Amicorum Peter Hay zum 70. Geburtstag, Frankfurt am Main 2005, p. 125, and footnote 38; **Ebenroth,** *Recognition of US Corporations,* p. 469.

Historically, the German courts applied the real seat theory (*Sitztheroie*)[248] which focused on the state in which the company had its actual seat. The courts determined this according to the centre of the corporate life of the company. The essential criterion being where the company was managed from. At the beginning of the 20th century, the then–highest court in Germany, the *Reichsgericht* ruled that the internal affairs of a corporation are governed by the law of the state in which the corporation has its seat[249]. This approach followed by the German Supreme Court's (*Bundesgerichtshof*) (the 'BGH') judgment of July 11, 1957[250]. German courts defined the term real seat as referring to the place where "the fundamental business decisions by the managers are being implemented effectively into day–to–day business activities"[251].

The principle of real seat has applied by the BGH over the last fifty years without exception. In applying this doctrine, the courts do not distinguish between corporations formed in another member state of the EU and companies incorporated elsewhere[252].

In addition to the abovementioned rationales to prefer the real seat[253], German co–determination system is another important factor on this preference. Under the German Stock Corporation Act (*Aktiengesetz*) (the 'AktG'), German public corporations have a two–tier board structure (management board and supervisory board). The managing board is responsible for day–to–day operations. But the supervisory board is, *inter alia*, responsible for appointing and supervising the managing board and 50% of the supervisory board members have to be elected by workers' representatives[254].

---

248 **Rammeloo,** *Corporations in PIL*, p. 175; **Englisch, Joachim:** Germany: Preliminary Questions of Company Law, in: Residence of Companies under Tax Treaties and EC Law (Chapter 16) (Guglielmo Maisto eds.), Amsterdam 2009, p. 468; **Pannier,** p. 13.

249 **Ebke,** *Real Seat Doctrine*, p. 1022, footnote 50.

250 **Ebke,** *Real Seat Doctrine*, p. 1022, and footnote 52; **Stein,** *Recognition of Companies,* p. 1330.

251 **Drury,** *Recognition of Companies*, p. 175; **Ebke,** *Real Seat Doctrine*, p. 1022, footnote 53; **Ryan,** p. 189, footnote 10; **Ebke,** *Conflict of Corporate Laws*, p. 121, footnote 10; **Roth,** *Recognition of Foreign Companies*, p. 32.

252 **Ebke,** *Real Seat Doctrine*, p. 1023.

253 See §1–III–B–1.

254 **Dammann, Jens C.:** The Future of Codetermination after Centros: Will German Corporate Law More Closer to the U.S. Model?, Fordham Journal of Corporate and Financial Law, Vol. 8, Issue 2, 2003, pp. 619, and footnotes 51–53; **Johnston,** pp. 92–94.

b. Enactment of MoMiG

For many years, Germany has failed to recognized that the CJEU case–law could have casted doubts on the compatibility with the European law of the real seat doctrine. However, the German government has recently enacted a reform with a view to provide a more company–friendly environment within which companies can operate.

Germany introduced this reform through the adoption of the *Gesetz zur Modernisierung des GmbH–Rechts und zur Bekämpfung von Missbräuchen* (MoMiG)[255]. The MoMiG abolishes the requirement both with regard to the GmbH and the AktG according to which the real seat and the statutory seat of the company have to coincide and be located in Germany. Under the new regime, German incorporated GmbHs and AktGs can dissociate their registered office from their head office and locate the latter even outside Germany if they so wish while retaining their original legal personality under German law. It is hoped that by allowing German businesses more structural flexibility the position of Germany in the regulatory competition in the EU will be strengthened[256].

Thus it is no longer necessary that the administrative centre of a German private company should coincide with the place where its registered office is situated; it appears this may be outside Germany. The new rule has probably been influenced by the CJEU decisions in such important cases as *Überseering* and *Inspire Art.* As it will be discussed, these decisions make it clear that EU Law permits companies having their registered office in one Member State to conduct their operations in another member state and to establish branches there. This simplification of German law is partially intended to enable German GmbHs to compete with other private companies which carry on substantially all their business in Germany and other countries, and may

---

255 See **Aydoğan, Fatih:** Federal Almanya'da Limited Şirketler Kanunu'nda (GmbHG) Yapılan Değişiklikler–Yenilikler (MoMiG), Banking and Commercial Law Review, September 2009, Vol. XXV, No. 3, p. 400 *et seq.*

256 The MoMiG entered into force on the 1st November 2008 and apparently allows for GmbH's, and also AG's, incorporated in Germany to have their administrative seat abroad. By abandoning the mandatory requirement of concurrence of statutory seat and seat of the head office in the same place, both German GmbH's and AG's now have the opportunity to move their head office into a different State.

encourage German companies to operate their foreign subsidiaries as German GmbHs[257].

c. Proposal on Amendment of the EGBGB

The German federal government is planning to revise comprehensively the regulations applying to companies in Germany with a foreign legal constitution. On 10 September 2003, the German Council for International Private Law (*Deutscher Rat für Internationales Privatrecht*) decided to set up a special committee for conflicf of law rules on company law. The task of this Committee was to draw up a psoposal for legislation for international company law in light of the case law of the CJEU. By the date of 9 February 2006 the Committee has prepared a proposal that envisages amandment of the EGBGB[258].

On 7 January 2008, the Federal Ministry of Justice (*Bundesministerium der Justiz*) published a draft on international corporate law on the basis of the abovementioned proposal. The draft supplements German private international law consolidated in EGBGB with legal relations for companies, associations and legal entities which are involved in cross–border transactions[259].

The draft consolidates the incorporation theory in German conflict of laws stipulations. The draft contributes considerably to the simplification of private international law of companies. Under the Art. 10(1) of Draft EGBGB, all companies and other legal entities will be subject to the law of the state in which they were formed. The decisive criterion will be the place where the company has been registered in a public register. In the absence of such a registration, the law of the state in which the company is

---

[257] On this argument, see **Wooldridge, Frank:** Recent Reforms of the German GmbH, Company Lawyer, Vol. 31, Issue 2, 2010, p. 60.

[258] For the English translation of the Proposal of the *Deutscher Rat für Internationales Privatrecht* for European and National Legislation in the Field of International Company Law see **Sonnenberger, Hans Jürgen** (Ed.), Vorschläge und Berichte zur Reform des Europäischen und Deutschen, Tübingen 2007, pp. 65–122.

[259] For the ministerial draft, see **Behrens, Peter:** From "Real Seat" to "Legal Seat": Germany's Private International Company Law Revolution, in: Resolving International Conflicts–Liber Amicorum Tibor Várady, (Peter Hay *et al*. eds.), Central European University Press, Budapest 2009, p. 53 *et seq*.

organized shall apply[260]. The draft goes beyond the requirements resulting from the freedom of establishment in EU law by extending the applicability of the incorporation theory to companies from non–EU states[261].

Art. 10 of Draft EGBGB does not distinguish between 'internal' and 'external' company law matters; therefore the rule applies to all matters that may be characterized as company law matters[262]. Also scope of applicability of the proposed regulations is very extensive. It will apply to companies and partnerships under both civil and commercial law, as well as cooperatives, associations, foundations and other legal entities of civil law[263].

Art. 10(2) of Draft EGBGB lists the situations that should be governed by the law of incorporation[264]. The law of incorporation will apply, for example, to the requirements regarding the number of shareholders, minimum capital[265], the permissible means of raising capital, winding–up and liquidation of companies. In contrast, legal questions which are not directly related to company law would still have to be assessed according to German law. For example, questions related to procedural law, i.e. the capacity to sue and be sued and the capacity to take legal action is still determined pursuant to *lex fori*. The procedural law which applies at the register's location shall also apply to the registration process.

It must be noted that the draft bill of Federal Ministry of Justice of Germany a totally new approach to the conflicts of law issues relating to companies. Because replacing the incorporation doctrine instead of traditional real seat doctrine is a major step

---

260 For English translations of the Art. 10 of the Committee proposal and of the ministerial draft respectively see **Sonnenberger,** p. 71–72; **Behrens,** *From "Real Seat" to "Legal Seat"*, p. 54.

261 **Behrens,** *From "Real Seat" to "Legal Seat"*, p. 56.

262 **Behrens,** *From "Real Seat" to "Legal Seat"*, pp. 56–57.

263 **Sonnenberger,** p. 67. It must be noted that the scope is very close to Art 54(2) of TFEU that defines "companies and firms" as "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non–profit–making".

264 For the translation of article see **Behrens,** *From "Real Seat" to "Legal Seat"*, pp. 54–55.

265 The German Act on Private Limited Companies (the 'GmbHG'), with its relatively high minimum capital requirements (currently EUR 25,000) would the no longer apply to foreign companies.

towards international mobility of companies[266]. But is has not been enacted yet, due to the workings on the proposal of the Fourteenth European company law Directive[267] on cross–border seat transfers[268].

2. France

The real seat (*siège réel*) criterion was introduced in France in the 1860s. It is established after discussions about French companies emigrating to the legally more clement climate in Belgium in the 19th century[269]. It has been also argued that it became fashionable for French corporations in the second half of this century to incorporate in the United Kingdom or in Switzerland and that this trend was the decisive reason for the triumph of the real seat doctrine in French law[270].

Domestic legal base of the theory is Art. 3 of Law No**.** 66–537 of July 24, 1966 on commercial companies[271]. It states that "companies whose seat is situated in French territory are subject to French law." Also the article stipulates that third parties can rely on the statutory seat, but this cannot be relied on by the company against them it its real seat is situated in another place[272]. The same concept is used in French conflict of laws to determine the law governing the company[273]. The theory of s*iège réel*, or real seat doctrine, requires that a corporation must be incorporated in the place where its central management decisions are made and implemented, and places the authority to regulate the corporation in the jurisdiction where the real seat is located[274].

---

266 **Behrens,** *From "Real Seat" to "Legal Seat"*, p. 65.

267 For detailed explanations on the draft Fourteenth European company law Directive see Chapter Three, §6 and succeeding pages.

268 **Behrens,** *From "Real Seat" to "Legal Seat"*, p. 62.

269 **Buxbaum, Richard M./Hopt, Klaus J.:** Legal Harmonization and the Business Enterprise Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A., De Gruyter Berlin/New York, 1988, p. 174; **Angelette,** p. 1194.

270 **Dammann,** *Freedom of Choice*, p. 526, and footnote 249.

271 For details of the Law, see **Rawlings, Boynton M.:** The French Company Law: Choice of Corporate Form Available to the Foreign Investor, The Business Lawyer, Vol. 30, 1974/75, p. 1251 *et seq*.; **Mesnooh, Christopher Joseph:** Law and Business in France: A Guide to French Commercial and Corporate Law, Kluwer Academic Publishers, Dordrecht 1994, p. 36; **Fibbe,** p. 26.

272 **Rammeloo,** *Corporations in PIL*, p. 201; **Drury,** *Recognition of Foreign Corporations*, p. 175.

273 **Drury,** *Recognition of Foreign Corporations*, p. 174–175.

274 **Angelette,** p. 1194, footnote 19.

Art. 210–3 of the French Commercial Code (*Code de Commerce*) provides that companies having their corporate seat in France subject to French company law. The expression "corporate seat" is not defined in the Code. But it is generally said that the French rule to determine the governing law of companies is based on the place of effective management. It has been noted that French courts do not apply strictly this principle[275].

Art. 1837 of the French Civil Code (*Code Civil*) is another legal basis of this principle. Under this provision, every firm whose registered place of business (*siege social*) is located on the French territory is subject to the provisions of French law[276]. The *siege social* generally refers to the administrative seat of the company[277].

There was a decision that taken by the Court of Appeal (*Cour d'appel*) of Paris on 19 March 1965 concerning a dispute on *siège réel* [278]. The defendant, Ottoman Bank was established under a concession agreement of 1863 between Ottoman State and a group of French and English financiers[279]. Under the Bank's statautes the Board of Directors was constituted by a Committtee of twenty–four members (twelve English and twelve French). These two national groups sat in London and Paris respectively, and were elected for a period of five years by General Meeting, which took place in London.

---

275 It has been noted that French courts have limited the scope of the effective corporate seat rule to fraudulent cases, where the founders of a foreign company had deliberately chosen a foreign place of incorporation to carry out operations in France. See **De Boynes, Nicolas:** France: Companies and Private International Law, in: Residence of Companies under Tax Treaties and EC Law (Chapter 15) (Guglielmo Maisto eds.), Amsterdam 2009, pp. 441–442.

276 English translation of French Civil Code is available at: <http://195.83.177.9/upl/pdf/code_22.pdf>.

277 **Panayi,** *Corporate Mobility in PIL*, p. 128, footnote 25.

278 For the decision of the Court of Appeal of Paris *Balkalian and Hadjithomas v. Ottoman Bank*, see **Lauterpacht, Elihu** (Ed.)**:** International Law Reports, Vol. 47, Butterworth & Co., London 1974, p. 216 *et seq*.

279 It was to operate as the State Bank of the Ottoman State. The Concession Agreement required that the Bank's registered office be established at Istanbul. At the date of 11 July 1952 an agreement was concluded between Turkish Government and the Bank. This agreement was approved by Turkish Parliament via the act numbered 6113 and dated 03 July 1953. By the article 3 of this Agreement the Bank lost its status as a State Bank and it should be subject to the general Turkish legislation applicable to banks incorporated in foreign countries and operating branches in Turkey. Also the article 4 of the Agreement provided that the Bank should maintain its registered office (*siege social*) and domicile at Istanbul. For the agreement and approval act see Official Journal dated 10 July 1953, numbered 8454.

Pakrat S. Bakalian and Thomas Hadjithomas who were Lebanese nationals, domiciled in Beyrout and shareholders in the Ottoman Bank, sought to bring an action against the Bank in France for a declaration of the nullity of all the resolutions voted by the General Meetings of ist shareholders between 1953 and 1960 on the ground that they had been passed in violation of French banking legislation[280]. The *Tribunal de Commerce of Seine* dismissed the action, and plaintiffs appealed. The Court of Appeal of Paris dismissed the appeal by the abovementioned decision. The Court ruled that the Bank must be regarded as subject to Turkish law, altough the *siège réel* of the Bank was clearly in London. In other words, the Court decided that the Ottoman Bank is a Turkish company although it is found that all the higher organs of management, administration and concentrated in London[281]. The Court held that the legal capacity as granted under Turkish law was to be recognized for French private law purposes since the applicable incorporation doctrine in the United Kingdom referred to the Turkish Laws. The court also adopted the *renvoi* by this decision[282].

3. Italy

In Italy, the rules governing the conflict of laws and especially of company laws followed the reform of private international law[283] by means of Law 31 May 1995, No. 218. The rules concerning the conflict of laws in the field of company law are contained in Art. 25 of Law 218/1995, entitled “Legal Persons”, which consists of three paragraphs.

Art 25(1) of Law 218/1995 provides that companies, associations, foundations and any other entity, either public or private, and whether or not having an associative nature, are regulated by the law of the state in which they have been constituted or of the state in whose territory the constitution procedure was concluded. Despite the fact that the

---

280 They contended that the allegiance of the Bank to Turkish Law had been broken as a result of the approval by the Turkish Parliament in 1953 of the 1952 Agreement; and the Bank possessed no more than a centre of operations in Turkey and was regarded there as a foreign bank. See **Lauterpacht** (Ed.), p. 216.

281 For the whole decision see **Lauterpacht** (Ed.), pp. 216–234.

282 **Fibbe,** p. 26, footnote 61.

283 For detail information on the reform of Italian private international law see **Giardina, Andrea:** Italy: Law Reforming The Italian System of Private International Law, International Legal Materials, Vol. 35, No. 3, 1996, p. 760 *et seq*.

Italin legislator did not expressly use the term "place of incorporation", the two criteria in fact may be considered equivalent[284]. Regarding Italian company law, some authors note that Italy adopts the real seat doctrine[285], while some argue that Italy adopts a qualified version of the incorporation doctrine[286]. Another argues that according to the Italian private international law, in principle, the "incorporation doctrine" applied. However, Italy also applies domestic company law to foreign companies having a domestic "place of management" or a domestic location of their "main object". The author argue that this approach is a variation of the "real seat doctrine"[287].

Art 25(2) of Law 218/1995 defines the objective scope of application of the Law 218/1995 by listing though not exhaustively. The article refers the legal nature, the social denomination, the capacity, the formation, the powers and the mechanism of functioning of the companies' organs, the representation of the entity, the responsibility of company's obligations and the violation of the law or of the articles of association[288]. Art 25(3) of Law 218/1995 states that the transfers of seat and international mergers of companies are dully affected insofar as such transactions meet the standards set out in the laws of the states involved[289], that is to say, the country of departure and the country of arrival. Symmetrically, Italian company law explicitly allows companies to transfer their registered office abroad[290].

---

284 **Tenore, Mario:** Italy: Companies and Private International Law, in: Residence of Companies under Tax Treaties and EC Law (Chapter 17) (Guglielmo Maisto eds.), Amsterdam 2009, p. 521.

285 **Wouters, Jan:** Private International Law and Companies' Freedom of Establishment, European Business Organization Law Review, Vol. 2, Issue 1, 2001, p. 101; **Lowry,** p. 332, footnote 5.

286 **Ebke,** *Real Seat Doctrine*, p. 1016.

287 **Behrens,** *Residence of Companies*, p. 19.

288 **Tenore,** p. 524, footnote 20.

289 **Tenore,** p. 525.

290 See **Ventoruzzo, Marko:** Cross–Border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders, European Company and Financial Law Review. Vol. 4, Issue 1, 2007, p. 62 *et seq*.

§2. FREEDOM OF ESTABLISHMENT OF COMPANIES

I. FREEDOM OF ESTABLISHMENT UNDER TFEU

From the perspective of the EU, the TFEU provisions on the freedom of establishment have major impact on cross–border mobility. Because business undertakings are expected to maximize allocation of their means of production. Granting undertakings the freedom of establishment in order to enhance economic prosperity is therefore of crucial importance. To realize this goal, both entry and exit barriers should be remowed[291]. Because there must be no barriers to the freedom of EU companies to reorganise and reshape their structure and activities. For this reason, the scope of the freedom of establishment has to be analysed firstly.

The European Union is premised on the Internal Market[292]. One of its objective is the true functioning of the internal market by way of ensuring the fundamental freedoms. Needles to say, freedom of establishment is a prerequisite for this objective. Under the Art. 26 TFEU (ex Art. 14 TEC)[293], the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. These fundemental freedoms constitute rules aimed at abolishing national barriers to the internal market[294]. The right of establishment essential to obtain the objectives of the TFEU notably the protection of the economic initiative.

---

291 **Rammeloo,** *Corporations in PIL*, p. 250; It is worth to note that Art. 49 TFEU (ex Art. 43 TEC) prohibits not only restrictions on freedom of establishment (in another Member State) on the part of *the host State* but also those restrictions that are attributable to *the State of origin*. On this argument, see **Vossestein, Gert–Jan:** Exit Restrictions on Freedom of Establishment after *Marks & Spencer*, European Business Organization Law Review, Vol. 7, Issue 4, 2006, p. 863.

292 The ‘internal market’ was not mentioned in initial versions of the founding treaties of the European integration. This term is referred first time in the document *Completing the Internal Market: White Paper from the Commission to the European Council* [COM (85)310 final]. The document is available at: <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf>. And then, the EEC Treaty has been supplemented by the Single European Act, *inter alia*, provisions with regard to internal market. See **Can, Hacı:** Avrupa Birliği İç Pazar Hukuku, Ankara 2008, p. 61 *et seq*.

293 For the TFEU, see OJEU (C 326), 26.10.2012, p. 47.

294 **Barnard, Catherine:** The Substantive Law of the EU–The Four Freedoms, Oxford University Press 2004, p. 10.

The right of establishment[295] for natural persons regulated by the Art. 49 TFEU (ex Art. 43 TEC). It provides that "within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting–up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."

Definition of the right of establishment is provided in the second paragraph of the Art. 49 TFEU. Under this paragraph, "freedom of establishment shall include the right to take up and pursue activities as self–employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected[296], subject to the provisions of the Chapter relating to capital."

The principle of freedom of establishment –and all the rights connected to it– constitute in substance a possibility for individuals (natural persons as nationals of a Member State) and companies (within the Union[297]), without any distinction as regards nationality or residence[298], to start up with economic activity in any Member State in a stable and continuous way[299]. These persons cannot be hindered by discrimination on the basis of nationality, any other types of unreasonable obstacles, or prior or exceptional authorizations especially if they are not justified by exercise of official authority (Art. 51 of TFEU), public order etc. requirements (Art. 52 of TFEU), imperative general interest, or 'objective distinctions'[300]. The TFEU requires that

[295] Although Part Three, Title IV, Chapter 3 of the TFEU is entitled "Right of Establishment", the term "Freedom of Establishment" is also used interchangeably in the case–law of the CJEU and in the academic literature on the subject.

[296] "The principle of non–discrimination was implemented and specifically laid down, in relation to the right of establishment." See Case C–193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chrissanthakopoulos* [1996] ECR I–929, §21. For economic integration, the prohibition of discrimination on the grounds of nationality among nationals and enterprises of Member States is essential. See Art. 18 TFEU (ex Art. 12 TEC).

[297] See Case C–212/97 *Centros* [1999] ECR I–1459; Opinion of AG La Pergola, §12.

[298] Case 115/78 *J. Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, §16.

[299] Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §25; Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §21.

nationals of all Member States should be on the same footing in each Member State with regard to freedom of establishment, i.e. national treatment[301].

The principle of freedom of establishment in the Art. 49 TFEU establishes a precise obligation to attain a result, and it has direct effect[302]. This is so because it is clear, complete and legally perfect provision in itself[303]. Thus, it is a directly applicable rule of EU law. Practically this means that it has direct effects between all EU individuals[304] and all Member States. The Member States, that is to say, all their authorities[305], must observe the rule even if there does not exist EU legislation or EU implementing measures on that particular field of law in question (for example, social security for self–employed persons) and even if enacting of such implementing legislation would be an explicit obligation of the EU institutions[306]. Furthermore, this obligation is valid despite the fact that in that particular field of law the Member States would still possess the competence to legislate[307].

However, the other fundamental freedoms regulated by TFEU have all been safeguarded by the case–law of CJEU and the institutions of the EU, it can be argued that the freedom of establishment of companies has been afforded less favorable

300 Case 11/77 *Richard Hugh Patrick v. Ministre des Affaires Culturelles* [1977] ECR 1199, §15.

301 Case C–62/96 *Commission of the European Communities v. Hellenic Republic* [1997] ECR I–6725, §23.

302 Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §30; Case C–253/03 *CLT–UFA SA v Finanzamt Köln–West* [2006] ECR I–1831, §12; Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585, p. 596; Case C–57/95 Case C–57/95 *French Republic v. Commission of the European Communities* [1997] ECR I–1627, §20; Case 11/77 *Richard Hugh Patrick v. Ministre des Affaires Culturelles* [1977] ECR 1199, §13. See also **Bachner, Thomas:** Freedom of Establishment for Companies: A Great Leap Forward, Cambridge Law Journal, Vol. 62, Issue 1, 2003, p. 47.

303 Case C–19/92 *Dieter Kraus v. Land Baden–Württemberg* [1993] ECR I–1663, §30; Case C–340/89 *Irène Vlassopoulou v. Ministerium für Justiz, Bundes– und Europaangelegenheiten Baden–Württemberg* [1991] ECR I–2357, §13; Case 107/83 *Ordre des avocats au Barreau de Paris v. Onno Klopp* [1984] ECR 2971, §10; Case 11/77 *Richard Hugh Patrick v. Ministre des Affaires Culturelles* [1977] ECR 1199, §10; Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §12.

304 Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §25.

305 Case 168/85 *Commission of the European Communities v. Italian Republic* [1986] ECR 2945, §11.

306 Case C–19/92 *Dieter Kraus v. Land Baden–Württemberg* [1993] ECR I–1663, §30; Case 168/85 *Commission of the European Communities v. Italian Republic* [1986] ECR 2945, §11.

307 Case C–53/95 *Inasti (Institut National d'Assurances Sociales pour Travailleurs Indépendants) v. Hans Kemmler* [1996] ECR I–703, §9; Case 143/87 *Christopher Stanton and SA belge d'assurances "L'Étoile 1905" v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti).* [1988] ECR 3877, §10; Case 270/83 *Commission of the European Communities v. French Republic* [1986] ECR 273, §13.

treatment[308]. In other words, there is no tangible freedom of establishment for legal persons under EU law as it now stands[309]. Unlike companies[310], there are secondary legislation[311] of the EU bodies and well–established case–law[312] of the CJEU on the freedom of establishment of natural persons. In other words, the right of establishment of natural persons has been clearly recognized by the EU. In contrast, freedom of establishment of companies could not be fully achieved due to the great differences of the Member States' laws regarding company law matters.

II. EU LAW ON THE FREEDOM OF ESTABLISHMENT OF COMPANIES

A. Protection under the TFEU

The right of establishment of companies is important aspect of functioning of the Internal Market[313]. Corporate mobility is *prima facie* safeguarded under the freedom of establishment, as enshrined in Arts. 49 and 54 TFEU[314]. It must be noted that these provisions do not by any means convey a clear right to act in such a way. In other

---

308 **Roussos, Alexandros:** Realising the Free Movement of Companies, European Business Law Review, Vol. 12, Issue 1/2, 2001, p. 7.

309 **Rammeloo,** *Corporations in PIL*, p. 247. The legal path towards freedom of establishment for legal persons in the EU characterized as a 'long and winding road'. See **Rammeloo, Stephan:** The Long and Winding Road towards Freedom of Establishment for Legal Persons in Europe, Maastricht Journal of European and Comparative Law, Vol. 10, No 2, 2003 p. 169 *et seq*.

310 It has been argued that it would appear strange that companies might have been forgotten or worse, neglected by the Union and the actual right of free movement of companies within the EU has not been fully achieved. See **Moran, Stephen J.:** Establishing Establishment–A Modern Chimera an Investigation into Securing the Right of Establishment for Companies within the Internal Market of the European Community, Irish Student Law Review, Vol. 15, 2007, p. 147; **Andersen/Sorensen,** p. 47.

311 See, *inter alia*, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. See OJEU (L 158), 30.04.2004, p. 77.

312 For a summary of the case–law of the CJEU on the freedom of establishment, see European Commission's Guide to the Case Law of the European Court of Justice on Articles 49 *et seq.* of TFEU (Ex Articles 43 *et seq.* EC Treaty) – Freedom of Establishment, p. 19 *et seq*. It is available at: <http://ec.europa.eu/internal_market/services/docs/infringements/art49–establishment_en.pdf>.

313 The right of establishment is regarded as the cornerstone of European company law. See **Andenas, Mads/Wooldridge, Frank:** European Comparative Company Law, Cambridge University Press, Cambridge 2009, p. 10; **Cath, Inne G.F.:** Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market, Yearbook of European Law, Vol. 6, Issue 1, 1986, p. 245 *et seq*.

314 **Panayi,** *Corporate Mobility in PIL*, p. 135.

words, the freedom of establishment provided by the Treaties does not permit a company to move out of the Member State where it was formed and into another Member State while preserving its legal capacity. But these provisions are still, at least to some extent, very much open to interpretation. Thus far, neither of two opposing conflicts of laws theories has been imposed upon EU member states by Arts. 49 and 54 TFEU. The TFEU in fact only grants rights to secondary establishment[315].

Art. 54 TFEU (ex Art. 48 TEC) extends entitlement to freedom of establishment[316], provided that the same conditions as those laid down for natural persons who are the nationals of the Member States, to "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 Union." The definition of a 'company' is broad[317], embracing "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non–profit–making"[Art. 54 of TFEU][318].

Provisions relating to the freedom of establishment of companies are based on two basic principles. Firstly, the TFEU does not lay down any requirements as to the nationality or residence of the directors or shareholders. As shown next paragraphs, the basis for the right of establishment is an existing economic link with the economy of a Member State. Secondly, a company established in one part of the Internal Market is entitled to establish itself in any other[319].

---

315 **Rammeloo,** *Corporations in PIL*, pp. 253–254.

316 "[…] the right to freedom of establishment is guaranteed not only to Community nationals but also to companies formed in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the Community." See, *inter alia*, Case C–299/02 *Commission of the European Communities v. Kingdom of the Netherlands* [2004] ECR I–9761 §16.

317 This Article is applicable to all forms of companies or firms. See **Andenas/Wooldridge,** p. 21.

318 On the exclusion of non–profit–making entities from the right of freedom of establishment see **Lombardo, Stefano:** Some Reflections on Freedom of Establishment of Non–Profit Entities in the European Union, European Business Organization Law Review, Vol. 14, Issue 2, 2013, p. 225 *et seq*.

319 **Lang, John Temple:** The Right of Establishment of Companies and Free Movement of Capital in the European Economic Community, University of Illinois Law Review, Vol. 1965, No: 4, 1965, p. 694; **Cabral Pedro/Cunha Patricia**: 'Presumed Innocent': Companies and the Exercise of the

Another important legal basis is the Art. 50 TFEU (ex Art. 44 TEC). Paragraph 1 of this Article entitles the European Parliament and the Council to adopt directives in order to attain freedom of establishment. Paragraph 2(g) empowers the European Parliament, the Council and the Commission "to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union".

During the sixties, the principal goal of the European Institutions was to harmonize the Member States' company laws by enacting European directives[320]. Although a number of company law directives[321] have been enacted under this article[322], it has been criticized that there has not been enough harmonization of company law[323] even less in the field of cross–borders transfers of company seats[324]. It is also asserted that the Internal Market has been completed, without completion of the harmonization of company law[325]. However, as it turned out that it was impossible to harmonize certain

---

Right of Establishment under Community Law, European Law Review, Vol. 25, Issue 2, 2000, p.157 *et seq*.

320 **Wouters, Jan:** European Company Law: *Quo Vadis*?, Common Market Law Review, Vol. 37, Issue 2, 2000, p. 257.

321 For the list of regulations, directives, reports and other documents on company law and their current status see <http://ec.europa.eu/internal_market/company/official/index_en.htm>.

322 See generally **Hopt, Klaus J.:** Company Law in the European Union: Harmonization and/or Subsidiarity, International and Comparative Corporate Law Journal, Vol. 1, 1999, p. 41 *et seq*.; **Bartman, Steef M.:** European Company Law in Accelerated Progress, Kluwer International Law, Alphen aan den Rijn 2006; **Enriques, Luca/Gatti, Matteo:** The Uneasy Case for Top–Down Corporate Law Harmonization in the European Union, University of Pennsylvania Journal of International Economic Law, Vol. 27, Issue 4, 2006, p. 939 *et seq*.; **Wymeersch, Eddy:** Company Law in Europe and European Company Law, available at SSRN: <http://ssrn.com/abstract=273876>.

323 See **Winter, Jaap *et al*.:** Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, Brussels 2002, p. 1. The Report is available at: <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>. But it should be noted that sometimes contended that there is no need for an extensive programme of company law harmonization and argued that better results might be obtained by means of regulatory competition. See **Andenas/Wooldridge,** p. 33, footnote 106.

324 See Committee on Legal Affairs of European Parliament's Draft Report with Recommendations to the Commission on Cross–Borders Transfers of Company Seats [2008/2196(INI)] of 17 October 2008.

325 **Timmermans, Christian:** Harmonization in the Future of Company Law in Europe, in: Capital Markets and Company Law (Klaus J. Hopt and Eddy Wymeersch eds.), Oxford University Press 2003, p. 627. As Moran cited, this completion is '*functional completion*' rather than '*absolute completion*'. The *completion* of the internal market is not to be mistaken with the *perfection* of the

company law areas, the EU took step further with the introduction of European corporate vehicles and a considerable body of European company law has been brought into existence[326].

As the CJEU pointed out in its settled case–law[327], companies are creatures of the law and, they exist only by virtue of the varying national legislation which determines their incorporation and functioning[328]. Variety in national company law 'cultures' is the most important factor on this issue. While some 'systems' still maintain the more economic definition of the company based on more functional idea, in the others formal incorporation remained the central factor. Mix of factors is decisive in some systems for various reasons[329].

There was another legal basis (Art. 293 TEC) that requiring the Member States to enter into negotiations with each other concerning the mutual recognition of companies and/or firms, the retention of legal personality in the event of transfer of the seat between the countries, and the possibility of merger between companies or firms governed by the laws of different countries. The Convention on the Mutual Recognition of Companies and Bodies Corporate of 1968 was based on this provision[330].

---

internal market. See **Moran,** p. 152; **Drury, Robert R.:** Review of the European Community's Company Law Harmonisation Programme, Bracton Law Journal, Vol. 24, 1992, p. 45 *et seq*.

326 **Enriques, Luca:** EC Company Law Directives and Regulations: How Trivial Are They?, University of Pennsylvania Journal of International Law, Vol. 27, Issue 1, 2006, p. 2; **Andenas/Wooldridge,** p. 7, and footnote 1.

327 **Gajjar, Jay:** Your Dominion or Mine? A Critical Evaluation of the Case Law on Freedom of Establishment for Companies and the Restrictions, International Company and Commercial Law Review, Vol. 24, Issue 2, 2013, p. 50 *et seq*.

328 Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, §19; Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–9641, §104.

329 **Kiikeri, Markku:** The Freedom of Establishment in the European Union–Report to the Finnish Ministry of Trade and Industry, p. 5–6. The report is available at: <http://www.helsinki.fi/publaw/opiskelu/Eurooppaoikeus/Sijoittautumistutkimus.englanti.Kiikeri.pdf>.

330 Apart from this Convention; there has not been a serious attempt within the EU dealing with corporate mobility and recognition of companies at a treaty level and there were no development of a useful instrument for the approximation of national company laws by Treaties. See **Panayi,** *Corporate Mobility in PIL*, p. 137; **Andenas/Wooldridge,** p. 10.

The Art. 293 TEC was repealed by the TFEU[331]. But it should be born in mind that the removal of this article does not eliminate the competence of the EU bodies to regulate the mobility of companies. A legal basis remains in Art. 50 TFEU on harmonization of company law and Art. 81 TFEU on judicial cooperation in civil matters. However, in many ways, the inclusion of Article 293 of TEC in the original scheme of the Treaty shaped the case–law prior to Lisbon[332].

Art. 52 TFEU (ex Art. 46 TEC) empowers Member States to restrict the freedom of establishment of foreign nationals by adopting provisions laid down by law, regulation or administrative action in so far as such provisions are justified on grounds of public policy[333], public security[334] or public health[335]. This three grounds mentioned above are not defined in the TFEU, but offer to Member States a wide margin of appreciation**.** Moreover, the CJEU has developed so–called "*Gebhard* test" or "rule of reason",

---

331 It has been argued that abolition of this article seems to definitely limit the harmonization exercise to the promulgation of new EU legislation, but it does not take away the relevance of *Daily Mail* case where both future legislation and conventions are mentioned. See **Wyckaert, Marieke/Jenné, Filip:** Corporate Mobility, in: The European Company Law Action Plan Revisited–Reassessment of the 2003 Priorities of the European Commission (Koen Geens and Klaus J. Hopt eds.), Leuven, 2010, p. 289, footnote 6. Also see Case 81/87 *Daily Mail* [1988] ECR 5483, §23.

332 **Borg–Barthet, Justin:** Free at Last? Choice of Corporate Law in the EU Following the Judgment in Vale, International & Comparative Law Quarterly, Vol. 62, No. 2, 2013, p. 510.

333 According to the case–law of the CJEU, the concept of public policy, first, comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society and, second, must, as a justification for derogation from a fundamental principle of the Treaty, be narrowly construed. See, *inter alia*, Case C–326/07 *Commission of the European Communities v. Italian Republic* [2009] ECR I–02291, §69–71; Case C–161/07 *Commission of the European Communities v. Republic of Austria* [2008] ECR I–10671, §35–36; Case C–465/05 *Commission of the European Communities v. Italian Republic* [2007] ECR I–11091, §49.

334 Under the CJEU's acceptance, with regard to bodies operating in the oil, telecommunications and electricity sectors, that the object of ensuring a secure supply of such services in the case of a crisis in the territory of the Member State concerned may constitute a reason of public security and, therefore, justify a restriction of a fundamental freedom. See, *inter alia*, Case C–326/07 *Commission of the European Communities v. Italian Republic* [2009] ECR I–02291, §69; Case C–463/00 *Commission of the European Communities v. Kingdom of Spain* [2003] ECR I–4634, §71. Public policy and public security may not be invoked unless there is a genuine and sufficiently serious threat to a fundamental interest of society. See, *inter alia*, Case C–355/98 *Commission of the European Communities v. Kingdom of Belgium* [2000] ECR I–1221, §28; Case C–54/99 *Eglise de scientologie* [2000] ECR I–1335, §17.

335 The protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment. See, *inter alia*, Case C–531/06 *Commission of the European Communities v. Italian Republic* [2009] ECR I–4103, §51–52; Joined Cases C–171/07 and C–172/07 *Apothekerkammer des Saarlandes and Others v. Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] ECR I–04171, §27; Case C–169/07 *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] ECR I–01721, §27.

according to which national measures hindering or restricting the exercise fundamental freedoms guaranteed by the TFEU are allowed if certain conditions are met[336].

B. Protection under Secondary Legislation

There is no EU secondary legislation that deals with right of establishment of companies, accordingly corporate mobility. As mentioned below, there are several EU secondary law instruments that are only indirectly relevant to right of establishment of companies. The European Company (*Societas Europaea*) Regulation, the European Cooperative Society (*Societas Cooperativa Europaea*) Regulation, the Regulation on the European Economic Interest Grouping, the Cross–Border Merger Directive and proposed Regulation on European Private Company (*Societas Privata Europaea*) have provisions which grant the transfer of company's seat from one Member State to another under certain requirements.

Under the European Company Regulation[337], a *Societas Europaea* may transfer its registered office to another Member State without having to wind–up or creation of a new legal person. The conditions for such transfer are regulated in the paragraphs 2 to 13 of the Art. 8 of SE Regulation. It is important to note that the registered office of the *Societas Europaea* has to be located within the EU, in the same Member State as its head office.

The Directive 2005/56/EC on Cross–Border Mergers[338] (or, the 10th Company Law Directive) allows companies to transfer their registered office by way of merger. The Directive allows a company, on being dissolved without going into liquidation,

---

336 According to the Court's case–law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: (i) they must be applied in a non–discriminatory manner; (ii) they must be justified by imperative requirements in the general interest; (iii) they must be suitable for securing the attainment of the objective which they pursue; and (iv) they must not go beyond what is necessary in order to attain it. See Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §37; Case C–411/03 *SEVIC SystemsAG* [2005] ECR I–10805, §23; **Storm, Paul:** Cross–Border Mergers, the Rule of Reason and Employee Participation, European Company Law, Vol. 3, Issue 3, 2006, p. 131.

337 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (*SE*). See OJEU (L 294), 10.11.2001, p. 1.

338 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross–Border Mergers of Limited Liability Companies, OJEU (L 310), 25.11.2005, p. 1.

transfers all its assets and liabilities to the company holding all the securities or shares representing its capital [Art. 2(2)–c of the Directive]. Therefore, Directive 2005/56/EC envisages indirect way of transferring the registered office of a company[339].

Transfer of registered office under the provisions of SE Regulation, of the Directive 2005/56/EC, of the SCE Regulation, of the EEIG Regulation and of the proposed SPE Regulation will be examined in detail within the following chapters[340].

C. Proposals for a Corporate Mobility Directive

There have been several attempts for adopting specific secondary legislation instrument for transfer or registered office since 1990s. The first attempt was 'Study on Transfer of Head Office of a Company from one Member State to Another' accomplished by KPMG European Business Centre in 1993. Several years later, a draft was prepared by the Commission in 1997, however there was never any official proposal. In 2002, the High Level Group of Company Law Experts recommended the Commission to adopt a proposal in this field[341]. Also the European Parliament approved several resolutions asking the Commission to purpose a directive on cross–border transfer of registered office of a company. But the Commision officially announced not to take any action on this field. The KPMG Study, Commision's 1997 unofficial draft, the European Parliament's resolutions and other documents will be evaluated in the following chapters[342].

III. SCOPE OF THE FREEDOM OF ESTABLISHMENT OF COMPANIES

Two matters affect the conditions which a company must fulfil in order to benefit from the right of establishment. The first is the material scope of the right of establishment, in other words the type of activities that a company must carry out in order to fall within the scope of application of the Treaty provisions on the right of establishment. The second concerns the personal scope of the right of establishmnet, i.e. the

339 **Panayi,** *Corporate Mobility in PIL*, p. 139.

340 See below chapter §4.

341 See **Winter Report**, p. 101. See also **Andenas/Wooldridge,** p. 31.

342 See Chapter Three §5 and §6–II–III–IV.

requirement that must be met by a company wishing to invoke the relevant Treaty provisions.

A. Personal (*Ratione Personae*) Scope of the Freedom

The freedom of establishment provided for in Arts. 49 to 55 TFEU is conferred as just mentioned, both on natural persons who are nationals of a Member State and on companies or firms within the meaning of Art. 54 TFEU. All natural persons who are nationals of a Member State are within the scope of freedom of establishment. Since the freedom of establishment of natural persons is out of this work, it should be discussed companies and firms.

Art. 54 TFEU (second paragraph) defines the ‘companies or firms’. The right of establishment is conferred upon any profit–making economic operator established in the Union who wishes to establish in another Member State. Because the Article excludes the non–profit making companies from the freedom of establishment. The CJEU confirmed in 1997 that non**–**profit making companies are excluded from the benefit of the chapter with regard to the right of establishment[343]. The rule on the freedom of establishment applies also to the state–owned companies[344].

A company, as a first requirement to be benefited from the freedom of establishment enshrined by TFEU, must be formed in accordance with the law of a Member State[345]. Because companies are creatures of national law an they exist only by virtue of the national legislation which determines their incorporation and functioning[346]. The

343 See Case C–70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I–3395, § 25.

344 **Kiikeri,** p. 29.

345 The CJEU has also confirmed this rule in its established case–law. See, *inter alia*, Case C–299/02 *Commission of the European Communities v. Kingdom of the Netherlands* [2004] ECR I–9761, §16; Case C–70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I–3395, §25; Case C–414/06 *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn* [2008] ECR I–03601, §18. See also **Vossestein, Gert–Jan:** Modernization of European Company Law and Corporate Governance: Some Considerations on its Legal Limits, Kluwer International Law, Alphen aan den Rijn 2010, p. 49.

346 Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, §19; Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641 §104. The CJEU further observes that a company enjoys the nationality of the Member State according to whose laws it was formed. See Case 270/83 *Commission of the European Communities v. French Republic* [1986] ECR 273, §18.

transfer of registered offices could thus only be permitted if the national law of the home state provided the requisite legal basis[347].

The second requirement for companies to be within the scope of the TFEU provisions on freedom of establishment is that they have their registered office, central administration or principal place of business within the Union[348]. The location of the companies registered office, central administration or principal place of business constitutes the connecting factor with the legal system of a particular Member State[349]. As the CJEU ruled, the TFEU has taken account of that variety in national legislation. In defining the companies which enjoy the right of establishment, the TFEU places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company[350].

Company's economic activity should be on a stable and continuous basis in order to participate in the economic life of a Member State. In other words, establishment, *inter alia*, engage with and participate in the economic and social life of another Member State[351]. As the CJEU ruled, the concept of establishment within the meaning of the TFEU involves the actual pursuit of an economic activity through a fixed establishment in another Member State[352].

---

347 **Ronfeldt, Thomas/Werlauff, Erik:** Merger as a Method of Establishment: on Cross–Border Mergers, Transfer of Domicile and Divisions, Directly Applicable under the EC Treaty's Freedom of Establishment, European Company Law, Vol. 3, Issue 3, 2006, p. 127

348 See **Vossestein,** *Modernization of EU Company Law*, p. 53 *et seq*.

349 For the discussion of the varying interpretations of these connecting factors see **Rickford, Jonathan:** Current Developments in European Law on the Restructuring of Companies: An Introduction, European Business Law Review, Vol. 15, Issue 6, 2004, pp. 1228–1231.

350 Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, §21; Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641, §106.

351 **Moran,** p. 147; Case C–411/03 *SEVIC Systems AG* [2005] ECR I–10805, §18

352 See, *inter alia*, Case C–70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I–3395, §24; Case C–221/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I–3905, §20; Case C–246/89 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1991] ECR I–4585, §21; Case C–196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I–7995, §54.

B. Material (*Ratione Materiae*) Scope of the Freedom

The freedom of establishment provided for in Arts. 49 to 55 TFEU includes the right to take up and pursue all types of self–employed activity in the territory of any other Member State, to set up an manage undertakings, and to set up agencies, branches, or subsidiaries [Art. 49 TFEU]. Although the Treaty mentions a number of activities which fall within the scope of application of the right of establishment, it does not provide a definition of this concept.

It's commonly accepted that the freedom of establishment can be exercised in two ways, namely by way of primary and by way of secondary establishment. European company law distinguishes primary from secondary establishment. While the former relates to the transfer of a company's primary seat, being either its registered office, its administrative seat or both, from one Member State to another, the latter excludes any transfer of the primary seat. Instead, it refers to the setting up of agencies, branches or subsidiaries in the territory of any Member State.

1. Primary Establishment

One of the ways in which a company can exercise the right of primary establishment is by transferring its decision–making centre, its headquarters or real seat from one member state to another[353]. The primary establishment denotes to the possibility of establishing and opening the business in the first place –i.e., establishing and forming the 'first' company as a formal entity– by acquiring the recognition of a Member State's laws and administration of justice to the entity and the action. In other words, it is used to describe the formation and governance of an undertaking, which constitutes the centre of the economic activities engaged in by the legal or natural person at hand.

In this case, establishment may take the form of the setting up a new company or the central management and control of company often regarded as its real head office. An essential prerequisite for any primary establishment is that the economic activities in

[353] **Looijestijn–Clearie, Anne:** Have the Dikes Collapsed? *Inspire Art* a Further Breakthrough in the Freedom of Establishment of Companies?, European Business Organization Law Review, Vol. 5, Issue 2, 2004, p. 403.

the home state are either abolished or of a minor nature. It has been said in that regard that central management and control is not a legal concept but an economic one and that it is located where the company organs take the decisions that are essential for the company's operations[354].

As the CJEU had held that the transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision–making there, which constitutes genuine and effective economic activity[355]. The CJEU stated categorically that a necessary precondition for the exercise of the right of establishment is recognition of a company in the host state[356].

The case–law of the CJEU on primary establishment of companies will be evaluated comprehensively in the following chapters[357]. But it should be noted that the case–law on the primary establishment has long time been less developed than that regarding the secondary establishment. It looks as if the Court has not examined the role of the distinction between secondary and primary establishment thoroughly. Nevertheless, the distinction between primary and secondary establishment is important[358].

2. Secondary Establishment

The TFEU contains an explicit provision concerning secondary establishments. Art. 49 TFEU (ex Art. 43 TEC) envisages that the prohibition on restrictions on freedom of establishment shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State. The right of a company to set up agencies, branches and subsidiaries is referred as

354 Case 81/87 *Daily Mail* [1988] ECR 5501, Opinion of AG Darmon, §4.

355 Case 81/87 *Daily Mail* [1988] ECR 5483, §12.

356 See **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 403, footnote 50; Case C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I–9919, §59.

357 See Chapter Four §7 and §8.

358 **Edwards,** *Company Law,* p. 343.

secondary establishment[359]. The secondary establishment is possible, if one is already established in Union (i.e., in one of the Member States). In other words, the secondary establishment refers the right to maintain more than one place of work within the EU[360]. Normally a company exercises this right by transferring part of activities or extending its activities to another member state while maintaining its principal establishment in the state of incorporation[361].

The list of the forms of secondary activity in the TFEU is not exhaustive[362]. There is a plethora of ways in which business may be conducted across Europea and, for this reason, companies may use any of the various forms of secondary establishment mentioned in the TFEU even some forms not explicitly mentioned in the Treaty.

None of the terms 'agency', 'branch' or 'subsidiary' is defined in the TFEU, but there is a certain *communis opinio*. Whereas a 'subsidiary' is an entity having legal personality distinguishable from the legal personality of the parent company, a 'branch' is an 'office' forming part of the legal entity of the principal establishment of the company[363]. Some guidance may also be found in decisions of the CJEU on terms 'branch, agency or other establishment' used in Art. 5(5) of the Brussels Convention[364]. The Court held that "the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties. The latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly

---

359 **Panayi,** *Corporate Mobility in PIL*, p. 136; **Xanthaki, Helen:** The Secondary Establishment of Companies within the EU: Challenge of Missed Opportunity?, European Business Law Review, Vol. 10, Issue 1, 1999, p. 120 *et seq*.

360 "[…] a person may be established, within the meaning of the Treaty, in more than one Member State, in particular, in the case of companies, through the setting–up of agencies, branches or subsidiaries…" See Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §24.

361 **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 404.

362 **Kuehrer,** p. 113. See also Case 205/84 *Commission v. Germany* [1986] ECR 3755, §21.

363 **Rammeloo,** *Corporations in PIL*, p. 33.

364 See Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJEU (L 304), 30.10.1978, p. 77.

with such parent body but may transact business at the place of business constituting the extension."[365]

In order to benefit from the right of secondary establishment, a company must satisfy three requirements. *First* the company must be formed in accordance with the law of a Member State. *Second*, it must have either its registered office, central administration or principal place of business within the Union (Art. 54 TFEU). And *thirdly*, in order to benefit from the right of secondary establishment, a company must already be established in the territory of one of the Member States[366]. Therefore, companies should in principle be allowed, with a view to taking up and pursuing activities to move to any other Member State, but in accordance with the conditions laid down in the law of that Member State for its own national (Art. 49 TFEU).

The TFEU itself provides no definition of the term 'established'. Thus the question arises as to when a company can be said to be 'established' in a member state. But it is possible to find descriptions in secondary legislation of EU bodies and case–law of the CJEU.

The Council adopted The General Programme for the Abolition of Restrictions on Freedom of Establishment on 18 December 1961[367]. The General Programme subordinates the benefit of the freedom of establishment, in case of companies and firms, to the requirement that there be a real and continuous link with the economy of a Member State[368]. This provision has been explained as requiring continuing business activities in the relevant sector of the economy of the Member State and permanent premises occupied by the company[369].

---

[365] Case 33/78 *Somafer SA v Saar–Ferngas AG* [1978] ECR 2183, §12.

[366] See also **Vossestein,** *Modernization of EU Company Law*, p. 49 and 53; **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 405; **Lang,** p. 695.

[367] For the General Programme see OJEU, No. 2, 15.01.1962. (English Special Edition is available at Series II, Vol. IX, pp.7–15).

[368] Title I of the General Programme. See also **Vossestein,** *Modernization of EU Company Law*, p. 57 *et seq.*; **Cerioni,** *EU Corporate Law*, p. 95.

[369] **Lang,** p. 696, footnote 49.

The CJEU also provided a definition of the concept of the right of the establishment in its case–law[370]. According to the rulings of the CJEU, the concept of establishment involves the following conditions: First of all, only economic activities are contained within the ambit of the right at hand[371]. Second this economic activity should be pursued in a stable and continuous nature[372]. In other words, the needed temporal factor to exclude short–term activities from the scope. Third, this activity must have cross–border character, i.e, the economic activity must be took place in another Member States[373]. Therefore, the TFEU cannot be applied to activities which are confined in all respects within a single Member State[374]. And lastly, the activity should be pursued for indefinite period of time through a fixed establishment[375].

The CJEU interprets the concept of 'establishment' in broad sense. The Court had ruled that the concept of establishment within the meaning of the TFEU is therefore a very broad one, allowing a Union national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom[376]. To summarize, a company can be said to be 'established' in a particular

---

370 **Edwards, Vanessa:** Secondary Establishment of Companies–The Case Law of the Court of Justice, Yearbook of European Law, Vol. 18, Issue 1, 1998, p. 221 *et seq*.

371 Case C–438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I–10779, §70; Case C–221/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I–3905, §20.

372 Case C–70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I–3395, §24; Case C–384/08 *Attanasio Group Srl v. Comune di Carbognano.* [2010] ECR I–02055, §39. "…[w]hether it is possible for a national of a Member State to exercise the right of establishment and the conditions for the exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State." See Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §32.

373 Case C–438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I–10779, §70; Case C–221/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I–3905, §20

374 Case C–134/95 *Unità Socio–Sanitaria Locale nº 47 di Biella (USSL) v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [1997] ECR I–195, §19.

375 Case C–438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I–10779, §70; Case C–221/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I–3905, §20.

376 **Moran,** p. 147; Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §25.

Member State only when it actually pursues an economic activity through a fixed establishment there for an indefinite period of time[377].

[377] **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 406.

CHAPTER TWO
CORPORATE MOBILITY AND
TECHNIQUES FOR MOBILITY OF COMPANIES ACROSS EUROPE

§3. CORPORATE MOBILITY

I. A SHORT HISTORICAL INTRODUCTION

There was an attempt on the notion of corporate mobility in the 1960s. The founding fathers in the early sixties decided that company law should be harmonized. Because the Treaty of Rome provided that the conditions governing the recognition of companies and their cross–border mobility could be determined through secondary legislation. On this issue, the Convention on Mutual Recognition of Companies and Legal Persons[378] was negotiated in 1968 among the six founding Member States. As mentioned earlier, this attempt failed because the Netherlands has stitched from the real seat doctrine towards the incorporation doctrine. Later on, the issue disappeared from the agenda of the EU bodies. In other words, the failure of this Convention resulted in a long hiatus in the development of corporate mobility[379].

The implementation of corporate mobility in the EU has been the subject of debate for decades[380]. This debate is to be placed against the background of the two competing conflict of laws theories for determining the connecting factor for the *lex societatis* existing in the EU[381]. The TFEU expressly recognizes the freedom of establishment for companies, but no choice has been made between these theories[382]. As EU law

---

[378] See Introduction, III–A–4.

[379] **Wymeersch, Eddy:** Is a Directive on Corporate Mobility Needed?, European Business Organization Law Review, Vol. 8, Issue 1, 2007, p. 162; **Drury,** *Recognition of Foreign Corporations*, pp. 181–182; **Stein,** *Recognition of Companies,* pp. 1329–1331; **Borg–Barthet, Justin:** The Governing Law of Companies in EU Law, Hart Publishing, Oxford 2012, pp. 106–109.

[380] **Lennarts, Marie–Loisse:** Company Mobility within the EU, Fifty Years on from a Non–Issue to a Hot Topic, Utrecht Law Review, Vol. 4, Issue 1, 2008, p. 1 *et seq.*; **Johnson, Maureen:** Does Europe Still Need a Fourteenth Company Law Directive?, Hertfordshire Law Journal, Vol. 3, No: 2, 2005, p. 18 *et seq.*; **Johnson, Maureen:** Roll on the 14th Directive –Case law Fails to Solve the Problems of Corporate Mobility within the EU– Again, Hertfordshire Law Journal, Vol. 2, No 2, 2004, p. 9 *et seq*.

[381] **Wyckaert/Jenné,** p. 291.

[382] **McCahery/Vermeulen,** *Delaware Effect*, p. 791.

currently stands, these connecting factors have not been harmonized; so each Member State can choose either one theory or the other[383].

Until the end of the twentieth century, there was no secondary legislation concerning the governing law of companies and their cross–border mobility. Two developments triggered the re–thinking the issue. The first development was the adoption of SE Regulation and the Cross–Border Mergers Directive. The SE Regulation not only allows companies to merge across borders, but also to transfer their seat from one jurisdiction to another. The Cross–Border Mergers Directive also envisages transferring the registered office of a company. The other development was the case–law of the CJEU. As will be examined later, they considerably changed the possibility for national law to restrict the access to foreign companies to their national legal order. Corporate mobility is hence allowed, although the conditions under which mobility can take place need to be further clarified[384].

II. IS CORPORATE MOBILITY A REAL ISSUE?

Mobility of companies within the EU internal market has been an eternal problem. Because the rights of owners and other participants in any firm to choose the most appropriate legal framework, to place their investments within the most effective organisational structure and to monitor closely the flow of the firm's tangible and intangible assets in the internal market constitute some of the key elements of business organisation at EU level[385]. Harmonization in this area has been very difficult, since Member States have different systems of conflicts of laws concerning companies, the above–mentioned 'incorporation theory' and 'real seat theory'.

---

383 This explains why the *Cartesio* judgment stated that although a Member State could not oppose the departure of a company created in accordance with its national law, it was nonetheless also necessary that the law of the host Member State should allow the transfer to be lawfully completed. More specifically States of arrival that have chosen to apply the real seat theory could therefore legitimately refuse to register a company that was transferring its registered office to its territory unless it transferred its real seat at the same time. See Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641 §112.

384 **Wymeersch,** *Directive on Corporate Mobility*, p. 163.

385 **Schön, Wolfgang:** The Mobility of Companies in Europe and the Organizational Freedom of Company Founders, European Company and Financial Review, Vol. 3, Issue 2, 2006, p. 127; **Schön, Wolfgang:** The Free Choice between the Right to Establish a Branch and to Set–up a Subsidiary–A Principle of European Business Law, European Business Organization Law Review, Vol. 2, Issue 2, 2001, p. 339.

Corporate mobility can generally speaking be defined as the freedom of a company to operate in different countries and to choose the company law model that best fits its entrepreneurial needs[386]. The concept of corporate mobility finds its origin in the United States, where corporations are in principle free to choose their state of incorporation, and where corporations are subject to the corporate law of the state in which they have chosen to be incorporated[387].

It has been identified several types of corporate mobility. One type concerns cases in which new companies are formed in one jurisdiction and do in business in another jurisdiction. Another type is the company migrating from one state ('home' or 'destination' state) to another ('host' or 'arrival' state) subjecting itself –voluntarily or not– to the company law of the latter. As will be mentioned later, several types of migration can be identified. Other types of mobility aim at increasing the efficiency of company structures. In this field, the cross–border merger of two companies constitutes another way of corporate mobility type[388].

III. MIGRATION OF COMPANIES

After the above brief exposition of the two conflicts of laws theories, right of establishment and general remarks on corporate mobility, it must be stressed that corporate mobility can be examined in a number of scenarios. The focus is firstly on the perspective of the home state/state of destination (i.e. *outbound migration*) and secondly on the perspective of the host state/state of arrival (i.e. *inbound migration*). Issues such as the company's ability to transfer its registered office and/or administrative seat without forgoing its legal identity, the change of applicable law as a result of the transfer of the connecting factor, as well as recognition of foreign companies are raised. These problems are related to both conflict of laws rules and

---

386 **Wyckaert/Jenné,** p. 290.

387 **Bebchuck, Lucian Arye/Cohen, Alma:** Firms' Decisions Where to Incorporate, Journal of Law and Economics, Vol. 46, No. 2, 2003, pp. 383–425; **McCahery/Vermeulen,** *Delaware Effect,* p. 789; **Siems,** *EC Company Law in the 21st Century,* p. 48; **Wyckaert/Jenné,** p. 290; **Dammann,** *Freedom of Choice*, p. 476–477, footnotes 1–2; **DeMott,** p. 163; **Kersting,** p. 2 *et seq*.

388 For this enumeration that has been accepted traditionally see **Wymeersch,** *Directive on Corporate Mobility*, p. 163; **Wyckaert/Jenné,** p. 290.

substantive law of the each states[389]. The first issue is governed by the substantive law of the home state and the host state. The last two are governed by conflict of laws rules, again, of both states[390].

A. Outbound Migration (Emigration)

It is possible that a company may want to transfer its registered office and/or administrative seat to another State. The outbound migration or emigration of companies refer whether or not such transfer is possible, from the perspective of the home state/state of destination. Issues arising this transaction are depend both on this State's conflict of laws rules and substantive law. There are several outcomes of the transfer abroad of a company's administrative seat and/or registered office.

(i) *Identity–preserving company law change:* After the transfer of the administrative seat and/or registered office, the company law of the country of arrival applies. The company retains its legal identity and is not regarded as having been wound up. This means that all assets, liabilities and contractual relations remain unaffected.

(ii) *Continuity of the legal identity without change of the applicable company law:* After the transfer of the administrative seat and/or registered office, the company is not regarded as having been wound up, but the applicable company law does not change.

(iii) *Winding–up of the company:* After the transfer of the administrative seat and/or registered office, the company is wound up, its assets are taxed as in the case of a liquidation and all contractual relations (such as those with suppliers or workers) are interrupted.

(iv) *The decision to transfer the seat abroad is ineffective:* Despite the transfer abroad, the administrative seat and/or registered office are regarded as still being in the country of incorporation, and the original company law should be still applied.

---

389 These are brief explanations about outbound/inbound migration and various scenarios will be discussed succeeding section §4–VI.

390 For a discussion on whether the change of applicable law should be linked with the transfer of seat, see **Wymeersch,** *Directive on Corporate Mobility*, p. 168; **Panayi,** *Corporate Mobility in PIL*, p. 131.

1. Transfer of Registered Office

If a company wants to transfer its registered office to another State, the position of this state will be determined according to the conflict of laws theory it follows. If the home state follows the incorporation theory, then the transfer of the registered office would mean that the connecting factor has moved. In principle, this is followed by a change of applicable law, unless substantive law in the home state prevents this[391].

If the home state follows the real seat theory and a company wants to transfer its registered office to another state, then, one would think that, so long as the administrative seat remains in the real seat state, this ought not to be an issue. However, as registration connects the company with the laws of the state in which it is registered, once the registered office is transferred, the laws of that state become unenforceable. Therefore, many states require the coincidence of administrative seat and registered office for companies to be validly formed and remain in existence therein. As a result, the purported transfer of the registered office may be ineffective and/or the company may be deemed or required to wind–up[392].

2. Transfer of Administrative Seat

If a company wants to transfer its administrative seat to another State, the position of this state again will be determined according to the conflict of laws theory it follows. If the home state follows the incorporation theory, then arguably, it only focuses on the registered office. The location of the administrative seat is irrelevant, this not being a connecting factor. Therefore, the transfer of administrative seat from an incorporation state is likely to be allowed. The company will remain registered in the home State and, as a corollary, there will be no change of applicable law.

---

391 A home State following the incorporation theory may not allow the transfer of registered office. For example, the UK, which follows the domicile rule, does not recognize a domicile of choice. Therefore, there can be no change of a connecting factor and as a corollary no change of applicable law. If there is such a move, then a new company may be deemed to have been incorporated in the country of arrival whilst the 'old' company will continue to exist in the UK. See **Nygh, Peter:** The Refugee Corporation, University of Western Australian Law Review, Vol. 12, 1975/76, p. 468.

392 **Roth,** *From Centros to Überseering*, p. 177; **Panayi,** *Corporate Mobility in PIL*, p. 132

If the home state follows the real seat theory, then the transfer of administrative seat may not be possible. The company may not be allowed to move its administrative seat abroad without having to wind–up and dissolve first, and/or the decision to transfer may be considered invalid in the home state. Even if the home state allows such transfer, it may impose a number of additional requirements. For example, there may be a requirement that the shareholders of the company approve such move unanimously, and/or that the transfer of administrative seat is in accordance with the rules of both the home state and the host state[393].

B. Inbound Migration (Immigration)

A company that wants to transfer its administrative seat and/or registered office also needs to ensure that the host state will accept such transfer. The inbound migration or immigration of companies refer whether or not such transfer is possible, from the perspective of the host state/state of arrival. This will, again, depend on the conflict of laws rules and the substantive law of the host state.

1. Transfer of Registered Office

If the host state follows the incorporation theory, then as the registered office is a connecting factor, the host state will most likely require reincorporation and as a result there will be a change of applicable law. However, if the host state allows a *renvoi* and the home state follows the incorporation theory, then there may be no change of applicable law.

If the host state follows the real seat theory, one would have thought that the purported transfer of the registered office is insignificant since the relevant connecting factor is the administrative seat. However, the host State may require the company to transfer its administrative seat as well in order to recognise it as a foreign company or to reincorporate altogether. In other words, it may require that the registered office and the administrative seat of a company coincide.

---

393 **Rammeloo,** *Corporations in PIL*, p. 14, **Panayi,** *Corporate Mobility in PIL*, p. 132.

2. Transfer of Administrative Seat

If a company wants to transfer its administrative seat to a real seat country, then from the perspective of the host state there is invariably a change of applicable law, irrespective of the conflict rules applied by the home state. Also, the host state may require that a company transfer its registered office as well and/or to reincorporate. In other words, the host state may deny recognition unless the company dissolves in its home state and reincorporates in the host state.

By contrast, if the host state follows the incorporation theory, then it will refer back to the home state, being the state of incorporation. If the home state accepts this *renvoi* and does not refer back to the laws of the host state, then there will be no change of law. The laws of the home state will most likely continue to apply. Otherwise, there may be a change of law. Some countries may still require the company to reincorporate in their jurisdiction, even if they concede that there is no change of law.

§4. TECHNIQUES FOR CORPORATE MOBILITY

I. THE EUROPEAN COMPANY (*SOCIETAS EUROPAEA*)

A. Creation of the European Company

The European Company (the '*Societas Europaea*' or 'SE') was created by Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute of European Company (SE)[394] as the first supranational type of company[395]. It has also been adopted the Directive 2001/86/EC of 8 October 2001 supplementing the statute with regard to the involvement of employees in the European company[396]. The SE Regulation has been

---

394 See OJEU (L 294), 10.11.2001, p. 1.

395 For a detailed legislative history of the SE Regulation see **Edwards, Vanessa:** The European Company Essential Tool or Eviscerated Dream?, Common Market Law Review, Vol. 40, Issue 2, 2003, p. 443 *et seq*.

396 Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company With Regard to the Involvement of Employees. See OJEU (L 294), 10.11.2001, p. 22.

transposed into Member States' national laws and officially entered into effect throughout Europe on 8 October 2004[397].

As it will be shown, the creature of the European Company does clearly provide European businesses with an alternative solution through its legal framework on the transfer of seat. One of the key features of this new legal form is the possibility of transferring the company's seat from one Member State to another without having to be wound up, to re–register or to change its legal personality[398]. Because this was a major step in the legislative evolution and harmonization of European company law regarding corporate mobility[399]. In other words, one of the SE's major benefits is its mobility throughout the EU[400] since the SE offers certain advantages over national companies, paricularly the cross–border corporate mobility[401]. Moreover, the SE has the opportunity to be able to combine all the techniques for company mobility: cross–border mergers, transfer of registered office, and fiscal neutrality for cross–border transactions[402].

A *Societas Europaea* cannot be freely incorporated solely by investment of private capital. There is a need for existence of at least two legal enterprises which furthermore

---

[397] For details of transposition of the Regulation into Member States' national laws see **Oplustil, Krzysztof/Teichmann, Christoph (Eds.):** The European Company–all over Europe: A State–by–State Account of the Introduction of the European Company, De Gruyter Recht, Berlin 2004, p. 1 *et seq*.

[398] Commissioner McCreevy pointed out that: "*Companies already have legal means to effectuate cross–border transfer. Several companies have already transferred their registered office, using the possibilities offered by the European Company Statute*". See Mr McCreevy's Speech of the 3[rd] October 2007 at the European Parliament's Legal Affairs Committee, available at: <http://europa.eu/rapid/press–release_SPEECH–07–592_en.pdf>.

[399] **Hansen, Lone L.:** Merger, Moving and Division Across National Borders–When Case Law Breaks through Barriers and Overtakes Directives, European Business Law Review, Vol. 18, Issue 1, 2007, p. 181; **McCahery/Vermeulen,** *Delaware Effect*, p. 797; **Wyckaert/Jenné,** p. 300.

[400] **Ringe, Wolf–Georg:** The European Company Statute in the Context of Freedom of Establishment, Journal of Corporate Law Studies, Vol. 7, No. 2, 2007, p. 186; **Bouloukos, Marios**: The European Company (SE) as a Vehicle for Corporate Mobility within the EU: A Breakthrough in European Corporate Law? European Business Law Review Vol. 18, Issue 3, 2007, p. 535 *et seq*.

[401] It has been argued that the European legislator designed the SE specifically to cater to the needs of cross–border business activity in the internal market. It is therefore no surprise that the European Company facilitates corporate mobility within the EU. See **Eidenmüller, Horst/Engert, Andreas/Hornuf, Lars:** Incorporating Under European Law: The *Societas Europaea* as a Vehicle for Legal Arbitrage, European Business Organization Law Review, Vol. 10, Issue 1, 2009, p. 8

[402] **Lenoir, Noëlle:** The *Societas Europaea* (SE) in Europe A Promising Start and an Option with Good Prospects, Utrecht Law Review, Vol. 4, Issue 1, 2008, p. 17.

must fall under the scope of different national legislation. In other words, in order to create a *Societas Europaea*, the definite cross–border element between companies at hand must be visible or can be identified[403].

The *Societas Europaea* is a European public limited–liability company, enjoying legal personality independent of its shareholders [Art. 1(1)–(3) of the SE Regulation]. Its name must be preceded or followed by the abbreviation 'SE' (Art. 11 of the SE Regulation). The minimum subscribed share capital is set to EUR 120.000, unless the activity carried on by the SE is subject to greater requirements due to the law of the Member State where the registered office is situated [Art. 4(1)–(3) of the SE Regulation].

It must be noted that, in accordance with the Art. 7 of the SE Regulation, the registered office of the SE has to be located within the EU, in the same Member State as its head office. It means that the seat indicated in the company's bylaws must be the place where the activity and legal life of the SE take place[404]. Additionally, Member States may require that the registered office and head office of the SE are situated in the same place (Art. 7 of the SE Regulation). This mandatory link between registered office and head office is even more emphasised by the Art. 64 of the SE Regulation, which provides for several sanctions in case the SE does not comply with this requirement[405].

The European Company is in large part governed by the same set of rules as a public company under national company law. There are, however, a number of differences between an SE and a public company incorporated under national law regarding, *inter alia*, the corporate governance, structure, mandatory rules on worker co–determination, corporate mobility[406], and the possibility to consummate a cross–border merger[407].

---

403 **Werlauff, Erik:** SE–The Law of the European Company, Copenhagen 2003, p. 39.

404 **Da Costa, Carla Tavares/De Meester Bilreiro, Alexandra:** The European Company Statute, Kluwer Law International, The Hague/London/New York 2003, p. 49.

405 **Ringe,** *The European Company Statute,* p. 188.

406 There are several motives for setting up an SE, but the possibility to transfer the registered office to another country represents an important advantage for choosing the SE as a legal form.

407 **Eidenmüller, Horst/Engert, Andreas/Hornuf, Lars:** The Societas Europaea: Good News for European Firms, ECGI Working Paper Series, Law Working Paper No. 127/2009, Brussels 2009, p. 19, available at SSRN: <http://ssrn.com/abstract=1409555>.

B. Principles of Formation of a European Company

There are four primary ways of forming an SE, found in Art. 2 of the SE Regulation. All four in a matter of principle require that participating companies have their registered office as well as their actual seat within the EU, though not necessarily in the same Member State. As mentioned above, a prerequisite for the formation of an SE is, basically, the existence of at least two companies of different nationalities.

1. Formation by Way of Mergers

The first possibility for formation of a SE is a process of merger between at least two public limited–liability companies[408] that are currently established in different Membes States. Under the Arts. 2(1) and 17(1) of the SE Regulation these companies may form an SE by means of a merger provided that at least two of them are governed by the law of different Member States. The procedure for such mergers is laid down in Arts. 17–31 of the SE Regulation and is similar to the procedure for 'national' mergers set out in the Third Company Law Directive[409].

During the merger by acquisition (absorption), the acquiring company becomes an SE at the same time as it carries out the acquisition. With the merger by formation of a new company (combination), the SE at hand is becoming a 'new company' as the final result of such merger[410]. An SE represents consequently a continuation of merged companies, taking over all the assets and liabilities of those companies.

The SE Regulation explicitly mentions that the law of the Member State governing each merging company must apply as in the case of a merger of public limited–liability companies, with regard to the protection of the interests of (i) creditors of the merging companies; (ii) holders of bonds of the merging companies; (iii) holders of securities, other than shares, which carry special rights in the merging companies [Art. 24(1) of the SE Regulation]. Moreover, Member States permitted to adopt provisions designed

---

408 A list of public limited liability companies in the respective Member State of the EU can be found in Annex I attached to the SE Regulation.

409 Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty Concerning Mergers of Public Limited Liability Companies. See OJEU (L 295), 20.10.1978, p. 36.

410 **Werlauff,** *The Law of the SE*, p. 44; Art. 17(2) of the SE Regulation.

to ensure appropriate protection for minority shareholders who have opposed the merger[411]. It must be noted that, this merger is tax–neutral under the Merger Tax Directive[412].

2. Formation by Creating a Holding Company

According the Art. 2(2) of the SE Regulation, an SE may be incorporated through the creation of a holding SE. The procedure for such transaction is laid down in Arts. 32–34 of the SE Regulation. Under this way, two or more public and/or private limited liability companies[413] can contribute their shares in order to establish an SE, which in exchange for those shares will become their parent company. The fact that only companies with liability linked to shares can participate in formation of a holding is clearly stipulated in the Art. 32(7) of the SE Regulation.

A holding SE acquires legal personality on the day of registration if the national registry approves the formalitied and conditions of formation in question. A notice of the formation with following registration shall be published in the OJEU [Art. 33(5) of the SE Regulation]

3. Formation by Incorporation of a Subsidiary

In accordance with the Art. 2(3) of the SE Regulation companies and firms within the meaning of the second paragraph of Art. 54 TFEU or legal entities can form a *Societas Europaea* by incorporation of a subsidiary. This article also includes other type of legal bodies governed by public or private law. The procedure of this formation is laid down in Arts. 35–36 of the SE Regulation. Art. 2(3) of the SE Regulation stipulates that at least two of the entities at hand must be subjected to the laws of different Member

---

411 Art. 24(2) of the SE Regulation. See also **Wyckaert, Marieke/Geens, Koen:** Cross Border Merger and Minority Protection: An Open–Ended Harmonisation, Utrecht Law Review, Vol. 4, Issue 1, March 2008, p. 40 *et seq*.

412 Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States, OJEU (L 225), 20.08.1990, p. 1. See also, **Wyckaert/Jenné,** p. 301.

413 A list of public limited liability companies in the respective Member State of the EU can be found in Annex II attached to the SE Regulation.

States of two of these entities at hand must have for at least two years owned a subsidiary governed by the law of another Member State.

4. Formation by Conversion

Under the Art. 2(4) of the SE Regulation, a public limited–liability company incorporated under the law of a Member State can, according to the principles of conversion, be transformed into an SE, if it has by that time had for at least two years a subsidiary company governed by the law of another Member State. It must be noted that there is no definition of 'subsidiary' in the SE Regulation. But the concept of 'subsidiary' has been defined in the Art. 1 of the Directive 83/349/EEC (Seventh Company Law Directive)[414], and the Member States have transposed that definition into their national legislations.

Conversion requirements of an existing public limited–liability company into an SE is laid down in the Art. 37 of the SE Regulation It should be born in mind that conversion does not lead to a liquidation of original company or a creation of a new one [Art. 37(2) of SE Regulation]. Instead, it presents a factual continuation of the old company in a new form. The important aspect of conversion is that registered office may not be transferred into another Member State until the end of the process [Art. 37(3) of SE Regulation]. Furthermore similarly to the case of holding SE, the national authorities has not have the right to veto the transformation on the grounds of the public interest[415].

C. Transfer of Seat by a European Company

1. General Remarks

As mentioned earlier, one of the key features of the SE is the possibility of transferring the company's seat from one Member State to another without prior liquidation and without new establishment[416]. Although one of the SE's major benefits is its mobility

414 Seventh Council Directive of 13 June 1983 based on the Article 54(3)(g) of the Treaty on Consolidated Accounts. See OJEU (L 193), 18.7.1983, p. 1.

415 **Werlauff,** *The Law of the SE*, p. 67.

416 **Ringe,** *The European Company Statute,* p. 185; **Wyckaert/Jenné,** p. 301; **Lombardo, Stefano/ Pasotti, Piero:** The 'Societas Europaea': a Network Economics Approach, ECGI Working Paper Series, WP 19/2004, Brussels 2004, p. 10, available at SSRN: <http://ssrn.com/abstract=493422>;

throughout the EU, cross–border corporate mobility is not an exclusive privilege of the European Company. Due to the below–mentioned case law of the CJEU, national companies are no longer barred from conducting all or part of their business activities abroad, provided that their home state permits such a move[417]. But it must be born in mind that the CJEU has held that the right of establishment, granted by the Arts. 49 and 54 TFEU, did not extend to a corporation's ability to transfer its place of incorporation[418]. So, prior to the SE Regulation, such transfer was effectively imposible for companies[419].

Art. 8 of the SE Regulation facilitates the transfer of an SE's registered office to another Member State. Under the Art. 8(1) of the SE Regulation, the registered office of an SE may be transferred to another Member State and such a transfer shall not result in the winding up of the SE or in the creation of a new legal person[420]. Therefore the SE is probably the only type of company that can move its headquarters from one "real seat" state to another without dissolution[421].

The phrase of 'to another Member State' stipulated in the Art. 8(1) of the SE Regulation has two consequences. First, the scope of this article does not include the transfer of registered office within the same Member State[422]. Secondly, the article

---

Werlauff, Erik: Cross–Border Transfers of SE Companies, European Company Law, Vol. 1, Issue 3, 2004, pp. 121–125; **Wymeersch, Eddy:** Cross–Border Transfer of the Seat of a Company–Recent EU Case Law and the SE Regulation, in: The European Company: Developing a Community Law of Corporations (Jonathan Rickford eds.), Antwerp–Oxford–New York 2003, pp. 83–94.

417 **Eidenmüller/Engert/Hornuf,** *Incorporating Under European Law*, p. 9.

418 See Case 81/87 *Daily Mail* [1988] ECR 5483, §24.

419 **Ringe,** *The European Company Statute,* p. 187.

420 Such transfer is not allowed, if proceedings for winding up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against relevant European Company. See Art. 8(15) of the SE Regulation.

421 **Navacelle, Charles:** Legislative Development: Council Regulation No. 2157/2001 of October 8, 2001 Establishing the European Company Statute, Columbia Journal of European Law, Vol. 9, 2002, p. 200.

422 For explanations on the internal transfer of the registered office, see **Ringe,** *The European Company Statute,* p. 207 *et seq*.

implies that it does not cover also the transfer of the registered office into a third State, i.e. a State which is not a Member of the EU[423].

As mentioned previously, Art. 7 of the SE Regulation mandates that an SE's registered office must be located in the same Member State as its head office. This means that every time a registered office is transferred to another Member State, the SE has to simultaneously transfer the head office to this new state[424]. Therefore, the transfer of the registered office has to be accompanied with the transfer of head office to be effective[425]. It is not possible for an SE to transfer its registered office alone to another Member State while keeping its real head office elsewhere. This reveals that there is in the SE Regulation a predominance of the real seat theory[426]. So, this article of the SE Regulation solves the problems of conflicts of laws that currently exist when there is the transfer of the sole registered office, between States adhering the incorporation theory and States relyging on the real seat doctrine[427]. If an SE fails to fulfill this requirement, the Member State in which the SE's registered office is situated will take appropriate measures to oblige the SE to regularise its position within a specified time; otherwise, it has to be liquidated (Art. 64 of SE Regulation)[428].

2. Rules and Procedure of the Transfer of the Seat of an SE

The idea of the SE is to provide the company with a large degree of flexibility and mobility within the European internal market. For this reason, the SE can transfer its seat to a different Member State, provided that certain safeguards have to be fulfilled. In other words, the transfer can only take place once the authorities in both Member States are satisfied that all the acts and formalities have been completed. The rules and

---

423 For explanations on the transfer into a Non–Member State, see **Ringe,** *The European Company Statute,* p. 208 *et seq*.

424 **Da Costa/De Meester Bilreiro,** p. 49; **Ringe,** *The European Company Statute,* p. 187. In other words, Article 7 of the SE Regulation makes a clear choice in favour of the real seat theory as the conflict of law rule to be applied to European companies registered in the Member States. See **Lombardo/ Pasotti** p. 10.

425 **Panayi,** *Corporate Mobility in PIL*, p. 138.

426 **Wymeersch,** *Transfer of the Company's Seat*, p. 691.

427 **Da Costa/De Meester Bilreiro,** p. 54.

428 It has been argued that these two provisions are contrary to the primary legislation of the EU and sanctions imposed by the SE Regulation are drastic. See **Ringe,** *The European Company Statute,* p. 202; **Wymeersch,** *Transfer of the Company's Seat*, p. 693; **Sousa,** p. 59.

procedure on the transfer of the seat of a *Societas Europaea* set out in the Art. 8 of the SE Regulation can be summarized as follows:

a. SE Transfer Proposal

The SE Regulation provides that a transfer proposal is to be drawn up by the management of administrative organ of the company, containing the items listed in the SE Regulation. This proposal must state the current name, registered office and number of the SE. Moreover, the proposal should cover: (i) the proposed registered office of the SE; (ii) the proposed statutes of the SE including, where appropriate, its new name; (iii) any implication the transfer may have on employees' involvement; (iv) the proposed transfer timetable; (v) any rights provided for the protection of shareholders and/or creditors [Art. 8(2) of the SE Regulation].

The SE transfer proposal of the company is to be publicized in the manner laid down in the laws of the Member State in which the SE has its registered office[429]. The decision to transfer is to be taken at least two months after publication of the proposal [Art. 8(6) of the SE Regulation]. The aim of this time–period is to ensure the protection of third parties, who, meanwhile, can take measures and provide guarantees before the transfer of the seat[430].

Moreover, the SE Regulation empowers Member States to oppose the transfer of the seat of an SE. According the SE Regulation, laws of a Member State may provide that, as regards SEs registered in their territory, the transfer of a registered office shall not take effect if any of that Member State's competent authorities opposes it within the two–month period. Such opposition may be based only on grounds of public interest[431]. There term of 'public interest' is a regrettably uncertain. It is possible to interpret this term in accordance with the general EU law as used in the Art. 52 TFEU (ex Art. 46

429 This proposal shall be publicized in accordance with the national provisions adopted for the implementation of the Directive 2009/101/EC (First Company Law Directive). See Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009, OJEU (L 258), 01.10.2009, p. 11. It must be noted that First Council Directive 68/151/EEC of 9 March 1968 has been repealed by this Directive.

430 **Da Costa/De Meester Bilreiro,** p. 55.

431 It has been argued that such a measure against the principle of freedom of establishment within the EU. See **Da Costa/De Meester Bilreiro,** p. 55, footnote 61.

TEC) and established case–law of the CJEU on this matter[432]. Review by a judicial authority shall be possible [Art. 8(14) of the SE Regulation].

b. The Special Report of the Management

The management or administrative organ of the company shall draw up a special report. This report should explain and justify the legal and economic aspects of the transfer and explain the implications of the transfer for shareholders, creditors and employees [Art. 8(3) of the SE Regulation]. This report must be available to shareholders and creditors[433].

c. Protection of Stakeholders' Interests

Three groups are protected by the detailed provisions laid down in Art. 8 of the SE Regulation: shareholders, creditors and minority shareholders[434]. The SE's shareholders and creditors are entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the SE's registered office the transfer proposal and the report drawn up by the management explaining and justifying the transfer, on request, to obtain copies of those documents free of charge [Art. 8(4) of the SE Regulation]. A Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer [Art. 8(5) of the SE Regulation].

d. Decision by the General Meeting of the SE

The decision to transfer the seat of the SE may be taken after the expiration of two months following the publication of the transfer proposal [Art. 8(6) of the SE Regulation]. The decision to transfer the seat requires amendment of the corporate statutes of the SE. The SE Regulation requires that amendment of an SE's statutes shall require a decision by the general meeting taken by a majority which may not be less than two thirds of the votes cast, unless the law applicable to public limited–liability

---

432 **Ringe,** *The European Company Statute,* p. 206.

433 **Wyckaert/Jenné,** p. 301.

434 For details of the rationales for protection of these groups see **Ringe,** *The European Company Statute,* p. 203.

companies in the Member State in which an SE's registered office is situated requires or permits a larger majority[435]. A Member State may, however, provide that where at least half of an SE's subscribed capital is represented, a simple majority of the votes shall suffice [Art. 59(2) of the SE Regulation].

It should be pointed out that the general meeting's decision –and the consequential amendment of the bylaws of the SE– is publicized in the manner laid down in the laws of the Member State in which the SE has its registered office in accordance with Directive 2009/101/EC[436]

It has been argued that, one of the advantages of the SE Regulation is the fact that unanimity of the shareholders is not required for the decision to transfer in general meeting[437].

e. Liabilities Arising Prior to the Publication of the Transfer Proposal

Before the competent authority issues the certificate attesting to the completion of the acts and formalities to be accomplished before the transfer, the SE shall satisfy it that, in respect of any liabilities arising prior to the publication of the transfer proposal, the interests of creditors and holders of other rights in respect of the SE (including those of public bodies) have been adequately protected in accordance with requirements laid down by the Member State where the SE has its registered office prior to the transfer. This obligation may be extended to liabilities that arise (or may arise) prior to the transfer. This rules shall be without prejudice to the application to SEs of the national legislation of Member States concerning the satisfaction or securing of payments to public bodies [Art. 8(7) of the SE Regulation].

435 Art. 8(6) in connection with Art. 59(1) of the SE Regulation.

436 Art. 59(2) and 13 of the SE Regulation.

437 **Da Costa/De Meester Bilreiro,** p. 56.

f. Scrutiny of the Transfer of the Seat's Legality

In the Member State in which an SE has its registered office the court, notary or other competent authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer [Art. 8(8) of the SE Regulation].

g. New Registration of the SE

The SE should be registered in the Member State of the new registered office, in a register designated by the law of the Member State [438]. The new registration may not be effected until the certificate attesting to the completion of the acts and formalities to be accomplished before the transfer has been submitted, and evidence produced that the formalities required for registration in the country of the new registered office have been completed [Art. 8(9) of the SE Regulation].

The transfer of an SE's registered office and the consequent amendment of its statutes shall take effect on the date on which the SE is registered in the register for its new registered office [Art. 8(10) of the SE Regulation]. When the SE's new registration has been effected, the registry for its new registration shall notify the registry where the SE was previously registered. Deletion of the old registration shall be effected on receipt of that notification, but not before [Art. 8(11) of the SE Regulation].

h. Publication Requirements

The new registration and the deletion of the old registration are to be publicized in the Member States concerned in the manner laid down in the laws of these Member States pursuant to the disclosure requirements imposed by the Directive 2009/101/EC[439].

On publication of an SE's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the SE's registration from the register for its previous registered office has not been publicized, third parties may

[438] In accordance with the Art. 3(1) of the Directive 2009/101/EC, each Member State shall designate a register, commercial register of companies register for the purpose of the disclosure requirements imposed by the Directive.

[439] Art. 8(12) and 13 of the SE Regulation.

continue to rely on the previous registered office unless the SE proves that such third parties were aware of the new registered office[440].

Notice of an SE's registration and of the deletion of such a registration shall be published for information purposes in the OJEU. The documents and particulars should be forwarded to the Office for Official Publications of the European Union within one month of the publication in tha manner laid down in the laws of the Member States concerned. That notice must state the name, number, date and place of registration of the SE, the date and place of publication and the title of publication, the registered office of the SE and its sector of activity together with the information relating to the new registration (Art. 14 of the SE Regulation).

D. Success of the European Company?

It is worth mentioning that, as a legal entity, the SE allowed to voluntarily change the applicable law without losing its legal identity. In other words, the SE Regulation allows identity–preserving company law changes, provided that the SE simultaneously transfers the registered office and administrative seat to another country. The SE is therefore a suitable vehicle for overcoming Member States' resistance to identity–preserving company law changes[441].

It must be noted that the SE is currently the only commercial company that benefits from complete freedom of establishment, at the same time being both secondary (establishment of agencies, branches and subsidiaries) and primary (transfer of registered office)[442]. For this reason, the SE form facilitates cross–border mergers and allows registered office mobility within the EU. The mobility offered by SE status lies in the possibility of transferring the registered office. The SE's legal personality continues unaffected by such transfers. This continuity of the legal personality,

---

[440] Art. 8(13) of the SE Regulation; See also Art. 3(6) of the Directive 2009/101/EC. It provides that the documents and particulars may be relied on by the company as against third parties only after they have been disclosed, unless the company proves that the third parties had knowledge thereof.

[441] **Enriques, Luca:** Silence is Golden: The European Company as a Catalyst for Company Law Arbitrage, Journal of Corporate Law Studies, Vol. 4, Issue 1, 2004, p. 84 *et seq.*

[442] On this argument, see **Pellé, Philippe:** Companies Crossing Borders within Europe, Utrecht Law Review, Vol. 4, Issue 1, 2008, p. 8; **Werlauff, Erik:** The SE Company–A New Common European Company from 8 October 2004, European Business Law Review, Vol. 14, No. 1, 2003, pp. 85–103.

regardless of the registered office's location and whether it is transferred from one Member State to another, avoids the issue of the company's nationality[443].

Almost 1603 SEs have been established between 2004 and 2012, and 12 companies were reported to be in the process of registering as an SE[444]. On the other hand, SEs have begun to use the flexibility specific to their status in terms of cross–border mobility. 52 SEs have already transferred their registered office to other Member States, sometimes just after initial registration[445].

It has been argued that this is not an impressive number. On the whole, it is felt that because of the abovementioned formation requirements, the European Company is mainly suitable and viable option for large companies[446] and it is not best solution for small and medium–sized enterprises (the 'SMEs')[447]. Nowadays, everyone recognises that SMEs play a fundamental role in the European economy, where they account for more than 90% of all firms and 2/3 of the jobs[448]. Since the costs of the establishment

---

443 **Stolowy, Nicole:** Does the "Societas Europaea" or "European Company" Make a Significant Contribution to Construction of a European Company Law?, Journal of Business Law, Vol. 5, 2012, p. 366. It must be noted that the SE has the opportunity to be able to combine all the techniques of corporate mobility: cross–border mergers, transfer of registered office, and fiscal neutrality for cross–border transactions. On this argument see **Lenoir,** p. 15.

444 Information on established and planned SEs is available at European Trade Union Institute for Research, Education, Health and Safety (ETUI)'s web site: <http://ecdb.worker–participation.eu>.

445 The reasons for these transfers are not yet entirely clear. In most cases, they are driven by tax optimization strategies. The most frequent destinations for transfers are generally the United Kingdom and Cyprus, and the SEs concerned by the transfers are mostly operational, but have no employees. On this argument, see **Stolowy,** p. 371.

446 **Wyckaert/Jenné,** p. 302; **Winter Report,** p. 114, 117; **Navacelle,** p. 201; **Lenoir,** p. 14–15; **Pellé,** p. 8. As evidenced by the Commission in its recent assessment report, the SE has not been a success. See Report from the Commission to the European Parliament and The Council The Application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Brussels 17.11.2010, [COM (2010) 676 final], available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0676:FIN:EN:PDF>.

447 According to a recommendation by the Commission since 2003, there is a communitarian legal definition of SMEs. Medium–sized enterprises have a turnover of not more than EUR 50 million or a balance sheet total not exceeding EUR 43 million and fewer than 250 employees. Small enterprises are defined as having fewer than 50 employees and an annual turnover and/or an annual balance–sheet total of not more than EUR 10 million, whereas micro enterprises have 10 or fewer employees and an annual turnover and/or balance–sheet total of no more than EUR 2 million. See Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium–Sized Enterprises [notified under document number C (2003) 1422)] (2003/361/EC), OJEU (L 124), 20.05.2003, p. 36.

448 EU SMEs in 2012: At the Crossroads: Annual Report on Small and Medium–Sized Enterprises in the EU 2011/12, Rotterdam 2012, available at: <http://ec.europa.eu/enterprise/policies/sme/facts–figures–analysis/performance–review/files/supporting–documents/2012/annual–report_en.pdf>.

and the amount of the minimum subscribed share capital of a SE are higher than those associated with the formation of a common company[449], the mobility of companies by way of SE is not suitable for SMEs that form the backbone of the EU economy.

Secondly, the SE is governed by the real seat principle[450], which is to say that its registered office (place of registration) and its head office (central administration) must be in the same location (Art. 7 of SE Regulation). Therefore, the transfer of the registered office has to be accompanied with the transfer of the head office to be effective. In other words, SEs will be able freely to change the legal regime to which they are subject by moving both registered office and head office. This constitutes an important limitation on the apparently free choice granted to SEs among the various company law regimes of the Member States[451]. That is why in *Cartesio*, the CJEU rejected[452] the Commission's argument that SE Regulation paved the way for unhindered transfer of registered office[453].

---

449 As mentioned above, the subscribed capital must be at least EUR 120,000 [Art. 4(1) of the SE Regulation]. This is almost five times higher than the legal capital required of a national public limited company according to the 2nd Company Law Directive. See Art. 6(1) of the Directive 2012/30/EU, OJEU (L 315), 14.11.2012, p. 74 [Before 4 December 2012, Art. 6(1) of the Second Council Directive 77/91/EEC].

450 Recital (27) of the SE Regulation provides that: "In view of the specific character of an SE the "real seat" arrangement adopted by this Regulation in respect of SEs without prejudice to Member States' laws and does not pre–empt any choices to be made for other Community text on company law". But there has been an ongoing academic debate about whether the SE Regulation corresponds more closely to the real seat or to the incorporation theory. On this argument, see **Ringe,** *The European Company Statute,* pp. 188–189 and footnote 8; **Johnson,** *Fourteenth Company Law Directive*, p. 29. In other words, the provisions of Arts 7, 8 and 64 of SE Regulation jointly adopt a kind of 'European real seat theory' for SEs. See **Ebert, Sabine:** The Law Applicable to Groups of Companies Involving European Companies (*Societas Europaea*), Company Lawyer, Vol. 25, Issue 4, 2004, p. 110.

451 The requirement of coincidence between registered office and head office in the same country is a disadvantage as regards the choice of law of incorporation and the flexibility of a company to change its place of registered or head office only. See **Johnston,** p. 90; **Rickford,** *Restructuring of Companies,* p. 1243; **Lenoir,** p. 17; **Lennarts,** p. 3; **Wooldridge, Frank:** The 10th Company Law Directive on Cross–Border Mergers, Company Lawyer, Vol. 27, 2006, p. 310. It has been argued, on the other hand, that in this respect the SE Regulation tries to find a compromise between the incorporation theory and the real seat theory. See **Ringe,** *The European Company Statute,* p. 190.

452 Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641 §115 *et seq.*

453 **Panayi,** *Corporate Mobility in PIL*, p. 138.

The other issue is employee participation. Alongside the SE Statute, the supplementary Directive on the Involvement of Employees in an SE[454] was adopted. It creates a European umbrella and common framework for cross–border participation rights for employees of SEs throughout Europe. On the basis of the rules contained in this Directive, employee representatives from the countries concerned and the management of the companies involved will negotiate to decide what form employee participation in the SE's decision–making process will take. The onerous procedure with regard to employee participation, as good a compromise as it may be, is not applied with enthusiasm by those Member States in which employee participation is limited to information or, at the most, consultation[455].

Moreover, the SE Statute provides special safeguards for minority shareholders of the participating companies, who disagree with the creation of an SE[456]. The minority protection is, of course, a good reason for the introduction of these provisions; but it could potentially create impediments to cross–border mergers.

It is apparent that the current EU secondary legislation offers the prospect for the indirect transfer of the registered office by virtue of SE Regulation. This possibility is described as indirect, since it does not provide for smooth and single step transfer. On the other hand, a company has to undergo three steps procedure when it wants to re–register[457]. Because the public limited company intending to transfer its seat abroad will, first have to convert itself into an SE in its home Member State[458]. The SE will subsequently transfer its registered office to the host Member State and finally, convert

---

454 Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees, see OJEU (L 294), 10.11.2001, p. 22.

455 **Wyckaert/Jenné,** p. 302.

456 Art. 8(5) states that a Member State may, in the case of SEs registered within its territory, adopt provisions designed to ensure appropriate protection for minority shareholders who oppose a transfer of the registered office of an SE to another Member State. Art. 24(2) refers specifically to the creation of an SE by a cross–border merger and states that a Member State may, in the case of the merging companies governed by its law, adopt provisions designed to ensure appropriate protection for minority shareholders who have opposed the merger. See **Rickford,** *Restructuring of Companies,* p. 1243.

457 **Vossestein, Gert–Jan:** Cross–Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment–Some Considerations on the Court of Justice's Cartesio Judgment, European Company Law, Vol. 6, Issue 3, 2009, p. 115 *et seq.*

458 This is only possible, however, if the company for at least two years has had a subsidiary company governed by the law of another Member State. See Arts. 2(4) and 37 of the SE Regulation.

itself back, in the host Member State, into a public limited company subject to the *lex societatis* of that host Member State[459]. Apparently, these procedures are far from being attractive to businessmen[460].

We find that SEs have also started to use their specific flexibility with regard to cross–border mobility. The practice to date has shown that not many companies decide to transfer their registered office on the basis of the SE Statute. By the date of 1 September 2011, 59 of them have already transferred their seat to another member state, sometimes immediately after their registration in the latter[461]. While perhaps not disappointing, this is not an impressive number.

II. CROSS–BORDER MERGERS

A. Lack of European Legislation for More Than 30 Years

The founding fathers of the EC included a provision in the EC Treaty (previously Art. 293 EC Treaty, now abolished) that the Member States would, as far as necessary, enter into negotiations with a view to securing the possibility of mergers between companies governed by the laws of different countries.

The scope of the Directive 2011/35/EU[462] (before 1 July 2011, Third Company Law Directive)[463] and Sixth Company Law Directive[464] is explicitly limited to "national"

---

459 Again, no decision on conversion may be taken before, in short, two years have elapse since its registration. See Art. 66 of the SE Regulation.

460 **Drinhausen, Florian/Nohlen, Nicolas:** The Limited Freedom of Establishment of an SE, European Company Law, Vol. 6, Issue 1, 2009, p. 14 *et seq*.

461 **Stollt, Michael/Wolters, Elwin:** Worker Involvement in the European Company (SE)–A Handbook for Practitioners, Brussels 2011, p. 90.

462 Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 Concerning Mergers of Public Limited Liability Companies, see OJEU (L 110), 29.4.2011, p.1.

463 Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty Concerning Mergers of Public Limited Liability Companies, see OJEU (L 295), 20.10.1978, p. 36; consolidated version by the date of 22.10.2009 is available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1978L0855:20091022:EN:PDF>.

464 Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, Concerning the Division of Public Limited Liability Companies, see OJEU (L 378), 31.12.1982, p. 47; consolidated version by the date of 22.10.2009 is available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1982L0891:20091022:EN:PDF>.

mergers and de–mergers[465]. For a long time, a European solution for cross–border mergers seemed impossible[466], in particular because some of the Member States were afraid that the procedure would be abused to place a company under a foreign legal system with (more) limited employee involvement[467]. As a result, European company law did not contain any legal basis for mergers between companies from different countries until 2005[468].

B. Impulse Given by the SE Regulation

Apart from the Cross–Border Mergers Directive, there is an additional legal basis for cross–border mergers at EU level, which preceded this Directive. As mentioned above, the SE Regulation that a first legal basis was created for cross–border mergers under European law, providing for the creation of a European Company by merger of two or more public limited liability companies from different Member States[469].

However, under the SE Regulation, a cross–border merger was only possible if the merging companies were public limited liability companies and a European Company was created. In view of this, the Commission announced in the Action Plan that it was desirable to adopt a Tenth Company Law Directive on cross–border mergers which was open to other types of companies and which did not require the creation of a European Company. Because both public and private limited liability companies are caught by the prvisions of the Cross–Border Mergers Directive[470].

465 See Art. 2 of the Directive 2011/35/EU; Art. 1.1. of the Directive 82/891/EEC.

466 For an early overview of various regulatory aspects of corporate mergers in the common market see **Stein, Eric:** Harmonization of European Company Laws, Michigan 1971, pp. 364–394.

467 For an historical overview of the discussions regarding a Cross–Border Directive see **Behrens, Peter:** Case Note–Judgment of 13 December 2005, *SEVIC* Systems AG, Common Market Law Review, Vol. 43, Issue 6, 2006, p. 1670.

468 **Wyckaert/Jenné,** p. 303.

469 See above the section §4–I–B–1.

470 For the relationship between the SE Regulation and Cross–Border Mergers Directive see **Papadopoulos, Thomas:** EU Regulatory Approaches to Cross–Border Mergers: Exercising the Right of Establishment, European Law Review, Vol. 36, No: 1, 2011, pp. 91–92. See also **Papadopoulos, Thomas:** Legal Perspectives on the Scope of the Tenth Company Law Directive on Cross–Border Mergers, European Current Law, No.10, 2008.

C. The Tenth Company Law Directive: Summary of Rules

The EU Commission, in accordance with the 2003 Company Law Action Plan, which was based on 2001 report of the High Level Group of Company Law Experts[471], drafted a proposal for a Cross–Border Mergers Directive[472]. Because cross–border mergers are becoming more frequent within the EU, thanks largely to companies' adaptations to the requirements of the global economy and increases in their productivity[473]. Eventually the Tenth Company Law Directive[474] was adopted on 26 October 2005 as a result of an extensive discussions emerged in 1970s[475].

Directive 2005/56/EC, which bans any obstacle imposed by the country of incorporation of a merging company, facilitates the cross–border mergers of limited–liability companies. It fills an important gap in European company law by setting up a simple framework in which, as a general rule, each merging company is governed by the provisions of its national law applicable to domestic mergers[476]. Because, prior to this Directive, only certain Member States allowed cross–border mergers; while some other Member States either did not permit cross–border mergers, or imposed onerous conditions for their realisation (e.g. winding–up of the acquired company), making the realisation of cross–border mergers very difficult or even *de facto* impossible[477].

The principles applicable to cross–border mergers laid down in the Tenth Company Law Directive are inspired by the rules set out in Third Company Law Directive wih

---

471 See for the Action Plan and the Report respectively, §6–II–C and §6–IV–A.

472 **Behrens,** *Case Note,* p. 1671; **Papadopoulos***, Regulatory Approaches,* p. 86.

473 **P. Rogers and A.–S. Cornette De Saint–Cyr:** Cross–Border Mergers (CBMs), International Company and Commercial Law Review, Vol. 13, 2002, p. 351; **Stein,** *Harmonization of EC Laws,* p. 364–370; **Papadopoulos***, Regulatory Approaches,* p. 73–74.

474 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross–Border Mergers of Limited Liability Companies, OJEU (L 310), 25.11.2005, p.1; consolidated version by the date of 02.10.2009 is available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0056:20091022:EN:PDF>.

475 For an historical discussions with regard to Cross–Border Mergers Directive see **Siems, Mathias M.:** The European Directive on Cross–Border Mergers: An International Model?, Columbia Journal of European Law, Vol. 11, Issue 1, 2004–2005, p. 167 *et seq*.

476 See European Commission Press Release, IP/05/1487.

477 **Grundmann, Stefan:** European Company Law: Organization, Finance and Capital Markets, Intersentia, Antwerp–Oxford–New York, 2007, pp. 577–578; **Papadopoulos***, Regulatory Approaches,* p. 93.

regard to national mergers. Since this thesis will discuss the Tenth Directive in terms of the mobility of companies, the basic principles must be summarized without examining all aspects of the Directive.

1. Procedures Governing Cross–Border Mergers

The Tenth Directive solely applies to cross–border mergers[478] of both public and private limited liability companies[479] formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union[480], provided at least two of them are governed by the laws of different Member States (Art. 1 of the CBMs Directive). Mergers by European and non–European corporations are not within the scope of the Tenth Directive[481].

Cross–border mergers are only possible between types of companies which may merge under the national law of the relevant Member States, and each company must comply with the provisions and formalities of the national law to which it is subject [Art. 4.1(a)–(b) of the CBMs Directive].

The management or administrative body of each of the merging companies is required to draw up the common draft terms of cross–border merger**.** The Directive contains a list of the twelve compulsory particulars that constitute the minimum content of the common draft terms (Art. 5 of the CBMs Directive), which must be published in the manner prescribed by the law of each Member State in accordance with the Directive

478 In accordance with the Art. 1(1) of this Directive, there can be (i) a merger by acquisition, (ii) by creation of new company or (iii) by transfer of share capital to a holding company. This is almost identical to the Third Company Law Directive on National Mergers, see Directive 78/855/EEC Arts. 3 and 4.

479 For the definition of "*limited liability company*", Art. 2(1) of the Tenth Directive refers to the catalogue of the Directive 2009/101/EC (formerly Directive 68/151/EEC).

480 It has been argued that reference to the companies caught by Art. 54 of the TFEU allows "*pseudo–foreign*" or "*letter–box*" companies coming from a third country to merge under the articles of the Tenth Directive. This is in contrast with the SE Regulation which requires the head office of participating companies to be located within the Union, unless a Member State relaxes this condition. See **Rickford, Jonathan:** The Proposed Tenth Company Law Directive on Cross–Border Mergers and its Impact in the UK, European Business Law Review, Vol. 16, Issue 6, 2005, pp. 1400–1401.

481 For different scenarios for national, European and international mergers see **Siems,** *Directive on CBMs,* pp. 172–173.

2009/101/EC at least one month before the date of the general meeting which is to decide on them (Art. 6 of the CBMs Directive).

The management or administrative organ of the merging companies must prepare a report on the proposed cross–border merger for the members and employees that explains the legal and economic aspects of the cross–border merger and its implications (Art. 7 of the CBMs Directive).

An independent expert report on the merger must be drawn up. It will not be required if all the members of each of the companies involved in the merger have so agreed. The expert report and the proposed cross–border merger report must be made available at least one month before the date of the general meeting (Art. 8 of the CBMs Directive)..

On the basis of the documents referred to above, the general meeting of each of the merging companies must decide on the approval of the common draft terms of cross–border merger (Art. 9 of the CBMs Directive).

2. Scrutiny of Mergers' Legality

Each Member State must designate the authority competent for scrutinising the legality of the cross–border merger as regards that part of the procedure that concerns each merging company subject to its national law. That authority must issue a pre–merger certificate attesting to the proper completion of the pre–merger acts and formalities.

Each Member State must designate the authority competent for scrutinising the legality of the cross–border merger as regards that part of the procedure that concerns the completion of the cross–border merger and, where appropriate, the formation of a new company resulting from the cross–border merger where the company created by the cross–border merger is subject to its national law. That authority must ensure that the merging companies have approved the common draft terms of cross–border merger in the same terms (Arts. 10 and 11 of the CBMs Directive).

3. Legal Effects of the Merger Transaction

Following scrutiny of legality, the law of the Member State to whose jurisdiction the company resulting from the cross–border merger is subject must determine the date on which the cross–border merger takes effect and the arrangements for publicising completion of the merger in the public register. The old registration must not be deleted until that notification has been received.

Cross–border mergers have the following effects: (i) the companies being acquired or the merging companies cease to exist; (ii) all the assets and liabilities of the companies concerned by the merger are transferred to the new entity (either the acquiring company or the new company); (iii) the members of the companies being acquired become members of the new entity.

Where the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, the company resulting from the cross–border merger is responsible for carrying out those formalities (Arts. 14 and 15 of the CBMs Directive).

D. Corporate Mobility by Way of Cross–Border Mergers

As the CJEU clarified in its *SEVIC* decision, cross–border mergers are clearly a means of corporate restructuring and the participation in any cross–border merger operations is considered to be an exercise of the right of establishment[482]. In this respect, this is something very positive for the evolution of corporate mobility and restructuring at EU level[483].

Under the Cross–Border Mergers Directive, companies may also transfer their registered office by means of merger. As mentioned above, the Directive allows a company, on being dissolved without going into liquidation, to transfer all its assets and liabilities to another company in exchange of shares and, if applicable, a cash payment.

482 In other words, the legal merger is a special method for the purpose of exercising the freedom of establishment. See Case C–411/03 *SEVIC Systems AG* [2005] ECR I–10805, §19.

483 **Papadopoulos**, *Regulatory Approaches,* p. 81.

After the completion of merger transactions, the law of the State in which the registered office of the merged company is located applies. By this way, cross–border mergers give the opportunity to EU companies to 'move' within the EU by merging and then, as single companies, to carry on their business anywhere they wish in the EU[484].

Although the adoption of the CBMs Directive undoubtedly represents an effort to increase corporate mobility, it provides an indirect way for transferring the seat of a company. A company wishing to transfer its registered office to another Member State can set up a subsidiary there and proceed with a downstream merger (i.e. become absorbed by that subsidiary)[485]. As a result, the registered office of the subsidiary will become the registered office of the merged company, which is effectively a continuation of the initial company[486]. This possibility is described as indirect, since it does not provide for smooth a singe step transfer[487]. The company has to undergo aforesaid two steps procedure when it wants to re–register. Unlike a direct cross–border transfer, it will necessarily require the company to overcome the extra and cumbersome burden of having to set up a company in the Member State of destination which will subsequently absorb the foreign participating company.

III. EUROPEAN COOPERATIVE SOCIETY (*SOCIETAS COOPERATIVA EUROPAEA*)

The European Cooperative Society (the '*Societas Cooperativa Europaea*' or 'SCE') owes its basis to the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)[488] and a Supplementary Directive[489].

---

484 **Ugliano, Arianna:** The New Cross–Border Merger Directive: Harmonisation of European Company Law and Free Movement, European Business Law Review, Vol. 18, Issue 3, 2007, p. 586; **Gaughan, Patric A.:** Introduction: Mergers, Acquisitions and Corporate Restructurings, in: Mergers and Acquisitions (J.A. Krug eds.), Vol. 1, London 2008, p. 7.

485 It is worth noting that this method of relocating the company's registered office between the states is commonly used in the US. Because the US law does not provide for a direct transfer of the registered office between the states. Such transfer can only be effectuated by means of a cross–border merger operation. See **Romano,** p. 34 *et seq*.

486 **Panayi,** *Corporate Mobility in PIL*, p. 138.

487 **Vossestein,** *Cross–Border Transfer of Seat*, p. 115 *et seq.*

488 See OJEU (L 207), 18.08.2003, p. 1 *et seq*. It is worth to note that the European Parliament brought an action before the CJEU, challenging the validity of the SCE Regulation. But the CJEU has dismissed the application seeking the annulment of Regulation 1435/2003 on the Statute for a

The SCE can be considered 'the cooperative equivalent' to the European Company (SE). The SCE is a legal person in the form of a cooperative society [Art. 1(5) SCE Regulation]. Its principal object is the satisfaction of the members' needs and/or the development of their economic and social activities [Art.1(3) SCE Regulation]. This statute guarantees equal terms of competition between cooperative societies and capital companies[490].

According to the Art. 2(1) of the SCE Regulation, an SCE may be formed in three different ways: (i) *New–Co SCE*: Formation of an SCE by either (a) five or more natural persons resident in at least two Member States (the '*Entrepreneur SCE*'); (b) at least two companies and/or firms within the meaning of Art.48 EC Treaty and other legal bodies governed by public or private law governed by the law of at least two different Member States (the '*Enterprise SCE*'); or (c) jointly by members of groups (a) and (b) (the '*Cooperation SCE*'); (ii) *Merger SCE*: Merger between cooperatives formed under the law of a Member State, provided that at least two of them are governed by the law of different Member States; (iii) *Conversion SCE*: Conversion of a cooperative formed under the law of a Member State which has for at least two years had an establishment or subsidiary governed by the law of another Member State.

The SCE is a company with limited liability, but the articles of association (or the statutes, by–laws) may contain provisions creating broader liability for its members [Art. 1(2) of SCE Regulation]. The capital of a SCE is variable, but may never be reduced below EUR 30.000 as a result of share redemption of members who no longer wish to belong to the SCE [Art. 3(2) of SCE Regulation].

An SCE is governed in accordance with Art. 8 of the SCE Regulation by a complex hierarchy of sources of law similar to that applicable to the SE under the Art. 9 of the

European Cooperative Society. See Case C–436/03 *European Parliament v. Council of the European Union* [2006] ECR I–03733.

489 Council Directive 2003/72/EC of 22 July 2003 Supplementing the Statute for a European Cooperative Society With Regard to the Involvement of Employees. See OJEU (L 207), 18.08.2003, p. 25 *et seq*.

490 Recital (6) of the Preamble of SCE Regulation. See also **Fici, Antonio:** The European Cooperative Society Regulation, in: International Handbook of Cooperative Law, (Dante Cracogna *et al*. eds.), Springer–Verlag Berlin Heidelberg 2013, p. 115 *et seq*.

SE Regulation. This may have the disadvantage of resulting in a number of different types of SCE in different Member States[491].

The structure of an SCE is similar in most respects of to that of an SE. It must have a general meeting, and may choose between a double board system (supervisory organ and management organ) or a single board system (only an administrative organ) [Art. 36 SCE Regulation]. The general meeting is in principle governed by the one man–one vote system, but within certain limits. If the national law of the registered office so permits, the statute may make provision for multiple voting rights [Art. 59 of SCE Regulation][492].

The SCE Regulation implicitly adheres to the 'real seat' doctrine. This entails that the registered office, as described in the statutes, must be located within the EU and in the same Member State as its head office. In other words, like an SE, the registered office and the head office of an SCE must be located within the same Member State. The Council allowed the Member States to restrict this doctrine even further by requiring that the SCEs incorporated on their territory have their registered office and their head office in the same location[493].

Like the SE, the SCE has the great advantage of being expressly permitted to transfer its registered office to another Member State at any time without the winding up or liquidation of the company. Such a transfer requires the removal of a SCE from the register of the country of its origin and its subsequent registration in the country where the head office is transferred.

Art. 7 of the SCE Regulation provides a procedure for the transfer of registered office of an SCE, which is almost identical to that provided by the SE Regulation. Since the

---

491 On this argument, see **Escuin Ibanez, Irene:** Law Applicable to the European Cooperative Society: Special Reference to the European Cooperative Established in Spain, European Company and Financial Law Review, Vol. 8, No. 1, 2011, p. 30 *et seq*; **Schmidt, Jessica:** SE and SCE: Two New European Company Forms–And More to Come!, Company Lawyer, Vol. 27, No. 4, 2006, p. 106.

492 **Schmidt,** p. 107.

493 See Art. 6 of the SCE Regulation. Thus, the Regulation imposes the theory of the "real seat" and not that of the "place of incorporation" with regard to the company law applicable to an enterprise which has transnational activities and various establishments abroad. See **Ioakimidis, Apostolos:** The Statute of the European Cooperative Society, Columbia Journal of European Law, Vol. 14, Winter 2007/2008, p. 197, footnote 32 and accompanying text.

SCE can be considered 'the cooperative equivalent' to the SE, the procedure laid down in Art. 7 of the SCE Regulation corresponds to that in Art. 8 of the SE Regulation. Since the SCE Regulation sets forth the procedure for the transfer of the registered office almost identical to the SE Regulation, it is not useful to repeat the all the procedure in this section. Instead, I refer to the section regarding the transfer procedure of the SE[494].

But it should be noted that, unlike under the SE Regulation, Art. 7(5) of the SCE Regulation provides that any member of an SCE who opposes the transfer may resign within two months of the meeting of the general assembly of members which voted in favour of the transfer. Resigning members are entitled to repayment of their shares. In other words, according to the Art. 8(5) of the SE Regulation, the appropriate provisions for protection of minority shareholders who oppose the transfer are within the discretion of the Member States. But according to the Art. 7(5) of SCE Regulation, any member of an SCE not agreeing to the transfer may tender his resignation and will be entitled to the repayment of his shares.

As mentioned in this thesis, the transfer of offices abroad has always been a difficult question in national company laws. The SE and SCE offer a partial solution to this problem[495], allowing companies to transfer their registered office to another Member State, without resulting in the winding up or liquidation of the company[496].

IV. EUROPEAN ECONOMIC INTEREST GROUPING

Another business form that envisages the cross–border transfer of seat is the European Economic Interest Grouping (the 'EEIG'). It is a type of legal entity created by the Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic

494 For the procedure of transfer of the registered office of an SE, which is almost identical to an SCE, see above Chapter §4–I–C.

495 See Chapter §4–I–D. Conclusions in this chapter are also valid for the evaluation on success of the SCE.

496 See also **Galle, Ruud C. J.:** The Societas Cooperativa Europea (SCE) and National Cooperatives in Comparative Perspective, European Company Law, Vol. 3, No. 6, 2006, p. 255 *et seq.*; **Cerioni, Luca:** The European Company Statute (SE) and the Statute for a European Cooperative Society (SCE): A Comparison Between the Two New Supranational Vehicles, European Legal Forum, Vol. 5, 2004, p. 296 *et seq.*

Interest Grouping (EEIG)[497]. The objective of this Regulation is to create a new legal entity based on European law to facilitate and encourage cross–border cooperation. This is the first instrument containing uniform rules of EU law offered to EU undertakings for the conduct of economic activities of common interest[498].

The purpose of the EEIG is to facilitate or develop the economic activities of its members by a pooling of resources, activities or skills. In other words, the use of an EEIG is a way for smaller commercial bodies to cooperate with others from different Member States, by pooling resources or skills to the benefit of all the participants and possible academic or technical advancement that would not have been achievable by individuals acting alone[499]. Art. 3(1) of the EEIG Regulation states, an EEIG is not to be established with the purpose of making profits. This, however, does not mean that it is prohibited from making profits; instead, all income and profits derived from the EEIG are to be passed on to the individual members of the grouping [Art. 21(1) of the EEIG Regulation].

An EEIG can be formed by companies, firms and other legal entities governed by public or private law which have been formed in accordance with the law of a Member State and which have their registered office in the EU. It can also be formed by individuals carrying on an industrial, commercial, craft or agricultural activity or providing professional or other services in the EU. But an EEIG must have at least two members from different Member States [Art. 4 of the EEIG Regulation].

It must be noted that an EEIG is a separate entity from its members (partners). Because the EEIG shall "have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued" [Art.

---

[497] See OJEU (L 199), 31.07.1985, p. 1 *et seq*. It has been argued that the EEIG Regulation was inspired by a French entity called '*groupement d'intérêt économique*', which was introduced in France in 1967, and which is regarded as an intermediate form between the '*société*' (company or partnership) and the '*association*' (club). See **Andenas/Wooldridge,** p. 377; **Santa Maria,** p. 173.

[498] See **Santa Maria,** p. 172; **Murphy, Daniel T.:** The European Economic Interest Group (EEIG): A New European Business Entity, Vanderbilt Journal of Transnational Law, Vol. 23, 1990–1991, p. 66 *et seq*.; **De Bruycker, Johan:** EC Company Law–The European Company v. The European Economic Interest Grouping and the Harmonization of the National Company Laws, Georgia Journal of International and Comparative Law, Vol. 21, No. 2, 1991, p. 191 *et seq*.

[499] **Johnson,** *Fourteenth Company Law Directive*, p. 32.

1(2) of the EEIG Regulation]. For this reason, it may undertake transactions and complete in its own name.

However, because of joint and several liability imposed upon the members of an EEIG, the corporate status granted to the EEIG is not beneficial. Because although the EEIG Regulation stated that the purpose of EEIG is not to make profits for itself, the EEIG is liable for debts. But, if the EEIG cannot pay its debts, according to the Art. 24(1) of the EEIG Regulation, the individual members are jointly and severally libale for the full amounts. The principle of unlimited joint and several liability extends not only to the original members of an EEIG, but also to new members. Art. 26(2) of the EEIG Regulation states that every new member will be responsible for the debts of the EEIG, even those debts arising before the new member joined to EEIG[500].

The EEIG Regulation clearly provides for the 'official address' of the EEIG to be transferred from one Member State to another while maintaining its capacity as a legal person. Arts. 13 and 14 of the EEIG Regulation organize the procedere with regard to cross–border transfer of an EEIG's registered office.

If the transfer does not result in a change in the *lex societatis* applicable to the EEIG, the transfer decision must be taken in accordance with the conditions laid down in the contract for the formation of the EEIG [Art. 13 of the EEIG Regulation].

If the transfer results in a change in the *lex societatis* applicable to the EEIG, a transfer proposal must be drawn up, filed at the registry, and published in the official gazette of the Member State where the grouping has its registered office [Art. 14(1) of the EEIG Regulation]. No decision to transfer the registered office may be taken for two months after publication of the proposal. The decision must be taken by the members of the EEIG unanimously. The registration of the transfer may not be effected until evidence has been produced that the proposal to transfer the registered office has been published. The transfer takes effect on the date on which the EEIG is registered at the registry covering the location of its new registered office [Art. 14(2) of the EEIG Regulation].

---

500 See also **Kerr, P. Sterling:** An Entity for Community Cooperation: The European Economic Interest Grouping, Bringham Young University Law Review, Vol. 1990, Issue 4, p. 1743 *et seq*.

The termination of the EEIG's registration at its previous registry may not be effected until evidence has been produced of the EEIG's new registration [Art. 14(3) of the EEIG Regulation].

It should be born in mind that the EEIG certainly seems to have been helpful in allowing smaller companies to form prosperous links with other such bodies and any transfer of registered or head office occurring will have minimal impact on the member states as the EEIG of itself is not allowed to make profits, and as such will be very small fry as regards taxation revenue for a Member State. A country will clearly gain from the kind of link available by virtue of formation of an EEIG to boost the development and business of its own small companies with no corresponding loss if the 'head office' of the EEIG itself is transferred to another member state[501].

V. THE EUROPEAN PRIVATE COMPANY (*SOCIETAS PRIVATA EUROPAEA*)

The European Private Company ('*Societas Privata Europaea*' or 'SPE')[502] is the latest project of the EU to establish a European–wide legal form[503] after the EEIG, the SE and the SCE. On 25 June 2008, the European Commission published the Proposal for a

501 **Johnson,** *Fourteenth Company Law Directive*, p. 33.

502 See, *inter alia*, **Drury, Robert:** The European Private Compay, European Business Organization Law Review, Vol. 9, Issue 1, 2008, p. 125; **Braun, Susanne:** The European Private Company: A Supranational Company Form for Small and Medium–Sized Enterprises?, German Law Journal, Vol. 5, No. 11, 2004, p. 1393; **Hommelhoff, Peter:** The European Private Company Before its Pending Legislative Birth, German Law Journal, Vol. 9, Issue 6, 2008, p. 799; **Siems, Mathias/ Herzog, Leif/Rosenhager, Erik:** The European Private Company: An Attractive New Legal Form of Doing Business?, Butterworths Journal of International Banking & Financial Law, Vol. 24, No. 5, 2009, p. 247; **Van den Braak, Sandra:** The European Private Company, Its Shareholders and Its Creditors, Utrecht Law Review, Vol. 6, Issue 1, 2010, p. 1; **Kornack, Daniel:** The European Private Company–Entering the Scene or Lost in Discussion?, German Law Journal, Vol. 10, Issue 8, 2009, p. 1321; **Tuleașcă, Luminița:** European Private Company: A New Instrument for Doing Business in Europeann Union?, Romanian Economic and Business Review, Vol. 6, No. 4, 2011, p. 135.

503 The goal of the EU is not only to harmonize the different national legislations but also to create new company models. These new company models are not intended to replace the national models, but instead to offer a new and free choice to business operators in addition to national models. See **Guidotti, Rolandino:** The European Private Company: The Current Situation, German Law Journal, Vol. 13, Issue 3, 2012, p. 331.

Council Regulation on the Statute for a European Private Company ("SPE Regulation Proposal")[504] based on the Art. 352 of TFEU (ex Art. 308 of TEC).

As explained in the Explanatory Memorandum, related to the SPE Regulation Proposal, the initiative creates new European legal form intended to facilitate the establishment and operation of SMEs in the European Internal Market. Because, the SMEs account for more than 99% of companies in the European Union but only 8% of them engage in cross–border trade and 5% have subsidiaries or joint ventures abroad[505].

According to Article 3(1) SPE Proposal, an SPE shall comply with the following requirement: (i) Its capital shall be divided into shares; (ii) a shareholder of the SPE shall not be liable for more than the amount he has subscribed or agreed to subscribe, (iii) an SPE shall have legal personality, (iv) due to its nature as a private company, its shares shall not be offered to the public and shall not be publicly traded, (v) an SPE may be formed by one or more natural persons and/or legal entities[506].

The SPE Regulation Proposal does not restrict the manner in which an SPE may be created. An SPE can be established in several ways: (i) An SPE may be set up *ex nihilo* in accordance with the provisions of the SPE Regulation Proposal; (ii) it may also be created by transforming an existing company; (iii) it may also be established by the merger of existing companies; (iv) or it may be set up by division of an existing company. Any company form existing under national law (private or public, with or without legal personality) may become an SPE (by way of transformation, merger or division), in accordance with the relevant provisions of national law applicable to the transforming company, to each of the merging companies or to the dividing company [Art. 5 of the SPE Regulation Proposal].

---

504 See Commission Proposal for a Council Regulation on the Statute for a European Private Company, COM (2008) 396 final. The document is available at <http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf>.

505 See Explanatory Memorandum related to the SPE Regulation Proposal, §1.

506 This last requirement allows for a single shareholder SPE. In the light of the 12th Company Law Directive on the single member company this is not a new phenomenon in the European context. See Directive 2009/102/EC of the European Parliament and of the Council of 16 September 2009 in the Area of Company Law on Single–Member Private Limited Liability Companies, OJEU (L 258), 01/10/2009, p. 20.

One of the principal innovations of the SPE Regulation Proposal is the fact that this new legal form is not obliged to have (from the moment of formation) relationships with at least two member states[507]. This is the case for the EEIG, the SE and the SCE. The proposal is limited to requiring that "[a]n SPE shall have its registered office and its central administration or a principal place of business in the Community" and that "[a]n SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has its registered office." [Art. 7 of the SPE Regulation Proposal]. For this reason, an SPE may be set up with its headquarters and its central administration or principal place of business in different Member States. So long as the SPE has its registered office and head office within the EU, those offices can be in separate Member States[508].

The other purpose of the SPE Regulation Proposal is to ensure an inexpensive and quick formation process[509]. Accordingly the SPE Regulation Proposal provides for a closed list of all documents that can be required upon application for registration such as information about the name of the SPE, addresses, the share capital and the articles of association. The registration documents must be in the national language of the Member State in which the registered office is located [Art. 10(2)–(3) of the SPE Regulation Proposal]. In addition, a notarization of the foundation of the SPE is not necessary, a simple written and signed form is sufficient. [Art. 8(2) of the SPE Regulation Proposal].

Art. 19(4) of the SPE Regulation Proposal sets the minimum capital requirement of an SPE at EUR 1[510]. In order to facilitate start–ups, the SPE Regulation Proposal "departs

---

507 **Noussia, Kyriaki:** European Private Company ('Societas Privata Europaea'), Business Law International, Vol. 11, September 2010, p. 285.

508 This freedom was to be permitted as a matter of EU law. This would have enabled the SPE freely to choose the national law to which it was to be subject, to the extent that the rules applicable to the SPE depended on national law, without having to commit itself to having its central administration in that Member State or even, it would seem, to carry out any business in that state. On this argument, see **Davies, Paul:** The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws, ECGI Working Paper Series, Law Working Paper No. 154/2010, pp. 24–25, available at SSRN: <http://ssrn.com/abstract=1622293>.

509 **Makowicz, Bartosz/Saifee, Faisal:** Societas Privata Europaea: The European Private Company, Company Lawyer, Vol. 30, Issue 8, 2009, p. 230.

510 The Parliament however amended this rule as follows: Art. 19(4): *"The capital of the SPE shall be at least € 1, provided that the articles of association require that the executive management body*

from the traditional approach that considers the requirement of a high minimum of legal capital as a means of creditor protection". Studies show that creditors nowadays look rather at aspects other than capital, such as cash flow, which are more relevant to solvency. Moreover, continues the Explanatory Memorandum "companies have different capital needs depending on their activity, and thus it is impossible to determine an appropriate capital for all companies."[511]

SPE shareholders have great freedom in determining the internal organisation of the SPE subject to the provisions of the SPE Regulation Proposal. Art. 27 of the SPE Regulation Proposal includes a non–exhaustive list of the decisions that need be taken by shareholders. It should set the required majority and quorum for voting subject to Art. 27 of the SPE Regulation Proposal, which provides that certain decisions require special majority[512]. There is no requirement to have a real presence of members at meetings. The method of decision–making is set in the Statute of the SPE. Shareholders have broad rights to information on the affairs of the SPE. The right to doubt on collective decision is subject to national law. The SPE Regulation Proposal ensures two specific minority rights for shareholders: (i) the right to seek a resolution of the shareholders and (ii) the right to request the competent judicial or administrative

sign a solvency certificate as referred to in Article 21. Where the articles of association contain no provision to that effect, the capital of the SPE shall be at least EUR 8.000." See European Parliament legislative resolution of 10 March 2009 on the proposal for a Council Regulation on the Statute for a European Private Company [COM (2008) 0396 – C6–0283/2008 – 2008/0130 (CNS)]. The Council at its turn modified the amendment: Art. 19(3): *"The capital of the SPE shall be at least € 1. Member States may set a higher minimum capital requirement for SPEs registered in their territory than the amount in the first subparagraph. However, it shall not exceed € 8,000*". Art. 19(3a): "*The Commission shall, two years after the date of application of this Regulation, analyse the effect of permitting Member States to set differing minimum capital requirements within the limit set in paragraph 3.*" See Revised Presidency compromise proposal for a Council Regulation on a European private company, Annex to Addendum 1 16115/09, Brussels 27 November 2009. As a result, three different versions have been proposed–capital of EUR 1; EUR 8.000 or a sum in between if a MS so desires.

511 **Enriques, Luca/Macey, Jonathan:** Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules, Cornell Law Review, Vol. 86, 2001, p. 1165 *et seq*. See also Explanatory Memorandum related to the SPE Regulation Proposal, §7.IV.

512 That is at least two–thirds of the voting rights of the European private company SPE, but the Statute can provide for a larger majority, for example three–quarters. Explanatory Memorandum related to the SPE Regulation Proposal, §7.V.

authority to appoint an independent expert (in particular, an independent auditor) [Art. 29 of the SPE Regulation Proposal][513].

For the companies to benefit from all advantages of the European Internal Market, the SPE will be able to have its registered seat and its administered seat in different Member States and to transfer its registered seat from one Member State to another, with our without also transferring its central administration or principal place of business[514]. The transfer of the registered office of the SPE shall not result in the winding–up of the SPE or in any interruption or loss of the SPE's legal personality or affect any right or obligation under any contract entered into by the SPE existing before the transfer [Art. 35(1) of the SPE Regulation Proposal].

It should be noted that in order to protect the interests of the parties, the SPE Regulation Proposal does not allow the transfer of the SPE's registered seat during winding up, liquidation or similar proceedings. In other words, the transfer of the registered office will not be possible for SPEs against which proceedings for winding up, liquidation, insolvency or suspension of payments have been brought, or in respect of which preventive measures have been taken by the competent authorities to avoid the beginning of such proceedings [Art. 35(2) of the SPE Regulation Proposal].

The formalistic transfer procedure regarding the transfer of the registered office of the SPE in Art. 36 of the SPE Regulation Proposal is based on the provisions deriving from the SE Regulation[515]. In other words, since the European company types of the SE, the EEIG and the SCE have the ability to transfer its registered seat within the European Union into another Member State, the transfer of the registered seat of the SPE in Art. 36 of the SPE Regulation Proposal with its procedural rules for the transfer of the registered seat follows an established scheme[516]. For this reason, I refer to the relevant

513 See also Explanatory Memorandum related to the SPE Regulation Proposal, §7.V.

514 See Recital (4) of the preamble of the SPE Regulation Proposal.

515 See Explanatory Memorandum related to the SPE Regulation Proposal, §7.VII.

516 **Peters, Carsten/Wullrich, Philipp:** "Borderless Flexibility": The Societas Privata Europaea (SPE) from a German Company Law Perspective, Company Lawyer, Vol. 30, No. 7, 2009, p. 217.

section of the thesis regarding the procedure of the transfer of the registered office on the SE[517] and the procedure will be decribed in the following only briefly.

The shareholders decide on the transfer of the registered seat of the SPE by a shareholders' resolution [Art. 36(4) of the SPE Regulation Proposal] that will be prepared by the management body which notifies the shareholders and employee representatives, or where there are no such representatives, the employees of the SPE for examination, and makes it available for the creditors for inspection. The proposal of the management body for the transfer shall include at least the following particulars: (i) the name of the SPE and the address of its registered seat in the home Member State; (ii) the name of the SPE and the address of its proposed registered seat in the host Member State; (iii) the proposed articles of association for the SPE in the host Member State; (iv) the proposed timetable for the transfer; (v) the date from which it is proposed that the transactions of the SPE are to be regarded for accounting purposes as having been carried out in the host Member State; (vi) the consequences of the transfer for employees and the proposed measures concerning them; (vii) where appropriate, detailed information on the transfer of the central administration or principal place of business of the SPE. [Art. 36(4) of the SPE Regulation Proposal].

The management body shall draw up a report to the shareholders explaining and justifying the legal and economic aspects of the proposed transfer and setting out the implications of the transfer for shareholders, creditors and employees [Art. 36(3)(1) of the SPE Regulation Proposal].

Where the SPE is subject to an employee participation regime, shareholders may reserve the right to make the implementation of the transfer conditional on the express ratification of the arrangements with respect to the participation of employees in the host Member State [Art. 36(5) of the SPE Regulation Proposal]. The protection of any minority shareholders who oppose the transfer and of the creditors of the SPE shall be governed by the law of the home Member State [Art. 36(6) of the SPE Regulation Proposal].

---

517 For the procedure of transfer of the registered office of an SE, which is similar to an SPE, see above Chapter §4–I–C. See also Art. 8 of the SE Regulation.

The SPE Regulation Proposal provides for a special regime where an SPE that is subject to employee participation transfers its registered office to another Member State where there is no or a lower level of employee participation rights or which does not provide for employees of establishments of the SPE situated in other Member States the same entitlement to exercise participation rights as they enjoyed before the transfer. In such cases, if at least one third of the SPE's employees are employed in the home Member State, negotiations must take place between the management body and the representatives of the employees to reach an agreement on the participation of employees. In the absence of an agreement, the participation arrangements existing in the home Member State are maintained [Art. 38 of the SPE Regulation Proposal][518].

VI. CROSS–BORDER TRANSFER OF SEAT

A. Definition of the Problem

As mentioned above, Member States apply different principles to determine which company law applies in relation to a corporation. Some Member States adhere the principle of the place of incorporation, altough some of them follow the principle of real seat. Some Member States have adopted a mixed system having the characteristics of both of the aforesaid approaches.

The difficulties in reconciling the two theories on the connecting factor for company law arise in particular in the context of a company wishing to transfer its seat from one Member State to another or wishing to change its corporate law[519]. In other words, these differences have an impact on the rules governing the transfer of company's seat to another Member State. It is worth to stress that, for this section, the term "seat" refers both the legal seat (i.e. the registered office) and the real seat (i.e. the head office) of a company.

518 See also Explanatory Memorandum related to the SPE Regulation Proposal, §7.VII. It is worth to note that with the rules of SPE Regulation Proposal, it is easy to establish an *employee participation free company*; for instance a SPE, that has its registered office in the territory of Italy, is without regulation on employee participation. Participation arrangements only apply to SPEs that are registered in countries which provide for such arrangements. Only in the case of the transfer of the seat or of a cross–border merger, does the Proposal contain rules to protect the level of employee participation. On this argument, see **Guidotti,** p. 344.

519 **Wyckaert/Jenné,** p. 306.

B. Conflict of Laws: Clash of "Real Seat" and "Incorporation"

In the absence of harmonization in EU level on cross–border transfer of the registered office and/or the real seat of a company ultimately depends on Member States' private international law on companies. Co–existence of the two theories in Member States' private international law rules may constitute problems when companies cross state borders[520]. Because these different approaches made it, in most of the cases, practically impossible for the companies to move the head office or registered office from one Member State to another.

The practical differences between "incorporation theory" jurisdictions and "real seat" jurisdictions materialize when a company moves from one jurisdiction to another. If a company wants to move its headquarters to a different European state, a few important legal questions arise[521]. First, whether the original home state will allow the company to move without dissolution; second, whether the host state will recognize the company as a legal entity; and third, whether the host state will apply the laws of the state of incorporation, thus recognizing the legal personality of the company.

It must be born in mind that in following pages I have pointed out the strict application of the aforesaid two theories, without taking into consideration the impact of the CJEU's case law on the companies' freedom of establishment. As it will be discussed later[522], it has been widely accepted in the case–law of the CJEU that a company validly incorporated in a Member State must be recognised in any other Member State to which it decides to move its real seat or operations. In other words, the CJEU has made it clear that the transfer of the company's head office, in principle, allowed under the EU law.

Three different situations need to be mentioned here. Primarily it should be discussed that why an entrepreneur want to transfer a company's head office and what are the

---

520 For a discussion on specific situations on difficulties of the application of these two theories see **Winter Report,** p. 102–103.

521 Other legal consequences may also arise, such as taxation, creditors' rights or the treatment of contracts in the host state. These issues are important but they are beyond the scope of this thesis.

522 See below section §7.

legal consequences of such a transfer. Secondly transfer of exclusively registered office should be examined. As an alternative, entrepreneurs may want to transfer a company's registered office together with the head office of the company. The transfer of a company's registration office to another legal order at the same time that the company's head office is transferred presents a different set of issues[523].

In its *Cartesio* judgment, the CJEU made a clear distinction between two types of transfer of head offices, according to whether they entailed a change in the national law applicable to the company or not. In practice, a company has two solutions open to it when it wants to transfer its head office: Either it can arrange to transfer its real seat; otherwise, it can transfer its registered office.

1. The Transfer of Head Office

First of all, the transfer of head office only shall be discussed in this paragraph. Most commonly known is the simple cross–border transfer of the company's head office. It is important to note in relation to this type of transfer that it is not inspired by the aim of taking advantage of a better legal system; rather, this type of transfer is used in order to remain accountable to the current law governing the company. Large companies may decide to move their head office abroad for economic reasons[524].

The transfer of a company's head office requires, as it has been put in the opinion of AG Maduro in *Cartesio* case[525], a simple and effective form of taking up genuine economic activities in another Member State without having to face the costs and the administrative burdens inherent in first having to wind up the company in its country of origin and then having to resurrect it completely in the Member State of destination. In this case, the company remains registered in its Member State of origin and retains its 'nationality' and this is generally done for operational reasons, notably in order to be closer to a market, customers or suppliers.

[523] This situation is qualified as 'double relocation'. See **Werlauff, Erik:** Relocating a Company within the EU, European Company Law, Vol. 5, Issue 3, 2008, p. 136.

[524] **Drury,** *Migrating Companies*, p. 354.

[525] See Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641, Opinion of AG Poiares Maduro §31.

a. From Incorporation State to Incorporation State

In this scenario, location and/or transfer of the head office (i.e. real seat) is possible, since the incorporation theory does not attach importance to the real seat. As a general rule, the countries adhering incorporation theory allow a company to transfer its head office to another Member State without dissolution[526]. In this case, the new (host) state would recognize the company as a legal entity.

In the event of transfer of head office of company from an incorporation Member State to another incorporation Member State, the host state recognises legal personality of the company and this transaction does not result in loss of legal status of the company. Because in this case a company only transfers its administrative seat, leaving its registered office in the original country, the conflict law of the country of arrival (i.e. host state) refers back to the law of the country of departure (i.e. home state). If the home state accept this *renvoi,* then the company will be still regulated by the law of the home state, despite the transfer of the administrative seat[527].

b. From Incorporation State to Real Seat State

If a company wants to transfer its head office from an incorporation state to a real seat state, such a change will not be possible. Because from the viewpoint of a country of arrival following real seat theory, any inbound transfer of the head office of a foreign company leads to a change of the applicable company law, irrespective of the conflict rules applied by the country of departure[528]. In this case, the "real seat" state will refuse the to recognize the company unless it dissolves and reincorporates under its laws. Since the registered office should generally be located in the country of the applicable

---

[526] **Wyckaert/Jenné,** p. 295; See also Commission Staff Working Document–Impact Assessment on the Directive on the Cross–Border Transfer of Registered Office, SEC (2007) 1707, point 3.1.2., p. 9, available at: <http://ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf>.

[527] This is true only if the conflict rules of the home country refer to both conflict and substantive law. If the conflict law only calls for the application of substantive law, the company should be governed by the law of the country of arrival, notwithstanding that the conflict law of the latter refers to another law. See **Mucciarelli, Federico M.:** Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited, European Business Organization Law Review, Vol. 9, Issue 2, 2008, p. 289, footnote 85 and accompanying text.

[528] **Mucciarelli,** *Company Emigration,* p. 287; Commission Staff Working Document SEC (2007) 1707, p. 9.

law, the company needs to be re–incorporated in accordance with the law of the host Member State. As it will be discussed below, after *Überseering*, the CJEU attacked this result and held that denying recognition in such a case would offend the freedom of establishment[529].

c. From Real Seat State to Real Seat State

The most complicated scenario arises if the companies moved from one "real seat" state to another. In this possibility, such a change will not be admissible without a change for the real seat. For countries applying the real seat theory, the cross–border transfer of the head office, in principle, either legally impossible as it resulted in a winding–up of a company or restricted by certain conditions. This transaction requires winding–up of the company in the home Member State and reincorporation in the host Member State or the change is restricted by certain requirements imposed by the home Member State[530]. In this possibility, the home state should allow the company to leave its territory and move to host state provided that the company also accepts a change of corporate law[531].

Theoretically, under real seat theory, the transfer abroad of the administrative seat should lead to change of the applicable company law. According to German case law for example, German company law should be applied to companies transferring their administrative seat to Germany. After the 'inbound' transfer of the administrative seat, the immigrating company should therefore be regarded either as non–existent, since it was not incorporated in accordance with the 'right' law, or as a mere partnership[532]. But

[529] See below paragraph §7–III–A–3; Case C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I–9919, §82.

[530] Commission Staff Working Document SEC (2007) 1707, p. 10.

[531] **Wyckaert/Jenné,** p. 294.

[532] **Roth,** *From Centros to Überseering*, p. 183. Following the decisions of the CJEU on freedom of establishment, German case law has abandoned the real seat theory towards companies incorporated in the EU and EEA Member States. See **Mucciarelli,** *Company Emigration,* p. 288, footnote 80 and accompanying text.

when a company wants to move its centre of administration out of a "real seat" state and into another state, *Überseering* requires the new state to recognize the company[533].

d. From Real Seat State to Incorporation State

If a company wants to transfer its head office from a real seat state to an incorporation state, such a change will not be possible in principle. In a strict application of both theories, this would lead to the company being stateless, unless the host state would, one way or another, allow the company to re–establish itself in the host state. This change requires, again, winding–up of the company in the home Member State and re–incorporation in the host Member State or the change is restricted by certain requirements imposed by the home Member State[534].

2. The Transfer of Registered Office

The cross–border transfer of solely the company's registered office is used much less frequently. This kind of transfer implies that the company's headquarters and main activities remaining located in the country in which the company duly set up and registered. It is important to note that as many legal orders require proper registration of the company as one of the formation requirements, most of these transfers would be expected to lead to the company's compulsory dissolution. Because the transfer of the registered office from the state of destination to the state of arrival, and the corresponding change of registration in the company registers of the two Member States, changes the connecting factor and consequently the nationality of the company[535]. In transferring its registered office, the company must comply with the new *lex societatis*, which involves its being converted into a form of company governed in the host Member State.

---

533 See below paragraph §7–III–A–3. However the holding does not guarantee a company's ability to move from its original state without permission. See **Wymeersch,** *Transfer of the Seat*, p. 675.

534 **Wyckaert/Jenné,** p. 294; Commission Staff Working Document SEC (2007) 1707, p. 10.

535 See Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641 §111.

a. From Incorporation State to Incorporation State

In principle, the cross–border transfer of registered office from the incorporation country results in a change of the company law applicable to this company and it is not possible without the dissolution of the company in the home Member State and its reincorporation in the host Member State. If a company transfers its registered office to a country that follows incorporation theory, it is important to determine the real connecting factor adopted by the host state. Because some countries adhering incorporation theory allow inbound reincorporation without liquidation. For example and as mentioned earlier[536], in Swiss law, the Art. 161(1) of the CPIL explicitly allows foreign companies to submit themselves to Swiss company law without being liquidated and reincorporated, provided that the original jurisdiction allows this.

b. From Incorporation State to Real Seat State

From the viewpoint of a country of departure following incorporation theory the cross–border transfer of registered office results in dissolution of the company as this is a connecting factor. The country of arrival adhering real seat theory disallows a transfer of a company's registered office alone to another Member State with a change of *lex societatis* while retaining the company's real head office in the Member State of origin. In other words, for countries following the real seat, there is a requirement of coincidence between registered office and head office in the same country. This transfer requires also winding–up of the company in the home Member State and re–incorporation in the host Member State.

c. From Real Seat State to Real Seat State

The transfer of registered office under the real seat theory is usually forbidden unless the company's head office is also transferred[537]. For this reason, in countries adhering the real seat theory, it is not possible for a company to transfer its registered office alone to another Member State while keeping its head office elsewhere.

---

536 See below paragraph §1–II–D–2–b.

537 Commission Staff Working Document SEC (2007) 1707, pp. 9–10.

In this case the transfer of the registered office abroad makes national law unenforceable. In addition, it should be considered that, according to the First Company Law Directive[538], the articles of association of limited liability companies need to be inscribed on a public register, which plays a crucial role in the incorporation and should therefore be located in the country according to whose law the company is incorporated. As mentioned earlier, according to the real seat theory the head office should coincide with the registered office and the public register on which the company is inscribed[539].

d. From Real Seat State to Incorporation State

As mentioned earlier, from the viewpoint of the country of departure following the real seat, there is a requirement of coincidence between registered office and head office in the same country. As a result, it is not possible to move the registered office alone and this transfer requires the winding–up of the company in the home Member State. In principle, the company must reincorporate in the host Member State. But some countries adhering incorporation theory allow inbound reincorporation without liquidation[540].

[538] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent. See OJEU (L 258), 01.10.2009, p. 11 (before 21.10.2009, First Council Directive of 68/151/EEC).

[539] **Mucciarelli,** *Company Emigration,* p. 285.

[540] **Mucciarelli,** *Company Emigration,* p. 289.

CHAPTER THREE
PROPOSALS FOR A CORPORATE MOBILITY DIRECTIVE

§5. KPMG STUDY ON TRANSFER OF HEAD OFFICE OF A COMPANY

I. INTRODUCTION

The EU bodies have so far refrained from adopting a specific instrument, though there have been several attempts since the early 1990s. So far, the European Commission has given little attention to the possibility of the individual corporation moving across borders. As a preliminary matter, the Commission asked the consulting and auditing firm KPMG to prepare a report on this subject. As a result of this initiative, there was a document containing concrete draft proposals to further cross–border company mobility in the EU was published in 1993. It was entitled "Study of Transfer of the Head Office of a Company from one Member State to Another"[541].

As the CJEU pointed out in its *Daily Mail* decision that problems regarding the transfer or registered office or real head office must be dealt with by future legislation or conventions[542], the KPMG Study took up this challenge[543].

The KPMG Study stated how desirable it was for a company to be able to transfer its administrative seat from one Member State to another without dissolution[544]. In fact, it was assumed that companies had such right by virtue of freedom of establishment, though this was subject to measures taken by Member States justified for the protection

---

541 See European Commission publication of 1993: Study on Transfer of the Head Office of a Company from one Member State to Another, carried out by KPMG European Business Centre, Brussels 1993 (hereinafter the 'KPMG Study'). For discussion of this Study, see **Bellingwout, Jaap W.:** Company Migration in Motion: The KPMG Report 1993, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, p. 75 *et seq*.

542 See Case 81/87 *Daily Mail* [1988] ECR 5483, §23.

543 **Rammeloo,** *Corporations in PIL*, p. 282, footnote 194 and accompanying text.

544 See Executive Summary of the KPMG Study, §1.

of the general good[545]. One consequence to be avoided is that the transferred company could find itself subject to either to two legal systems or to no legal system at all[546].

As the technical pros and cons will be discussed, two draft proposals were elaborated in the KPMG Study. The first proposal was based on the incorporation theory, allowing the transfer of the head office without dissolution. Safeguards were incorporated to prevent forum shopping, to protect the German workers' co–determination rules and to ensure tax neutrality. The second proposal was based on the real seat theory, allowing a company to transfer both its registered office and its head office, without being dissolved. Again, the interests of workers, shareholders, creditors, debenture holders and tax authorities should be safeguarded[547].

II. DRAFT PROPOSAL BASED ON THE INCORPORATION THEORY

A. General Remarks

As mentioned above, the first proposal concentrates on the transfer of the *siège réel* (i.e. real seat) of a company from one Member State to another without dissolution[548]. This proposal contains the text of the Draft Directive, as well as an explanatory memorandum.

The first proposal was based on the incorporation theory and requires that every company should be registered in its state of incorporation and should maintain a formal registered office there. The head office could be transferred anywhere in the EU, but the company would continue to be governed by the law of its place of incorporation in matters such as validity, nullity and winding–up[549].

---

545 See Executive Summary of the KPMG Study, §2.

546 See Executive Summary of the KPMG Study, §3; **Rammeloo,** *Corporations in PIL*, p. 283.

547 See Executive Summary of the KPMG Study, §5–6.

548 The full name of the proposal was "Draft Directive on the Transfer of the Siege Reel of a Company from one Member State to Another without Dissolution (While Remaining Subject to the Law of the State of Incorporation)". See KPMG Study, p. 31–39.

549 See KPMG Study, p. 27.

B. Main Features of the Draft Directive

Article 1 defines the scope of the Draft Directive. According to the Explanatory Memoramdum, the draft proposal envisages both public and private limited companies, for there is no reason to exlude either from the freedom of establishment[550]. Article 2 contains further definitions for the purposes of the Draft Directive.

The procedure for seat transfers is set out in the Article 3 of the proposal. It obliges Member States to regulate transfers of a company's real seat into or out of the Member State, in accordance with the Directive [Art. 3(1)]. A transferring company shall retain its official registered address in the state of incorporation. Member States shall adopt their private international law rules so that, for a company having its head office and its official registered office in the EU, the proper law shall be that of the state in which the official registered address is located and this shall also be the company's seat under the Brussels Convention[551] [Art. 3(2)].

The host state, not being the state of incorporation, may require the company to register a branch at the place where the head office is situated. The procedure will be similar to the registration of a branch by a company in another Member State [Art. 3(3)]. After a company transferred its head office, subsequent transfers are allowed in accordance with the Directive [Art. 3(4)]. No Member State shall consider a company to be incorporated or to have been dissolved for the sole reason that its head office has been transferred to a Member State other than that of incorporation. The host state, however, need not apply the Directive in respect of companies which transfer their real seat for no reason other than to circumvent provisions of the host state that would have been applicable if the company had been incorporated there [Art. 3(5)].

Article 4 prescribes that the transfer of the head office shall require no more than the approval of the organ or organs of the company competent to authorize the transfer

[550] See Explanatory Memorandum of the Directive, KPMG Study, p. 31.

[551] See above Introduction; paragraph III–A–4.

within the state of incorporation in accordance with the law of that state[552]. Other authorization requirements are, however, acknowledged where national laws allow the transfer of the real seat to be regulated by the articles of association of the company.

The consequences of a seat transfer are regulated in the Article 5 of the Draft Directive. It stipulates that the legal personality of the company shall be continuous and uninterrupted by the transfer. Because under the incorporation theory, the company continues its legal personality notwithstanding the transfer of its head office outside the state of incorporation[553].

III. DRAFT PROPOSAL BASED ON THE REAL SEAT THEORY

A. General Remarks

The second proposal regulates the transfer of the registered office of a company from one Member State to another without dissolution[554]. This proposal also contains the text of the Draft Directive, as well as an explanatory memorandum. It is worth noting that from a procedural perspective, it closely resembles the first proposal[555].

The first proposal would allow a company to transfer its head office but it would continue to be subject to the law of the home state. This was a retrograde step for those Member States which apply the real seat theory and allow the company to transfer its head office without dissolution. However, there is a practical difficulty in that the location of the head office is a question of fact which can be appreciated differently by the competent authorities of different Member States, whereas the registration of the official registered address is a procedural formality which guarantees legal certainty.

---

552 Since the transfer of the head office of the company does not involve a change in applicable law, the Draft Directive did not impose special safeguards for shareholders. See Explanatory Memorandum of the Directive, KPMG Study, p. 33.

553 Article 5 simply states this for the avoidance of doubt. See Explanatory Memorandum of the Directive, KPMG Study, p. 33.

554 The full name of the proposal was "Draft Directive on the Transfer of the Official Registered Address of a Company from one Member State to Another without Dissolution (With Consequent Change of the Proper Law of the Company)". See KPMG Study, p. 41–62.

555 **Rammeloo,** *Corporations in PIL*, p. 288.

Therefore is has been evaluated that it was appropriate to concentrate on transfer of the official registered address rather than the transfer of the head office[556].

B. Main Features of the Draft Directive

As in the first proposal, Article 1 defines the precise scope of application. According to the Explanatory Memorandum since the transfer of seat of a company can be considered as a special case of a cross–border merger, there is no reason to exlude either public of private limited companies from the scope of the Draft Directive[557]. Again, Article 2 contains further definitions.

According to Article 3, the official registered address shall bind the company as to the location of it seat. Consequently, a transfer of this seat results in an alteration of the proper law. Third parties shall be entitled to prove that the company does not in fact maintain its seat as its official registered address[558]. Third parties are not members of the company's organs.

It is worth to note that this draft proposal has a neutral character, since it does not oblige member states to abandon their conflict of laws theories on determining the connecting factor of *lex societatis*. It only provides a mechanism for transferring the official registered address of the company with co–existence of both theories[559].

The Draft Directive obliges Member States to bring their national law in accordance with the Directive, as regards the transfer of the company's official registered address [Art. 4(1)]. If a company retains a place of business in home Member State, it shall register that place as a branch in compliance with the law of that state [Art. 4(1)]. In other words, the company must be treated in exactly the same way as a company

---

556 See KPMG Study, p. 28.

557 See Explanatory Memorandum of the Directive, KPMG Study, p. 41.

558 According to the Explanatory Memorandum, this is a question for each Member State's private international law. If, for example, a company incorporated in a Member State (A) which adheres the real seat theory, transfer its official registered office to another Member State (B), without however at the same time transferring its center of management and control, third parties may prove that the proper law of the company is still that of the state of incorporation. See Explanatory Memorandum of the Directive, KPMG Study, p. 41.

559 See Explanatory Memorandum of the Directive, KPMG Study, p. 41; **Rammeloo,** *Corporations in PIL*, p. 289.

originating in the state of arrival which opens a branch *de novo* in the state of departure[560].

Article 5 obliges the company managers to draw up draft terms of transfer in writing, *inter alia*, specifying (i) the type and official registered address of the company before transfer and the proposed type and official registered address of the company after transfer; (ii) if it is proposed to convert the company's share capital into the currency of the state of arrival, and, if so, the manner of redesignation of the shares; (iii) the proposed modifications (if any) to the company's name and the company's statutes to bring them into conformity with non–discriminatory laws of the state of arrival [Art. 5(2)][561].

Article 6 requires publication of the draft terms of transfer must be published in the manner prescribed by the laws of the state of departure in accordance with the Article 3 of the First Company Law Directive[562] at least two months before the date fixed for the general meeting which is to decide thereon[563].

Article 7 regulates the approval of the general meeting. It differs from the first proposal[564] in that it contains an absolute rule a majority of not less than two–thirds of the votes attaching either to the shares or to the subscribed capital represented and shall be the same as the majority required for a modification of the company's statutes. Any derogation from this in the statutes or otherwise shall be void, unless the laws of the Member State may, however, provide that a simple majority of the votes shall be sufficient when at least half of the subscribed capital is represented. Moreover, rules governing the alteration of the statutes, insofar as they are prescribed by the EU member states, shall apply.

---

560 See Explanatory Memorandum of the Directive, KPMG Study, p. 43.

561 The principal elements of the draft terms of transfer are listed as type of company, name, official registered address, currency of capital. See more information on these elements Explanatory Memorandum of the Directive, KPMG Study, pp. 43–44.

562 It was the First Council Directive 68/151/EEC of 9 March 1968; see OJEU (L 065), 14.03.1968, p. 8. But the Directive 68/151/EEC is repealed by the Directive 2009/101/EC by the date of 20.10.2009.

563 See Art. 6 of the Directive 2011/35/EU, see OJEU (L 110), 29.4.2011, p.1 (Before 1 July 2011: Art. 6 of the Third Council Directive 78/855/EEC); Art. 8(4) of the SE Regulation.

564 See Article 4 of the First Draft Proposal.

Article 8 obliges the management board of the company to draw up a written report on the transfer including legal and economic grounds[565]. Shareholders of the company shall, on the basis of article 9, be entitled to inspect documents (i.e. the draft terms of transfer provided for in Article 5 and the management report in Article 8) and to receive copies at the company's official registered address at least two months prior to the transfer decision[566]. Similar to the article 5 of the first proposal, article 10 establishes the principle that the legal personality continuous and uninterrupted by the transfer of its official registered address. This applies in particular to the rights of creditors and empoyees of the company. The same principle applies to the protection of secured creditors (article 11), debenture holders (article 12), as well as other security holders (article 13)[567].

Article 14 regulates the judicial or administrative supervision. According to the proposal, if there is no judicial or administrative supervision of the legality of the transfer in Member States, or if this supervision does not extend to all acts, the minutes of the general meeting which decide on the transfer shall be drawn up and certified in due legal form [Art. 14(1)]. The competent notary or the authority must check and certify the existence and validity of the legal acts and formalities required of the company for which such notary or authority is acting and of the draft terms of transfer [Art. 14(2)].

Article 15 prescribes how the registration of the transfer should be implemented. According to the proposal, no decision to transfer the official registered address may be taken for two months after publication of the proposal in accordance with Article 6. The transfer shall take effect on the date on which the company is registered in the host state. There should be evidence in the form described in Article 14 that the proposal to transfer the official address has been duly approved by the general meeting of the company in the host state [Art. 15(1)].

565 See Art. 9 of the Directive 2011/35/EU (Ex Art. 9 of Directive 78/855/EEC)

566 See Art. 11 of the Directive 2011/35/EU (Ex Art. 11 of Directive 78/855/EEC)

567 For further exposition see Explanatory Memorandum of the Directive, KPMG Study, p. 48 *et seq.*

Similarly, termination of the company's registration in the home state will only be effected when evidence has been produced that the company has been registered with its official registered address in the host Member State. Upon such termination all information already recorded in the registry of the home state shall be preserved by that registry. The host state may close such register only upon proof of dissolution of the company in accordance with the laws of a Member State having jurisdiction [Art. 15(2)].

Publication of the company's new official address may be relied upon as against third parties. However, third parties may continue to rely on the old official registered address, if the termination of registration of the company in the home state has not been published, unless the company proves that such third parties were aware of the new official registered address [Art. 15(3)]. The laws of Member States may provide that the transfer shall not take effect if, within the two month period, a competent authority in that Member State opposes it. Such opposition may be based only on grounds of public interest. Review by a judicial authority must be possible [Art. 15(4)].

Article 16 regulates the matters of liability and nullity. All questions concerning the validity or nullity of acts of the company or its organs, or the responsibility of the company or its organs are subject to the law of the home state in respect of acts or events taking place before the transfer and to the law of the host state in respect of acts or events taking place after the transfer. The effective date of transfer is to be determined in accordance with Article 15(3). In determining such matters, Member States apply to the company the same rules as it applies to companies incorporated in its own jurisdiction.

The Draft Directive contains exlusive conditions of nullity. These conditions are listed in the article 16(2) as: (i) nullity must be ordered by a court judgment; (ii) transfers may be nullified only if there has been no judicial or administrative preventive supervision of their legality, or if the minutes of the general meeting approving the transfer has not been drawn up and certified in due legal form, or if it is shown that the decision of the general meeting is void or voidable under the law of the home state; (iii) nullification proceedings may not be initiated more than six months after the date on which the transfer becomes effective as against the person alleging nullity, or if the situation has been rectified; (iv) where possible, the court shall grant the company a time period in which to rectify defects liable to render a transfer void; (v) a judgment declaring a transfer void shall be published; (vi) where the laws of a Member State permit a third party to challenge such a judgment, he may do so only within six months of publication of the judgment; (vii) a judgment declaring a transfer void shall not of itself affect the validity of obligations owed by or in relation to the company in each of the Member States which arose before the judgment was published and after the date of registration of the company in the host state.

IV. OVERALL ASSESSMENT OF THE PROPOSALS

Although the KPMG Study seemed to show deference to both theories and would have been more politically acceptable to Member States, it was never adopted by the Commission. Perhaps the Commission did not believe that the bifurcated approach adopted under the KPMG Study would succeed[568].

First of all, a problem with the solution based on the first proposal is that it could encourage forum shopping so that a company could be constituted in a state which had no connection with the company's business. On the other hand it could be argued that this would encourage competition among Member States for the most efficient and practical company law system[569].

Secondly, the consequence of the first solution is the abolition of the real seat theory in all Member States. Consequently, this solution is unlikely to be adopted, as those Member States that apply the real seat theory are not likely to abandon this theory at the time of this draft proposed[570].

---

[568] **Panayi**, *Corporate Mobility in PIL*, p. 140.

[569] KPMG Study, pp. 27–28.

[570] At present, for example, Germany is discussing a draft proposal on amendments to the EGBGB that consolidates the incorporation theory in Germany. See above §1–III–C–1–c.

§6. THE PROPOSAL OF FOURTEENTH COMPANY LAW DIRECTIVE

I. THE POSITION OF THE EUROPEAN COMMISSION

A. The Legal Base

As mentioned earlier, one of the fundamental objectives of the European Union is to ensure the freedom of establishment. Ensuring the right to transfer the company's seat from one Member State to another contributes to achieving freedom of establishment for companies[571]. Arts. 50(1) and 50(2)–g TFEU [ex Arts. 44(1) and 44(2)–g TEC] requires the European Parliament and the Council to act by means of directives in accordance with the ordinary legislative procedure to attain freedom of establishment. According to the Art. 294(2) TFEU (ex Art. 251 TEC) the Commission shall submit a proposal to initiate the legislative procedure. Besides, the CJEU referred to the need for legislation on the issue of the transfer of a company's seat in its *Daily Mail* and *Cartesio* judgments[572].

B. 1997: Draft Proposal for 14th Company Law Directive

1. General Remarks

In 1997, a few years later from the KPMG Study, a draft was prepared by the Commission itself as an attempt to solve the problems associated with corporate mobility within the internal market. The full name of the draft Directive was "Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the De Facto Head Office of a Company from One Member State to Another"[573]. As the following discussion will show that the proposal for a 14th Company Law Directive was based on the second proposal of the KPMG Study[574].

---

571 It is worth to note that the Union can act only where the TEU equips it with competence in accordance with the principle of conferred powers which is laid down in Art. 5 of TEU. The Union competences are conferred by specific provisions of the TEU, known as the legal basis.

572 See Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, §21–23; Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–09641, §108.

573 There are two proposals for the Directive. The first is dated April 22, 1997 (the document number is XV/6002/97) and on this draft version of the 14th Company Law Directive see **Drury,** *Migrating*

Like earlier directives in the area of company law, this proposal was also based on the Art. 50 TFEU (ex Art. 44 TEC). As regards the legal basis for this legislative project it has been observed that the concept of the Directive was necessitated by the subsidiarity principle[575]. Put another way, in line with the EU principles, the Directive was based on the notion of subsidiarity.

In the preamble to this draft Directive, it was assumed, similar to what had been assumed in the KPMG Study, that the transfer of the registered office or of the administrative seat from one Member State to another involved the exercise of the right of establishment, "which Community law should make possible in practice"[576]. At the same time, the Community law had to lay down "equivalent safeguards for the protection of the interests of members and others affected by the change in the legal system applicable to a company that has transferred its seat to another Member State"[577].

It should be noted that the draft Directive did not intend to harmonize the conflict of laws rules of the Member States[578]. The aim of the proposed 14th Company Law Directive was make it possible for corporations in the EU to effect an identity–preserving nationality change, whereby a corporation that is incorporated in one Member State (the state of departure) may be incorporated in another Member State

---

Companies, p. 362 *et seq.* The latest proposal, which is the one referred to in the following text, is dated November 11, 1997 (document number is XV/D2/6002/97–EN REV1) and for re–production of this Draft Directive see **Rammeloo,** *Corporations in PIL*, p. 296 *et seq.* Neither proposal has been adopted by the European Commission. They are therefore not official proposals and have not been published in the Official Journal. Also that draft proposal is not available anymore at the Commission's website. For detailed information see the German Law Review ZGR (1999), issues 1–2, entirely devoted on this project. See also **Rammeloo, Stephan:** Cross–Border Company Mobility and the Proposal for a 14th EC Company Law Directive: '*Daily Mail*' Surmounted, Maastricht Journal of European and Comparative Law, Vol. 6, Issue 2, 1999, p. 105 *et seq.*; **Rajak, Harry**: Proposal for a Fourteenth European and Council Directive on the Transfer of the Registered Office or de facto Head Office of a Company from One Member State to Another With a Change in Applicable Law, European Business Law Review, Vol. 11, Issue 1, 2000, p. 43 *et seq*.

574 For this reason, the draft directive would not require Member States to give up the real seat doctrine to facilitate cross–border transfers of the registered office from one Member State to another. Rather, the draft directive suggests dealing with such transfers as a matter of substantive law.

575 See 1st paragraph of the preamble to the Draft Directive; Art. 5 TEU; Protocol No (2) on the Application of the Principles of Subsidiarity and Proportionality, OJEU (C 326), 26.10.2012, p. 206.

576 See 5th paragraph of the preamble to the Draft Directive.

577 See 7th paragraph of the preamble to the Draft Directive.

578 **Moran,** p. 162; **Sorensen/Neville,** p. 197.

(the state of arrival) without having to be dissolved in the state of departure and then reincorporated in the state of arrival[579]. Consequently, Member States applying the real seat theory still may require a corporation wishing to change its nationality to also move its head office[580].

It is worth, however, to note that officially there was never any proposal. As follows from earlier findings, the co–existence of the incorporation theory and the real seat theory prevents cross–border company mobility in the EU. This explains why attempt at national level to regulate this subject–matter is doomed to fail[581].

2. Scope of the Draft Directive

According to the proposal, both public and private company types fall within the scope of the draft Directive. It should be pointed out that the scope of this draft Directive has been restricted to corporations with limited liability. Pursuant to Article 1, the draft Directive covers cross–border company transfers of the registered office or *de facto* head office from one member state to another; on condition that both seats were situated on the territory of the EU and that company was formed in accordance with the law of a Member State. This means that companies from third countries having their real head office in a Member State would not benefit from this Directive. As regards the opposite situation, companies having only their registered office on the territory of an EU Member State are *de facto* excluded from primary establishment[582].

---

579 **Sorensen, Karsten Engsig/Neville, Mette:** Corporate Migration in The European Union–An Analysis if the Proposed 14th EC Company Law Directive on the Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law, Columbia Journal of European Law, Vol. 6, Issue 2, 2000, p. 182; **Panayi**, *Corporate Mobility in PIL*, p. 140. See also **Bisacre, Josephine:** The Migration of Companies within the European Union and the Proposed Fourteenth Company Law Directive, International and Comparative Corporate Law Journal, Vol. 3, 2001, p. 251 *et seq*.

580 **Sorensen/Neville,** p. 195.

581 **Rammeloo,** *Corporations in PIL*, p. 300.

582 **Rammeloo,** *Corporations in PIL*, p. 301–302. **Rammeloo,** *Proposal for a 14th Company Law Directive,* p. 107.

Article 2 of the draft Directive repeats the well–known definitions of the companies 'registered office'[583] and '*de facto* head office'. Since the draft Directive did not intend to harmonise the conflict of laws rules of Member States, both recognition theories remain fundamentally unaffected by this legislative project. If all Member States involved follow the incorporation theory, the transfer of registered office either with or without a transfer of head office to be covered by this Directive. If the state of arrival applies the real seat theory, both registered office and head office shall be transferred. The mere transfer of the management and control centre is considered to be exclusively governed by the internal law[584].

3. Transfer Procedure

Article 3 of the draft Directive obliges Member States to take all measures to allow a company to transfer its registered office or head office to another Member State, although the winding up of the company or the creation of a new legal person should not result. Both the state of departure and the state of arrival must safeguard the company's survival[585].

Under the draft Directive, there was a certain transfer procedure which had to be followed in order for the transfer to be effective. The management or administrative body of the company had to draw up a transfer proposal and publicize it. The proposal shall include: (i) the proposed office of the company, (ii) the proposed statutes of the company including, where appropriate, its new name, (iii) the means by which it is proposed to organize employee participation in cases where employees are represented on the governing bodies of the company prior to the proposed transfer, (iv) the proposed transfer timetable [Art. 4(1)]. The transfer proposal shall be published in accordance with the Directive 68/151/EC (now, Directive 2009/101/EC) [Art. 4(2)].

---

583 It has been argued that this proposal's definition of 'registered office' is more suitable than the 'official registered address' concept in the KPMG Study. See **Drury,** *Migrating Companies*, p. 365.

584 **Rammeloo,** *Corporations in PIL*, p. 302.

585 **Rammeloo,** *Corporations in PIL*, p. 303, footnote 287 and accompanying text; **Rammeloo,** *Proposal for a 14th Company Law Directive,* p. 107.

Article 5 of the draft Directive is striking in that it obliges migrating companies to clarify their strategy. The management or administrative body of the company had to draw up a report explaining and justifying the legal and economic aspects of the transfer and indicating the implications on members and employees [Art. 5(1)]. This report and the transfer proposal could have been examined by the company's members, creditors and employee representatives at least one month before the general meeting called to decide on transfer [Art. 5(2)].

It is important to arrange for publishing the transfer plan before the decision to transfer is taken at the general meeting. There needs to be an adequate period between the two events. For this reason, Article 6 of the draft Directive regulates that the decision to transfer could not be taken before two months had elapsed from the publication of the proposal [Art. 6(1)]. Also, such decision required a two–thirds majority of the votes cast at a general meeting, unless the *lex societatis* of the company required or allowed a larger majority [Art. 6(2)], or the Member State allowed a simple majority. Simple majority was permitted only if half of the capital of the company was represented by the majority of those votes [Art. 6(3)].

Under the Article 9 of the draft Directive, the completion of pre–transfer acts and formalities had to be attested in a certificate issued by a court, notary or other competent authority of the Member State in which the company had its registered office or *de facto* head office prior to the transfer. Pursuant to the draft Article 10, the transfer would only be effective if this certificate was submitted and evidence produced that the formalities required for registration in the Member State of arrival were completed. It is worth to note that 'real seat' countries can always fall back on the safeguard device in article 11(2) and refuse to register the transfer if the central administration is not to accompany the registered office[586].

The new statutes and the change of nationality are effective from the date on which the new registration is made [Art. 11(1)]. Once registration has been effected, the previous register must be informed of this, and not until this happens may the corporation

---

[586] See **Drury,** *Migrating Companies*, p. 365; **Rammeloo,** *Corporations in PIL*, p. 305.

request that the entry in its regard be deleted from the old register. The new registration has to be made public in both Member States concerned. Until such publication is made, third parties may rely on the old registration unless such third parties are aware of the new registration [Art. 12][587].

4. Protection of the Stakeholders

As regards the protection of stakeholders who have legitimate interests in the company's transfer, notably minority shareholders, company creditors, debenture holders, employees etc. are involved. In this respect, the draft Directive envisages various safeguards for different interest gropus.

a. Minority Shareholder Protection

A decision to move the corporation to another Member State may negatively affect minority shareholders. By changing its nationality, the corporation becomes subject to a new legal system, and thereby the minority shareholders lose the minority guarantees ensured by the law of the state of departure. They also become subject to the rules on minority protection of the state of arrival.

For this reason, the Article 7 of the draft Directive permitted Member States to adopt rules for the protection of minority shareholders who opposed the transfer of the company. As it is clear from the text of the draft Article 7, Member State is not obliged to take such a protection measure. In other words, the Member States are granted with considerable discretionary powers[588] and each Member States may adopt provisions specifying the contents of the protection.

Different models for the protection of minority shareholders in connection with this transfer may be envisaged. One model protects minority shareholders by introducing a requirement for unanimity, thus giving each shareholder a right to veto the decision. As a means of protection the proposal would give to minority shareholdres a possibility thwart transfer of seat. But it must be noted that, for large corporations, for instance

[587] **Sorensen/Neville,** p. 200.

[588] See **Rammeloo,** *Corporations in PIL*, p. 306, footnote 303 and accompanying text.

those listed on a stock exchange, it will be virtually impossible to reach unanimity[589]. As the decision to transfer the company's seat must be taken on the basis of a qualified majority, it leaves open the possibility of opposition from some members.

Another method for safeguarding the interests of minority shareholders is to introduce the right to exit from the company for minority shareholders by way of granting sell–out rights. It may be envisaged that the resolution has to be passed by a qualified majority of the votes cast and of the voting share capital represented at the shareholders' meeting. The shareholders who opposed the decision for the transfer of the company may then demand a repurchase of their shares[590]. In this case the company would have the obligation to buy the shares.

It has been argued that this repurchase model does not solve all problems, the (directive–based) rules of the Member States on the acquisition by a company of its own shares, are likely often to restrict the practical possibility of such transfer[591]. Because according to the Second Company Law Directive[592] on capital requirements, the corporate laws of the Member States may allow corporations to acquire not more than 10% of their own shares, i.e. shares of a nominal value equivalent to 10% of the nominal share capital.

Because of the above–mentioned restriction, it has been offered different solutions on this matter. First of all, it is possible to introduce a provision to the effect that the remaining shareholders are required to purchase the shares of the minority shareholders if the corporation is unable to complete the repurchase[593]. Another solution would be to

589 **Sorensen/Neville,** p. 201. See also Commission's Impact Assessment Report, point 5.3.4., p. 31.

590 See Commission's Impact Assessment Report, point 5.3.4., p. 31. For example, Art. 16 of the Directive 2004/25/EC grants the "sell–out right" for remaining shareholders in the event of a takeover bid. In this respect, the "sell–out right" enables minority shareholders to require the majority shareholder to buy their securities following a takeover bid and Member States must ensure that a holder of remaining securities is able to require the offeror to buy his securities from him at a fair price.

591 **Sorensen/Neville,** p. 201.

592 Art. 22 of the Directive 2012/30/EU, (Before 4 December 2012, Art. 19 of the Second Council Directive 77/91/EEC).

593 For a similar solution see Commission's Impact Assessment Report, point 5.3.4., p. 31.

exempt the repurchase of own shares as part of a such tranfser from the rules against acquiring more than 10 percent of own shares[594].

b. Protection of Creditors

The other important interest group is creditors of the migrating company. A company's creditors are a particularly vulnerable group when a head office is transferred, particularly in terms of the resulting change of law. For this reason, creditors and holders of other rights were also entitled to demand that adequate security be provided from the migrating company on their behalf[595]. The proposed Directive has opted for the simple solution of protecting the creditors. According to the draft Directive, creditors and holders of other rights may demand such a protection measure only if these are predated the publication of the transfer proposal. The exercise of such rights shall be governed by the law applicable to the company before its transfer [Art. 8(1)]. But a Member State may extend the application of this rule to debts arising up to the date of the transfer [Art. 8(2)][596].

Creditor protection comprises protection against companies engaged in insolvency procedures. According to the darticle 13 of the draft Directive, a company was not allowed to transfer its registered office or de facto head office if proceedings for winding up, liquidation, insolvency or suspension of payments had been brought against it. By this article, transfers of economic refugees are explicitly excluded from the scope of the Directive and any 'rescue attempt' should be undertaken before the company's transfer. Companies planning migration for no other purpose than to avoid insolvency should also be prevented from completing such a transfer[597].

---

594 **Sorensen/Neville,** p. 202.

595 **Mccahery, Joseph A.:** Creditor Protection in a Cross–Border Context, European Business Organization Law Review, Vol. 7, Issue: 1, 2006, p. 455 *et seq*.

596 It is worth to note that the draft Directive does not require any specific protection means such as '*security for claims*' or '*right of veto*'. The draft proposal requires the Member States to introduce creditor protection rules in relation to the transfer, but leave them discretion as to their content and scope. See Commission's Impact Assessment Report, point 5.3.5., p. 31.

597 See **Rammeloo,** *Corporations in PIL*, p. 306, footnote 307.

c. Protection of Employees

The question of employee participation is a difficult area to deal with in EU matters[598]. The draft Directive provides that the transfer proposal drawn by management had to cover the means by which it is proposed to organize employee participation in cases where employees are represented on the governing bodies of the company prior to the proposed transfer [Art 4(1)–c]. Not only transfer proposal but also the report drawn by management had to indicate the implications of the transfer for, *inter alios*, employees [Art. 5(1)]. The employees are entitled to examine the transfer proposal and the report, at least one month before the general meeting called upon to decide on the transfer [Art. 5(2)]. It is obvious that in so far as these protectionist rules were concerned, the emphasis was placed on the laws of the home State[599]. Perhaps such concessions are necessary for the instrument not to be rejected *ab initio* by some Member States with strict employee participation regimes[600].

Certain countries –notably Germany– fear that corporations will try to escape from the rules on co–determination of workers through merger or by moving out of the country. When harmonizing the rules, it must be ensured that the employees have a right of some form of representation in all Member States before corporations are allowed to take such cross–border initiatives. This question also is relevant in connection with the 14th Company Law Directive because some countries may fear that corporations transfer their seat for the sole purpose of avoiding rules on co–determination of workers in management[601].

598 **Lafontaine, Christoph:** Company Mobility and Employee Rights: A Continental Approach to Reconcile Individual Protection with Corporate Politics while Addressing the Needs of the Common Market, *Zeitschrift für öffentliches Recht*=Austrian Journal of Public and International Law, Vol. 61, Issue 2, 2006, p. 263 *et seq*.

599 In addition to the right to be properly and timely informed about the transfer and its implications, this article implies that employee participation rules of the home Member State would continue to apply following the transfer of the seat. See Commission's Impact Assessment Report, point 5.3.6., p. 32.

600 **Panayi**, *Corporate Mobility in PIL*, p. 141.

601 **Sorensen/Neville,** p. 205. It should be noted that the harmonization of the rules on the right of employees to be represented in the corporation has now been discussed for nearly 40 years. See on this matter Final Report of the Group of Experts on European Systems of Worker Involvement (with Regard to the European Company Statute and Other Pending Proposals) (IP/97/396), Brussels 1997, available at: <http://europa.eu/rapid/press–release_IP–97–396_en.htm>.

5. Overall Assessment of the Draft Proposal

Whilst the Commission's draft offered a good framework on which to build an official proposal, there were a number of problems. Firstly, the draft Directive was beleaguered by definitional uncertainties, for example, '*de facto* head office' was defined as the place at which a company had its central administration and was registered. However, the concept of 'central administration' was not itself defined. This generated doubts as to the necessary criteria for establishing that the draft Directive applied to a company and that that company had actually relocated its central administration, in connection with a change of nationality[602].

Another problem was that transfers under this draft Directive always led to a change in the law applicable to the company and the new office had to be registered in the arrival Member State. In fact, the change of law and the consequent amendment of the statutes of the company did not take effect until the company was re–registered in the host Member State [Art. 3 and 11(1)]. Arguably, rather than reducing obstacles to cross–border migration, these provisions would actually enable Member States adhering to the incorporation theory to impose more burdens and formalities on migrating companies. Invariably, when a company transfers its administrative seat from an incorporation Member State to another incorporation Member State, this does not lead to a change in the applicable law. The state of arrival may impose some registration requirements on the company[603], but it does not tend to require dissolution and reincorporation of the migrating company. Therefore, in such circumstances, a migrating company may, in fact, get more protection under national law than under the draft Directive[604].

Another criticism that can be levied against the draft Directive was that a host Member State could refuse to register a company if its central administration was not in that Member State [Art. 11(2)]. In other words, a company could be prevented from transferring its registered office unless it also transferred the central administration. By

602 **Sorensen/Neville,** p. 196; **Panayi**, *Corporate Mobility in PIL*, p. 141–142.

603 Within the context of legislation for pseudo–foreign companies see above §1–II–B–3.

604 **Panayi**, *Corporate Mobility in PIL*, p. 142

this provision, the draft Directive accepted the 'narrow approach'[605] with regard to the creation of an EU legal instrument on cross–border transfer of a company. According to the narrow approach, a Member State adhering the real seat theory would be allowed to require a company wishing to transfer its registered office to its territory to transfer also its real seat. Companies could relocate their registered office alone when moving to an incorporation Member State, but would have to relocate both registered and head office when moving to a real seat Member State. Arguably, the existence of this discretion suggests an endorsement of the real seat theory for arrival Member States[606].

As for issues that are ancillary to the transfer, for example the protection of workers, creditors and minority shareholders, the safeguards provided would not ultimately be applied in a uniform manner in all Member States. This was because the draft Directive deferred heavily to the rules of the home State. Therefore, in this regard, the draft Directive did not really manage to reconcile the divergent Member State protectionist rules which hinder cross–border migration[607].

C. Action Plan of 21 May 2003

In 2003, on the basis of the High Level Group's final report[608], the European Commission elaborated an Action Plan containing the policy to be followed to achieve a competitive European economy by 2010[609]. In its Action Plan of 21 May 2003, the Commission assessed the current position and prospects of European company law, and provided an outline of the approach that it intended to follow in the area of company

---

605 There are basically two legislative approaches available for the Community legislator with respect to the creation of a community legal instrument on the cross–border transfer of companies. The future 14th Company Law Directive may either allow companies to transfer their registered office alone to another Member State, or it may allow only the transfer of registered office simultaneously with the transfer of the company's real seat. The first approach is characterized as 'broad' or 'limited' and the second is 'narrow' or 'extensive'. See The Commission's Impact Report, p. 42; See also **Sousa,** p. 57 *et seq*.

606 **Panayi**, *Corporate Mobility in PIL*, p. 142.

607 **Panayi**, *Corporate Mobility in PIL*, p. 143.

608 For details on this Report see paragraph §6–III–A.

609 It has been argued that ample time have passed since the Company Law Action Plan was launched and the appropriate time has come to revisit it, in light of the most recent developments. For the suggestions about the main topics of company law reform see **Hopt, Klaus J./Geens, Koen (Eds.):** The European Company Law Action Plan Revisited–Reassessment of the 2003 Priorities of the European Commission, Leuven, 2010, p. 9 *et seq*.

law and corporate governance[610]. In view of the fact that companies increasingly do business across national borders and the need for alignment of their structure to their activities, the Action Plan of 2003 announced the several measures in respect of corporate mobility[611].

In the Action Plan of 2003, *inter alios*, the Commission intends to present in the short term a new proposal for a 14th Company Law Directive on the transfer of the seat from one Member State to another. According to the Action Plan of 2003, a legislative effort is needed in this field in order to implement the freedom of establishment in the manner intended by the Treaty[612]. The Action Plan had categorised this legislation under the short term measures that were to be implemented by 2005[613].

It is worth to note that today all these measures have been put in place except the Directive on the cross–border transfer of seat. The public consultation relates to the outline of the planned proposal for a 14th Company Law Directive[614] reaffirmed the need for legislative action to regulate cross–border seat transfers, by way of freedom of establishment, of the registered office of a limited liability company already formed under the law of a Member State, whereby the case of a transfer of the real seat should be addressed both for Member States adhering to the incorporation doctrine and for Member States opting for the real seat doctrine.

Also the Working Document of DG Internal Market dated 15 November 2003 shows that the Commission's intention for a proposal for a 14th Company Law Directive was

---

610 Communication from the Commission to the Council and the European Parliament–"Modernising Company Law and Enhancing Corporate Governance in the European Union–A Plan to Move Forward" ('Action Plan of 2003'), Brussels 21.05.2003, [COM (2003) 284 final], available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0284:FIN:EN:PDF>.

611 On this argument, see **Baums, Theodor:** European Company Law Beyond the 2003 Action Plan, European Business Organization Law Review, Vol. 8, Issue 1, 2007, pp. 155–156.

612 The Commission justified its intention by arguing that "*in the absence of legislation governing the cross–border transfer of seat, such an operation is currently impossible or at least contingent on complicated legal arrangements*", and that the "*Member States laws do not provide the necessary means and […] there are frequent conflicts between those laws because of the different connecting criteria applied in the Member States*." See paragraph 3.4. of the Action Plan of 2003.

613 See Action Plan of 2003, p. 25.

614 The public consultation is available at: <http://ec.europa.eu/internal_market/company/seat–transfer/2004–consult_en.htm>.

supported by a very large majority of respondents[615]. At the 2006 consultation and hearing on the Action Plan of 2003[616], a very large majority again confirmed the need for a Fourteenth Directive, but a minority expressed doubt as to its practical value, albeit merely in view of obstacles of another nature that should be dealt with, such as employee participation and taxation.

D. Commission's Lisbon Agenda of 2005

In 2005, the Commission reinforced its purposes by the adoption of the so called "Lisbon Agenda"[617], which aims at achieving a stronger and lasting economic growth and increased employment. It prescribes to examine the existent company regulations in an attempt to simplify and modernize them. With these goals in mind, the European legislator has tried to deal with corporate mobility matters, introducing European supranational entities through which the running of cross–border activities is facilitated.

The 14th Company Law Directive was also listed as part of the corporate mobility matters in Commission's Lisbon Agenda of 2005. This document includes, *inter alios*, regulatory actions regarding the Commission's recalls about the foreseen initiatives. In other words, the 'key regulatory actions' listed in order to achieve the objectives of the Lisbon Agenda. According to this Agenda, the 14th Company Law Directive with regard to transfer of companies' seat will contribute to modernisation of company law facilitating cross–border mergers and takeovers. The measure will contribute to enterprise competitiveness and economic growth by improving the conditions for cross–border economic activity. In this Agenda, the final adoption time of the 14th Company Law Directive was listed as 2006[618].

---

615 The working document is available at: <http://ec.europa.eu/internal_market/company/docs/modern/governance–consult–responses_en.pdf>.

616 DG Internal Market and Services of the European Commission, Consultation and hearing on future priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, 3 May 2006, available at: <http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf>.

617 Commission Staff Working Document–Annex to the Communication from the Commission to the Council and the European Parliament–Common Actions for Growth and Employment: The Community Lisbon Programme {COM (2005) 330 final}, Brussels 20.07.2005, [SEC (2005) 981 final], available at:<ftp://ftp.cordis.europa.eu/pub/technology–platforms/docs/sec2005_981_en.pdf>.

618 See Commission's Lisbon Agenda of 2005, p. 6.

E. Public Consultations by the Commission

In February 2004, the Commission launched an open consultation on an outline of the planned proposal for a Directive on the right of limited companies to transfer their registered office from one Member State to another. Altough the results of the consultation have been published on the Commission's internal market website and these analyses have not been made public, majority of the participants in the public consultation were in favour of the adoption of a company law directive on the cross–border transfer of company seats. In other words, the responses to the consultation showed overwhelming support for the introduction of a process for the cross–border transfer of a company's seat which does not involve winding up the company. Overall, 88% of the consultation participants were of the view that 'the transfer of the registered office should not entail the company's being wound up in the home Member State[619].

There was another public consultation on the future priorities for the Action Plan of 2003[620]. The document highligted that the transfer of registered office is today either impossible or hindered by burdensome company law and/or fiscal requirements. The proposal would enable European companies to transfer their registered office in the EU without previous winding–up in the home Member State and subsequent re–incorporation in the host Member State.

F. 2007: Cancelation of the 14th Company Law Directive

In April 2007, the Commission issued a Roadmap of the Commission Legislative and Work Programme[621] in which it formulated certain preconditions. According to this Roadmap, the cross–border mobility shall be submitted to harmonization measures and the Directive on the cross–border transfer of a company listed in the section of 'priority initiatives'. The objective of this initiative was to facilitate the cross–border transfer of

---

619 See Consultation Document numbered IP/04/270 and dated 26/02/2004, available at: <http://europa.eu/rapid/press–release_IP–04–270_en.pdf>.

620 See Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, available at: <http://ec.europa.eu/internal_market/company/docs/consultation/consultation_en.pdf>.

621 Commission Legislative and Work Programme 2007, Brussels 24.10.2006, COM (2006) 629 final, available at: <http://eur–lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0629en01.pdf>.

a company's registered office within the EU, whilist ensuring the continuity of the company's legal personality.

In June 2007, the Commissioner McCreevy made a statement concerning the cross–border transfer of seat. According to his speech[622], the Commission had envisaged submitting a proposal for a directive in the year of 2007. At the same time, the Commissioner announced the postponement of the proposal for a Directive and the legislator of the EU should wait for the outcome of the *Cartesio* case.

In October 2007, the Commission changed its mind and abandoned the project for a 14th Company Law Directive cross–border company seat transfers[623]. In a Working Document dating from year–end 2007[624], the Commission analysed the various options regarding the adoption of 14th Company Law Directive. In this document it has been discussed different possible policy options. Firstly the Commission discussed the 'no action' scenario with regard to alternative means if the European legislator were to decide not to take any action on the transfer of the company's seat[625]. As an alternative, the Commission discussed the 'Community action' scenario regarding the content of a possible action and the legal instrument to be used for such a probable legislation[626].

Consequently, the Commission came to the conclusion that in order to achieve the policy objectives either 'a directive' or 'no action' would be suitable, but that 'no action' was preferable. There were several reasons for the Commission's current 'no–

---

622 Commissioner's McCreevy Speech in Berlin on the 28 June 2007 (SPEECH/07/441) available at: <http://europa.eu/rapid/press–release_ SPEECH–07–441_en.pdf>.

623 **Rammeloo, Stephan:** The 14th Company Law Directive on the Cross–Border Transfer of the Registered Office of Limited Liability Companies: Now or Never?, Maastricht Journal of European and Comparative Law, Vol. 15, No: 3, 2008, p. 372.

624 See Commission Staff Working Document–Impact Assessment on the Directive on the Cross–Border Transfer of Registered Office, SEC (2007) 1707, available at: <http://ec.europa.eu/ internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf>.

625 See Commission's Impact Assessment Report, points 3.5. (p. 24), 5.2. (p. 29) and 6.2. (p. 37).

626 See Commission's Impact Assessment Report, points 5.3. (p. 29) and 6.3. (p. 42).

action' strategy[627] regarding the adoption of a 14th Company Law Directive on the cross–border transfer of company's seat.

First, the Commission apparently considers that after the entry into force in particular of the 10th Company Law Directive regarding the cross–border merges, but also of the SE Regulation companies now have at their disposal the legal means to effectuate a cross–border transfer of registered office[628]. As explained earlier, the CBMs Directive, in particular would provide to limited liability companies in the EU the possibility of transferring their registered office to another Member State with a change of *lex societatis* through a cross–border merger. The company wishing to transfer its registered office to another Member State would be absorbed by a company previously set up in the Member State of destination[629]. Similarly, the SE Regulation would also give public limited liability companies the possibility of transferring their registered office from one Member State to another after being converted into SE's in their home Member State.

The second reason for the non–EU initiatives on the issue of the cross–border transfer of the seat of a company has to do with the fact that, according to the Commission, that matter could be clarified by the CJEU in its *Cartesio* judgment. According to the Commission the Court of Justice will soon take a decision in case that could provide the Commission with new insights on the current legal situation in Europe[630].

In my opinion the arguments of the Commission with regard to 'no action' strategy is unsustainable. Because companies can currently transfer their seat only by dissolution

---

627 Further examination on the Commission's change in this policy see **Vossestein, Gert–Jan:** Transfer of the Registered Office–The European Commission's Decision Not to Submit a Proposal for a Directive, Utrecht Law Review Vol. 4, Issue 1, 2008, p. 53 *et seq*.

628 See Commission's Impact Assessment Report, point 3.5., pp. 24–25.

629 Commissioner McCreevy pointed out that limited liability companies presently have the option to transfer their seat through a cross–border merger, 'by setting up a subsidiary in the Member State to which they want to move and then merging the existing company into that subsidiary.' See Mr McCreevy's Speech of the 3rd October 2007 at the European Parliament's Legal Affairs Committee (SPEECH/07/592), available at: <http://europa.eu/rapid/press–release_SPEECH–07–592_en.pdf>; see also Commission's Impact Assessment Report, point 3.5.1., p. 24.

630 See Commission's Impact Assessment Report, points 3.5.2., p. 24 and 6.2.3., 38; Commissioner's McCreevy Speech in Berlin on the 28 June 2007 (SPEECH/07/441) available at: <http://europa.eu/rapid/press–release_SPEECH–07–441_en.pdf>; **Vossestein,** *Transfer of the Registered Office,* p. 62; **Rammeloo,** *The 14th Company Law Directive*, p. 372.

and the establishment of a new legal entity in the Member State of destination, or by establishing a new legal entity in the Member State of destination and then merging both undertakings, or by way of converting into an SE. As mentioned previous sections[631], these procedures involve administrative obstacles, costs and offer no legal certainty. If these possibilities of indirect cross–border transfer of company's seat from one Member State to another prove to be effective, the planned 14th Company Law Directive would become virtually redundant.

On the other hand, the CJEU in its judgment in *Cartesio*, has not provided the necessary clarification with regard to the transfer of a company's seat as expected by the Commission in its 2007 impact assessment. In contrast, the CJEU ruling in *Cartesio* confirms the need for a harmonised regime governing the cross–border transfer of company seats; since it is for the EU legislators and not for the CJEU to establish on the basis of the TFEU the relevant measures to accomplish the freedom of a company to transfer its seat.

G. Action Plan of 2012: Further Investigation on the Need for a Directive

On 20 February 2012, DG Internal Market and Services of the European Commission launched a public consultation[632] on the future of European company law. The consultation recalls the importance of the EU company law in respect of building the single market and covers questions to be asked to contributors regarding the cross–border mobility for companies.

DG Internal Market and Services of the European Commission announced the feedback statement of the public consultation in July 2012[633]. There was a strong support for the option of facilitating cross–border transfer of registered office by introducing a harmonizing Directive, with a strong majority of 68% of participants[634]. The significant

631 See sections §4–I–D and §4–II–D.

632 Details are available at: <http://europa.eu/rapid/press–release_IP–12–149_en.pdf>.

633 See DG Internal Market and Services of the European Commission, Feedback Statement Summary of Responses to the Public Consultation on the Future of European Company Law, Brussels 17.07.2012, available at: <http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/feedback_statement_en.pdf>.

634 Feedback Statement, Question 14, p. 9.

majority of participants conditioned the cross–border transfer of registered office on there being no proceedings for winding–up, liquidation, insolvency suspensions of payments or similar open against a particular company[635]. According to the overwhelming majority of participants the company should not lose its legal personality in case of the transfer of seat; the transfer of registered office should not result in a loss of the pre–existing rights of shareholders, members, creditors and employees and the company seat should be transferred without the necessity of winding up the company in the home Member State[636].

At the end of the 2012, the European Commission accepted and announced a new Action Plan with regard to European company law and corporate governance[637]. According to the Action Plan of 2012, currently, only a few Member States allow for a seat transfer without winding up and subsequent re–incorporation. The Commission reminds again that companies can also use the 10th Compnay Law Directive on cross–border mergers or the SE Regulation as a tool for changing their home Member State.

The Commission acknowledges the importance of the transfer of seat of a company taking into consideration the responses to the 2012 public consultation, recent case–law of the CJEU[638] and the developments in Member States' legal frameworks. The Commission declared that, throughout 2013, it will conduct public and targeted consultations to update its impact assessment on a possible initiative on cross–border transfer of registered office and subsequently, it will consider the appropriateness of a legislative initiative[639]. For this purpose, the Commission announced a new public consultation to get more in–depth information on the costs currently faced by

---

635 On the other hand, the compulsory attachment of the real seat to the registered seat during a transfer was the most favored option by the trade unions but only received the support of around 30% of participants. See Feedback Statement, Question 15, p. 10.

636 See Feedback Statement, Question 16, p. 10.

637 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions–Action Plan: European Company Law and Corporate Governance–A Modern Legal Framework for more Engaged shareholders and Sustainable Companies (Text with EEA relevance) ('Action Plan of 2012'), [COM (2012) 740 final], Strasbourg 12.12.2012, available at: <http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM: 2012:0740:FIN:EN:PDF>.

638 Case C–378/10 *Vale Építési Kft v Hungary* [2012] (not yet published in ECR). See §7–IV of the thesis.

639 See Action Plan of 2012, point 4.1., p. 12.

companies transferring their registered offices abroad and on the range of benefits that could be brought by the EU action on the cross–border transfer of them[640].

H. Public Consultation of 2013

On 14 January 2013, DG Internal Market and Services of the European Commission launched a public consultation on the cross–border transfers of registered offices of companies which ended on 17 April 2013. The need to consult stakeholders has become apparent after the Resolution of the European Parliament from 2 February 2012[641] and the CJEU judgments in cases *Cartesio*[642] and *Vale*[643].

The purpose of the consultation was to acquire more in–depth information on the costs currently faced by companies transferring their registered offices abroad and on the range of benefits that could be brought by an EU action in this respect.

Summary of responses to the Public Consultation on cross–border transfers of registered offices of companies was announced in September 2013. According to the results, the overall majority of the respondents opined that recent CJEU case–law does not provide an adequate solution for cross–border transfer of registered offices of companies. They also claimed that clarity, certainty and uniformity was essential and could only be obtained by a legislative action. The overall majority of the respondents (85%) believed that a specific EU instrument on the direct cross–border transfer of registered offices of companies (direct transfer without the need of winding–up or a cross–border merger) would contribute to the reduction of transfer costs[644].

II. THE POSITION OF THE EUROPEAN PARLIAMENT

The European Parliament does not have a genuine right of initiative with regard to legislation procedure within the context of the founding Treaties. This right is attributed

640 Available at: <http://ec.europa.eu/internal_market/consultations/2013/seat–transfer/index_en.htm>.

641 See §6–II–D of the thesis.

642 See §8–III of the thesis.

643 See §7–IV of the thesis.

644 See Feedback Statement–Responses to the Public Consultation on Cross–Border Transfers of Registered Offices of Companies, available at <http://ec.europa.eu/internal_market/consultations/2013/seat–transfer/docs/summary–of–responses_en.pdf>.

to the Commission. In other words, Union legislative acts may only be adopted on the basis of a Commission proposal in principle [Art. 17(2) TEU (repealed Art. 211 TEC). The Parliament may, however, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required in order to properly implement the Treaties [Art. 225 TFEU (ex Art. 192 TEC).

In addition, the Parliament and its Members have a right to put oral or written questions to the Commision [Art. 230 TFEU (ex Art. 197 TEC)]. When the European Parliament requests his or her presence, finally, the Commission will ensure that the responsible Commissioner is presence at the plenary session or in committee[645]. As result, the European Parliament can put pressure on the Commission, in the case at hand, to adopt a proposal for a Directive on transfer of the seat of a company. Several Parliament Resolutions may be quoted as examples of the European Parliament bearing down on the Commission.

A. European Parliament Resolution of 2006

The European Parliament emphasized the need for a Directive on cross–border transfers of seat in its Resolution on recent developments and prospects in relation to company law of July 2006[646]. The European Parliament stressed that the transfer of a registered office is today either impossible or hindered by the requirements imposed at national level, that a directive in this area is crucial for freedom of establishment, and that the long–awaited Fourteenth Company Law Directive would fill a lacuna in the system of the internal market for companies; therefore the European Parliament calls on the Commission to present in the near future a proposal concerning the Fourteenth Company Law Directive on the cross–border transfer of the registered office of limited companies[647].

---

645 See Interinstitutional Agreement on Better Law–Making of 16 December 2003, OJEU (C 321), 31.12.2003, p. 1.

646 See European Parliament Resolution of 4 July 2006 on Recent Developments and Prospects in Relation to Company Law [P6_TA (2006) 0295], OJEU (C 303E), 13.12.2006, p. 114.

647 See European Parliament Resolution of 4 July 2006, para. 32–33.

The public consultation showed that around 80% of respondents considered that there is still a need for a Directive on the transfer of registered office. In the view of stakeholders, the Directive would facilitate the mobility of European companies, in particular SMEs, and allow them to locate their businesses in the Member State that best suits their needs. Many of the respondents mentioned that the existing measures still do not provide for a straightforward transfer of the registered office (the transfer of registered office is only possible through a conversion into an SE or a cross–border merger) and, therefore, European legislation is necessary[648].

B. European Parliament Resolution of 2007

Again, the European Parliament resolution on the European Private Company and the Fourteenth Company Law Directive on the transfer of the company seat of 25 October 2007 shall be mentioned[649]. In this Resolution the European Parliament states that it regrets that the Commission, after a considerable delay, has now informed Parliament that it intends to make no legislative proposal for a Fourteenth Company Law Directive on the transfer of the seat, but reserves the right, nevertheless, to take further action with regard to the question of cross–border transfers of company seats.

With regard to this 'further action', a point worthy of attention is that the opening consideration in the preamble of the Resolution refers not just to Article 192 of TEC (now, Art. 225 TFEU), on the basis of which the European Parliament may request the Commission to submit proposals, but also refers to Article 232 of TEC (now, Art. 265 TFEU). According to this article an action for failure to act may be brought against, *inter alia*, the Commission. This article confers this right on all institutions, including the European Parliament. Its object is a declaration on the part of the CJEU that the defendant institution acted unlawfully by failing to take a decision[650]. The 'further

[648] Directorate General for Internal Market and Services, Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union (summary report) of July 2006, available at: <http://ec.europa.eu/internal_market/company/consultation/index_en.htm>.

[649] See European Parliament Resolution on the European Private Company and the Fourteenth Company Law Directive on the Transfer of the Company Seat [P6_TA (2007) 0491], OJEU (C 263E), 16.10.2008, p. 671.

[650] Case 377/87 *European Parliament v. Council of the European Communities* [1988] ECR 4017, §9.

action' the European Parliament thus considers, notably an action against the Commission for failure to act, shows the Parliament's intention to keep pressure on the Commission to submit a proposal[651].

C. European Parliament Resolution of 2009

The European Parliament drafted another resolution with regard to recommendations to the Commission on the cross–border transfer of the registered office of a company at the date of 10 March 2009[652]. It emphasized that the cross–border company migration is one of the crucial elements in the completion of the internal market.

The draft covered all companies with limited liability and required the Member State "to take all measures necessary to allow such companies to transfer their registered or head office without a subsequent winding up an re incorporation but with the law applicable to the company chancing with the effect from the date of the registration of the transfer"[653].

By this Resolution, the European Parliament explicitly requested the Commission to submit to Parliament by 31 March 2009, on the basis of Art. 44 TEC (now, Art. 50 TFEU), a legislative proposal for a directive laying down measures for coordinating Member States' national legislation in order to facilitate the cross–border transfer within the Community of the registered office of a company formed in accordance with the legislation of a Member State. In opposition to the previous resolutions, the European Parliament has given a deadline to the Commission to submit a proposal[654]. Nevertheless this long awaited directive never materialized as the Commission has not yet submitted a legislative proposal.

In addition, the European Parliament prepared an annex to the Resolution with regard to detailed recommendations on the content of the proposal requested. The European

---

651 **Vossestein,** *Transfer of the Registered Office,* p. 57.

652 See European Parliament Resolution of 10 March 2009 with Recommendations to the Commission on the Cross–Border Transfer of the Registered Office of a Company [P6_TA (2009) 0086], OJEU (C 87E), 01.04.2010, p. 5.

653 **Roussos,** pp. 24–25.

654 See European Parliament Resolution of 10 March 2009, para. G–1.

Parliament requested the Commission to put forward a proposal for a directive that should contain; (i) the effects of a cross–border transfer of the registered office, (ii) transfer procedure within the company, (iii) transfer decision by meeting of the shareholders, (iv) administrative transfer procedure and verification, (v) employee participation and (vi) third parties concerned by the transfer[655].

D. European Parliament Resolution of 2012

The last and current document is the European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th Company Law Directive on the cross–border transfer of company seats[656]. By this Resolution, the European Parliament requested the Commission swiftly to submit, on the basis of Arts. 50(1) and (2)(g) TFEU, a proposal for a directive on the cross–border transfer of company seats[657].

The Resolution summarized the rationales for adopting the 14th Company Law Directice. It explicitly clarifies that it is for the EU legislators and not for the CJEU to establish on the basis of the TFEU the relevant measures to accomplish the freedom of a company to transfer its seat. It also highligts that the cross–border company migration is one of the crucial elements in the completion of the internal market within the context of the freedom of establishment for all companies and firms guaranteed by the Arts. 49 and 54 TFEU[658].

The Resolution criticizes the Commission’s statement in its 2007 impact assessment that the ‘no action’ option seems more proportional as no further EU action is required and emphasized company mobility still encounters high administrative burdens as well as social and tax costs. Another rationale is the prevention of the misuse of post–box

655 For further information see Annex to the European Parliament Resolution of 10 March 2009.

656 See European Parliament Resolution of 2 February 2012 with Recommendations to the Commission on a 14th Company Law Directive on the Cross–Border Transfer of Company Seats [P7_TA (2012) 0019].

657 European Parliament Resolution of 2 February 2012, para. (1).

658 European Parliament Resolution of 2 February 2012, para. (A) and (E).

offices and shell companies with a view to circumventing legal, social and fiscal conditions[659].

Similar with the previous Resolution of 10 March 2009, the European Parliament prepared an annex to the Resolution with regard to detailed recommendations on the content of the proposal requested. The European Parliament requested the Commission to put forward a proposal for a directive that should contain; (i) the scope of the directive to be adopted, (ii) the effects of a cross–border transfer, (iii) transparency and information rules prior to the transfer decision, (iv) the decision by the meeting of shareholders, (v) the verification of the legality of the transfer, (vi) protective measures, (vii) employees' rights[660].

In its resolution of 14 June 2012 on the future of European company law, the European Parliament reiterated its request to the Commission that it submit a legislative proposal laying down measures designed to facilitate cross–border mobility for companies within the EU[661]. It recalls that it is for the legislators, not the CJEU, to establish, on the basis of the Treaty, the relevant measures to give companies the freedom to transfer their seat.

III. REPORTS OF COMPANY LAW SCHOLARS

A. The Winter Report of 2002

In September 2001, the European Commission set up a Group of High Level Company Law Experts with the objective of initiating a discussion on the need for the modernisation of company law in Europe. In April 2002, the High Level Group launched consultations on possible reforms to company law in Europe. The corporate

---

659 European Parliament Resolution of 2 February 2012, para. (F) and (H).

660 For further information see Annex to the European Parliament Resolution of 2 February 2012.

661 See European Parliament Resolution of 14 June 2012 on the Future of European Company Law [P7_TA (2012) 0259].

restructuring and mobility was one of the issues covered by the Consultative Document[662].

The Consultative Document preceding the Winter Report points to a 1997 draft Fourteenth Directive on transfer of seat as a means for a company to change its internal law/corporate status. It calls for a common EU approach taking into account shareholder and creditor protection when a company moves its “head office” or “central administration” cross–border, whether or not the Member States involved also require changing the law of incorporation. It points out the existence of the incorporation doctrine and the real seat doctrine, and is of the opinion that the requirement of the incorporation states to keep a place for service of process and maintenance of public documents within the territory of formation is a proportionate measure, while the real seat states are not acting proportionately when requiring that the main activities of a company must be maintained in a given state in order for that state's company law to be applicable. It concludes by calling for further harmonization in this field, but is not convinced that the 14th Company Law Directive should be based on a change of applicable law upon each transfer of registered office or de facto head office to another Member State, as the draft directive stated at that time, because in many cases that could be unnecessary and produce anomalies[663].

At the end of 2002, the High Level Group of Company Law Experts presented its Final Report on “A Modern Regulatory Framework for Company Law in Europe” (the ‘Winter Report’)[664]. This report was focused on corporate governance in the EU and the modernisation of European company law. It reminded that there is a perceived need for Community action in the legislative field with regard to corporate mobility, especially

---

662 A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts, available at: <http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf>.

663 See Consultative Document, point 3.5., pp. 31–34; **Wyckaert/Jenné,** p. 295–296.

664 Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, Brussels 4 November 2002, available at: <http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf>.

in the cross–border context. The Commission should urgently bring forward revised proposals for a 14th Company Law Directive on transfer of the company seat[665].

The Winter Report itself sets out several guiding principles that would need to be applied in the case of a change of corporate seat. First of all, Member States are not allowed to adopt a version of the real seat doctrine which automatically denies recognition to a company with its real seat in a country other than that of its incorporation[666].

In the Report, the transfer of the head office between two "incorporation" Member States is described as the simplest scenario. In this case, if a company moves its head office it continues to be governed by the state of incorporation and neither the states concerned directly in the change nor third states have any interest in inhibiting the move. According to the Report, existing EU secondary legislation should be aligned with this view. As the SE Regulation make it unlawful for SEs to have their 'real seat' in a state other than their state of incorporation (Art. 7 of the SE Regulation), the Winter Report calls for this to be corrected[667]**.**

In the case of a transfer of the head office to another real seat state (i.e. where a company moves its head office to a host state where the effect of its law of incorporation is inconsistent with local mandatory requirements), the state of arrival is allowed to take measures overriding the law of incorporation of the migrating company, provided that such measures[668] (i) are imposed only to support a requirement of legitimate general interest; (ii) are not disproportionate (the '*proportionality principle*'); (iii) require no more than is necessary and appropriate to secure the interest concerned (the '*principle of minimum intervention*'); (iv) are non–discriminatory compared to the rules applicable to national companies formed in the state of arrival (the '*non–discrimination principle*'); (v) are sufficiently transparent to inhibit to the minimum

[665] Winter Report, p. 111.

[666] According to the Winter Report this is disproportionate measure which can never be justified and it is likely to be against the EU law. See Winter Report, p. 102.

[667] Winter Report, p. 102.

[668] Restrictions on the freedom of establishment in the public interest are allowed if they pass the "*rule of reason*" or "*Gebhard test*" that has been developed by the CJEU. See above §2–II–A.

extent necessary the exercise in practice of the fundamental freedom of establishment (the '*transparency principle*')[669].

The transfer of the head office out of a real seat state can be regarded as a means of escaping the law of the home country, provided that any sanctions applied by the home country must comply with the above–metioned rule of reason principles. The Winter Report even mentions that if the host state is a Member State which has adopted the incorporation theory and which has applied the law of origin, the home state should not be able to take special measures on the ground of the transfer of the head office. In the event of a conflict law between the home state and the host state, the reciprocity principle applies[670].

Third states are unlikely to be concerned in cases of moving real seat between a home and a host state, but the general rule should be that they should apply the law of the state of incorporation, with a *renvoi* to the law of the host state where appropriate[671].

B. Report of the Reflection Group of 2011

The European Commission appointed a group of experts named The Reflection Group on the future of EU company law (the 'Reflection Group') at the end of 2010 with the objective of addressing current issues in EU company law and making recommendations for legislative initiatives to be undertaken at EU level.

The Reflection Group prepared a report[672] which was presented at a conference on "*European Company Law: the way forward*"[673] hold in Brussels on 16 and 17 May 2011. The conference brought together highly qualified practitioners and scholars to discuss key company law issues and reflect on steps to take in the future. After

669 According to the Winter Report, justification must be provided for requirements imposed with respect to the internal governance, the protection of creditors or the external representation of the company. See Winter Report, p. 103.

670 Winter Report, p. 106.

671 Winter Report, p. 106.

672 See Report of the Reflection Group on the Future of EU Company Law, Brussels 5 April 2011. The Report is available at: <http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf>.

673 Recordings and presentations of the Conference are available at: <http://ec.europa.eu/internal_market/company/modern>.

analyzing the means and purposes of EU company law harmonization, the Reflection Group has made several recommendations for further harmonization of European company law. These recommendations include, *inter alia*, measures on improvement of cross–border mobility of companies within the EU.

The report points out the necessity to enhance the mobility of national companies by tackling the obstacles that prevent companies from enjoying a complete freedom of establishment. The Reflection Group identifies several obstacles, *inter alia*, (i) the inability for a company to transfer its registered office from its Home State to another Member state while retaining its legal personality; (ii) the real seat doctrine which is adopted by some Member States and limits the company's ability to reorganize its internal organization and relocate its real seat; and (iii) the lack of EU legislation on cross–border division[674].

The Reflection Group made several recommendations on cross–border mobility. According to the report, EU harmonisation is called for to provide a right for national companies to transfer their registered office from one Member State to another, effectively changing the applicable company law regime from that of the former to that of the latter[675]. According to the Reflection Group, the proper legal instrument for legislation would be a directive. Legislation by directive in this area can be done in one of two ways. Legislation can take the form of a separate directive on the transfer of registered office as the 14th Company Law Directive. Alternatively, legislation can be made by amending the 10th Company Law Directive on cross–border mergers to provide more generally for cross–border mobility[676].

---

674 See Report of the Reflection Group, point 2.3., p. 17 *et seq*.

675 Report of the Reflection Group, p. 22.

676 The report points out that a separate directive has the advantage of providing a tailor made solution to the specific problem of a transfer of registered office. The advantage of the second approach would be that the 10th Company Law Directive already makes provisions for the protection of three groups of stakeholders (shareholders, employees and creditors), whose interests should be addressed in any directive on cross–border mobility, including one on a transfer of registered seat. See Report of the Reflection Group, p. 21.

C. European Added Value Assessment of 2012

On 26 June 2012, the Committee on Legal Affairs requested a European Added Value Assessment[677] to support its work on the two legislative own–initiative reports on a directive for the cross–border transfer of company seats (14th Company Law Directive). The legislative own–initiative reports adopted by Parliament call on the Commission to submit a proposal for a directive on the cross–border transfer of company seats on the basis of Art. 50(1) and (2)(g) of TFEU[678].

As the EAVA shows, the European Union needs the 14th Company Law Directive because it needs corporate mobility. This is a clearly given fundamental freedom, and a right that is increasingly required by businesses operating in a global economy. The principal problem arising from the current unclear situation is that, given the Commission's refusal to enforce this right, there is no comprehensive secondary legislation to guide the expectations of companies aspiring to cross–border mobility.

This EAVA supports Parliament's position, which is that there is an inherent need for a 14th Company Law Directive in order to ensure the granting of a fundamental freedom. It identifies the benefits the requested directive can bring to the transfer process in terms of legal certainty, clarity, transparency and simplicity. It focuses on the extent to which the requested directive will facilitate the cross–border mobility of company seats and looks at some aspects of the associated economic impact. On balance, it would seem that, even with regard to the proportionality criterion, a directive would be superior to a 'no action' policy, as it is overall a less onerous route for companies wishing to move their registered office cross–border. A directive would therefore be more likely to deliver the single–market benefits of greater company mobility.

---

677 See European Added Value Assessment (EAVA 03/12), Directive on the Cross–Border Transfer of a Company's Registered Office (14th Company Law Directive), An Assessment Accompanying the European Parliament's Legislative Own–Initiative Reports, available at: <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL–JOIN_ET(2013)494460_EN.pdf>.

678 See §6–II–D of the thesis.

CHAPTER FOUR
CASE–LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON ENHANCING CORPORATE MOBILITY

§7. CASE–LAW ON INBOUND ESTABLISHMENT OF COMPANIES

I. THE ROLE OF THE CJEU IN ENHANCING CORPORATE MOBILITY

The CJEU ruled in its *Reyners* decision in 1974 that the provisions on the freedom of establishment to have direct effect from the end of the transitional period[679]. Later on, the CJEU has made increasingly use of its power to interpret the EU law and define the scope of the freedom of establishment, preventing Member States from obstructing its exercise.

Member States of the EU have to trust each other and give recognition to companies duly formed in accordance the law of one of them[680]. As mentioned earlier, Member States can only try to justify the national provisions able to jeopardize the goals of the internal market on grounds of public policy, public security and public health. Moreover, the CJEU shall scrutinize those justifications by way of the method of "*rule of reason*" or "*Gebhard test*"[681].

On many occasions the CJEU has been asked to give a preliminary ruling on the compatibility with the freedom of establishment of national legislators with the aim of the preventing the formation of post–box companies. In particular, the CJEU had often to deal with cases in which an undetaking decided to incorporate in a state with a lax substantive law regulation and then carried out its business activities totally through the setting up of a secondary establishment in another country[682].

---

[679] See Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §30.

[680] **Garcia–Riestra, Manuel:** The Transfer of Seat of the European Company v Free Establishment of Case–Law, European Business Law Review, Vol. 15, Issue 6, 2004, p. 1300.

[681] See above §2–II–A; on this argument see **Garcia–Riestra,** p. 1321.

[682] **Casoli, Alessandra:** European Corporate Mobility–Recent Developments in the ECJ Case Law on the Transfer of Companies' Offices, Saarbrücken 2011, p. 52 *et seq*.

II.CORPORATE MOBILITY VERSUS FORMALLY FOREIGN COMPANIES

A. Segers (C–79/85)

1. The Facts and the Procedure

The first case in which the CJEU expressed its view on the transfer of companies' seat was the *Segers* decision[683]. This case refers to the freedom of establishment in relation to the social security for migrant workers and was the first time in which the CJEU dealt with corporate mobility and its implications.

The facts underlying the *Segers* case were the following: From 1980 Mr Segers, a Dutch national, ran a commercial undertaking known as Free Promotion International which had its registered office in Netherlands. In 1981 Mr Segers and his wife took over a company, the Slenderose Limited, duly incorporated under the law of England and Wales and having its registered office in London. During the same year, Mr Segers incorporated all the shares of Free Promotion International into the Slenderose Limited. At the same time, he became the director of the Slenderose Limited. In practice all of Slenderose's business was conducted by its subsidiary in the Netherlands[684].

In July 1981, Mr Segers applied, as an employee, to the *Bedrijfsvereniging*, the assocition responsible for sickness insurance benefits (the 'Association'), in order to obtain sickness insurance benefits. The Association refused Mr Seger's request on the ground that he had no employment contract with Slenderose Limited and thus he was not subordinated to any employer[685]. As a result, a dispute arose between Mr Segers and the Association.

After proceedings before the court of first instance, Mr Segers appealed to the *Centrale Raad van Beroep*. The Court observed that a company director who holds 50 percent or more of the shares must be deemed to work for that company in a position subordinate

683 Case 79/85 *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank– en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

684 Case 79/85 *Segers*, §3.

685 The Dutch *Ziektewet* (The Law Establishing a General Sickness Insurance Scheme) provided that any person in a subordinate position in relation to another person, an employer, is insured. See Segers, §4.

it. The Association argued that this case–law applied to directors of companies whose registered office was in the Netherlands, but excluded directors of a company incorporated under any foreign system of law[686].

The *Centrale Raad van Beroep* stayed proceedings and referred the following questions to the CJEU for a preliminary ruling: "(i) Do the principles of freedom of establishment within the EEC and freedom to provide services within the EEC –in particular the last sentence of article 52 read with article 58 of the EEC Treaty and the last sentence of article 60 read with article 66 of that Treaty– mean that, when deciding whether there is an insurance obligation under Netherlands social security legislation, Netherlands courts may not make any distinction between the director/major shareholder of a private company incorporated under Netherlands law and a director/major shareholder of a private company incorporated under the laws of another member state, even if the foreign company clearly does not carry out any actual business in the other member state concerned but carries on business only in the Netherlands? (ii) If that question must be answered in the negative, does Community social security law (in particular, article 3(1) of Regulation no. 1408/71) or any other provision of Community law prohibit such a distinction?"[687]

Mr Segers argued that the provisions on the freedom of establishment were directly applicable and guaranteed him the right to benefit from the insurance scheme. The Association claimed that the Treaty's provisions at issue did not require to treat foreign and national companies in the same way[688].

2. The Judgment of the CJEU

The Court, *inter alia*, observed that: The question submitted to the Court concerns a case in which the refusal to grant benefits is based not on the nationality of the director but on the location of the registered office of the company which he directs. However, as far as companies are concerned, it should be recalled that according to the

686 Case 79/85 *Segers*, §5.
687 Case 79/85 *Segers*, §6.
688 Case 79/85 *Segers*, §7–8.

judgment[689] of the court of 28 January 1986 the right of establishment includes, pursuant to Art. 58 EEC Treaty, the right of 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 to pursue their activities in another Member State through an agency, branch or subsidiary. With regard to companies, it should be noted that it is their registered office in the abovementioned sense that serves as the connecting factor with the legal system of a particular state, as does nationality in the case of natural persons[690].

In that respect the Court would observe that a company which has been formed in accordance with the law of another Member State and which conducts its business through an agency, branch or subsidiary in the Member State in which it seeks to establish itself cannot be deprived of the benefit of the rule set out above[691].

The Court reached the conclusion that distinct treatment based solely on the fact that the company has its registered office in another Member State would deprive article 58 of all meaning, an continued as follows: It is established that entitlement to reimbursement of sickness costs pertains to a person and not to a company. However, the requirement that a company formed in accordance with the law of another Member State must be accorded the same treatment as national companies means that the employees of that company must have the right to be affiliated to a specific social security scheme. Discrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another Member State to establish themselves through an agency, branch or subsidiary in the member state concerned[692].

The Court further established that Art. 58 EEC Treaty only requires that a company is duly formed under the law of another Member State and has either its registered office,

---

689 Case 270/83 *Commission of the European Communities v. French Republic* [1986] ECR 273.

690 Case 79/85 *Segers*, §13.

691 Case 79/85 *Segers*, §14.

692 In particular, the CJEU recalled the Council's General Program for the Abolition of Restriction on the Freedom of Establishment of 18 December 1961, in which it was stated that all provisions and administrative practices which deny or restrict the right to participate in social security schemes are to be regarded as restrictions on the freedom of establishment. See Case 79/85 *Segers*, §14–15.

central administration, or principle place of business within the European Union. The fact that the company conducts its business solely in another Member State is immaterial. Neither does the need to combat fraud justify different treatment of the employee on the basis of the public policy, public security or public health[693].

The Court therefore ruled that the provisions of Articles 52 and 58 of the EEC treaty must be interpreted as prohibiting the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company in question was formed in accordance with the law of another member state, where it also has its registered office, even though it does not conduct any business there[694].

3. Commentary

The fact is that while the company was incorporated under the law of England and Wales, it conducted all its business from the Netherlands, i.e. formally foreign company[695]. From this perspective, the real problem seems to have been that the Association did not want to grant social security benefits to the director of a company that was circumventing Dutch company law rules and instead of incorporating in the Netherlands, decided to establish in England and then carry out its business totally through the setting up a secondary business premise in the Netherlands[696].

Considered from the perspective of the freedom of establishment of legal persons under the TFEU, *Segers* can be considered as a landmark judgment. Rather than explicitly imposing the incorporation theory upon all Member States (to the detriment of the real seat theory), the CJEU was confronted with a constellation of facts, which involved the legal orders of two EU Member States (the United Kingdom and the Netherlands)

693 Case 79/85 *Segers*, §16–17.

694 Case 79/85 *Segers*, §19.

695 See above paragraph §1–II–B–2 on formally foreign (pseudo–foreign) companies.

696 **Casoli,** p. 56.

whose private international law systems had both adopted the incorporation theory, independent from, and prior to, EU law[697].

The CJEU ruled that once foreign companies are permitted to conduct business in one EU Member State, directors of such companies –in their capacity as natural persons– ought not to be deprived of benefits provided under the law of another Member State. By its *Segers* decision the CJEU recognized that restrictions on the granting of social security benefits indirectly jeopardize the freedom of companies to establish a business presence in a host country. In other words, the Court ruled that the fact that a company does not perform any economic activities in the State in which it is registered office does not affect its right to exercise the freedom of secondary establishment.

The *Segers* decision implies that social welfare laws of one state will apply to the employees and employers of a company in that state, even if it is not incorporated in that state and does not do any business in its state of incorporation. Consistently, the CJEU held that the Dutch legislation at issue was contrary to the EU law[698]. Because the fact that a company has no activities in a Member State where its registered office is located (i.e. the United Kingdom), does not allow the Member State where its real activities are exercised (i.e. the Netherlands) to impose restrictions on the freedom of establishment.

B. Centros (Case C–212/97)

1. The Facts and the Procedure

In March 1999, the CJEU rendered a decision in the so–called *Centros*[699] case that is regarded by many commentators as a 'milestone', 'landmark' or 'monumental' decision in the development of the EU law on the freedom of establishment of companies[700].

---

697 **Rammeloo,** *Corporations in PIL*, p. 44.

698 Case 79/85 *Segers*, §19; **Rammeloo,** *Corporations in PIL*, pp. 44–45; **Casoli,** p. 56.

699 Case C–212/97 *Centros Ltd v. Erhvervs–og Selskabsstyrelsen* [1999] ECR I–1459. See also **Hansen, Jesper Lau:** A New Look at *Centros*–From a Danish Point of View, European Business Law Review, Vol. 13, Issue 1, 2002, p. 85 *et seq.*: **Merkt, Hanno:** *Centros* and its Consequences for Member State Legislatures, International Company and Commercial Law Review, Vol. 3, 2001, p. 119 *et seq.*; **Sorensen, Karsten Engsig:** Prospects for European Company Law after the Judgment

The facts of the case were quite simple. The case was concerned a private limited company, the Centros Ltd., incorporated under the law of England and Wales and registered on 18 May 1992 in England. The company's capital amounted GBP 100 and was divided into two shares which were held by Mr and Mrs Bryde, Danish nationals residing in Denmark. The company had its registered office at the house of a family friend in England and it did not do any business in England[701].

During the summer of 1992, Mrs Bryde requested the Trade and Companies Board (the 'Board') (the *Erhvervs– og Selskabsstyrelsen*) to register a branch of Centros in Denmark and problems arose when the company sought to register a branch in Denmark. Because the Danish couple had incorporated the company for the sole purpose of registering a branch office in Denmark through which the company's business was to be carried out. By incorporating an English company, Mr and Mrs Bryde, who were intending to establish a primary business, sought to avoid Danish minimum capital requirement[702].

Under Danish law, Centros, as a 'private limited company', is regarded as a foreign limited liability company. The rules governing the registration of branches of such companies are laid down by the Danish Law numbered 660 and dated 25 September 1991 on Private Limited Companies (the *Anpartsselskabslov*)[703]. Article 117 of the Law

---

of the European Court of Justice in *Centros* Ltd, Cambridge Yearbook of European Legal Studies, Vol. 2, 1999–2000, p. 203 *et seq.*; **Werlauff, Erik:** The Consequences of the *Centros* Decision: Ends and Means in the Protection of Public Interests, European Taxation, 2000, pp. 542–545.

700 **Wymeersch, Eddy:** Centros: A Landmark Decision in European Company Law, Financial Law Institute Working Paper Series, WP 1995–15, Gent 2001. It is available at SSRN: <http://ssrn.com/abstract=190431>. See also Corporations, Capital Market and Business in the Law: Liber Amicorum Richard M. Buxbaum (Theodor Baums *et al.* eds.), Kluwer Law International, 2000, at p. 629 *et seq.*

701 Case C–212/97 *Centros,* §2–3.

702 As mentioned above, company's share capital amounted at a mere GBP 100 and had not been paid up. At the time of the events at issue in this case, companies established in Denmark were required to have paid up capital of not less than DKK 200.000.

703 It must be noted that on 29 May 2009 Bill No. L 170 on a new Danish Companies Act was adopted. The Bill was based on the Danish Green Paper on Company Law Reform which was prepared by the Committee on the Modernization of Company Law. The Committee's proposal was presented in the Bill before Parliament as Chapter 17 making a transfer of a limited company's registered seat to or from Denmark possible. However, the Chapter was rejected by the Parliament on the grounds that it would be better to await developments at European level. On this argument see **Hansen, Jesper Lau:** The New Danish Companies Act of 2009, European Business Organization Law Review, Vol. 11, Issue 1, 2010, p. 93.

provided that private limited companies and foreign companies having a similar legal form which are established in one Member State of the EU may do business in Denmark through a branch[704].

As a result, such a registration could not have been granted to the Centos on the basis that the company intented to carry out its businesses entirely in Denmark and the decision to incorporate in the United Kingdom was just a mean to avoid the application of the Danish company law rules[705]. Danish law does not impose any requirements as to minimum capital for companies from other EU countries seeking to establish a branch in Danish territory. But in this case, the Board consiered that the Centros was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national company law rules on minimum capital[706].

After this refusal, *Centros* brought an action before the Eastern Regional Court (the *Østre Landsret*) against the refusal of the Board to effect that registration. The Court upheld the arguments of the Board in a judgment delivered on 8 September 1995, in which it found that the right of establishment did not allow companies of any Member State, whose activity is directed entirely towards the territory of any other Member State, to circumvent mandatory rules of that other State[707].

In these circumstances, Centros appealed to the Supreme Court (the *Højesteret*) to ovverrule the decision of the Regional Court. The *Højesteret* stayed proceedings and referred to the CJEU, asking whether it was contrary to the provisions on the freedom of establishment for a Member State "to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the state in which that branch is to be set up, while avoiding the formation of a company in that state, thus evading application of the rules governing the formation of companies which

---

704 Case C–212/97 *Centros,* §4–5.

705 Case C–212/97 *Centros,* §7; **Casoli,** p. 57.

706 See Opinion of AG La Pergola on Case C–212/97 [1999] ECR I–1461, §3.

707 Case C–212/97 *Centros,* §8–9; Opinion of AG La Pergola, §3.

are, in that state, more restrictive so far as minimum paid–up share capital is concerned[708].

2. Submissions of the Parties and the Intervening Bodies

Centros argued that the company was lawfully formed in the UK and was entitled to set up a branch in Denmark pursuant to Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU). It submits that all the conditions prescribed under Danish company law for registration of a branch are satisfied and the refusal to register the company is therefore, in its view, contrary to the freedom of establishment. Centros also argued that the fact that the company carries on its business solely in one or more Member States other than the Member State in which the principal establishment is situated, is entirely immaterial. As a result, it submitted that the fact that it had never traded in the United Kingdom had no bearing on its right to freedom of establishment and there was no additional requirement that the company must actually do business in the State in which it is registered[709].

The Board contented that it was not possible for Centros to rely on the provisions regarding the right of establishment to avoid payment of the minimum capital laid down by the national laws. According to the Board, the branch which Centros sought to register in Denmark was in reality the parent company. The Board argued, within the context of Brussels Convention[710] and case–law[711], that if there is no parent body with effective powers of direction and control over the activities of the branch, the branch will constitute the company's principal place of business.

The Board also contended that Centros were abusing the freedom of establishment in order to avoid Danish legislation. According to the principles established by the CJEU, a Member State is entitled to take measures to prevent its nationals from improperly

708 Case C–212/97 *Centros,* §14.

709 Case C–212/97 *Centros,* §10–11; Opinion of AG La Pergola, §4.

710 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJEU (L 304), 30.10.1978, p. 77, see above paragraph §2–III–B–2.

711 Case 14/76 *A. De Bloos, SPRL v. Société en commandite par actions Bouyer* [1976] ECR 1497, §20; Case 33/78 *Somafer SA v. Saar–Ferngas AG* [1978] ECR 2138, §12; Case 139/80 *Blanckaert & Willems PVBA v. Luise Trost* [1981] ECR 819, §12.

circumventing their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of the EU law[712]. In short, the Board argued that, even if Centros was entitled to exercise the right to freedom of establishment within the EU territory, the fact remains that the requirement in respect of the minimum capital for limited companies, imposed by Danish law to protect the interests of companies and their employees and creditors, is a perfectly legitimate measure[713].

The views of the Board were shared by the Danish Government and by the French and Swedish authorities. The Danish Government also claimed that the situation at issue was purely domestic concern to Denmark and that the EU rules cited by Centros would not apply in this case[714].

The UK Government argued that the refusal to register the branch is tantamount to denying Centros a right which is at the very core of freedom of establishment and that is contrary to the principle of mutual recognition of companies. The Netherlands Government, for its part, contended that the Board's decision was contrary to the provisions of right to freedom of establishment[715].

The Commission proposes a different and more complex view of the case. On the one hand, it maintains that Centros was simply exercising the right of establishment in the Member State that offered it most favourable conditions in respect of the paid–up capital requirements. The ability to take advantage of the opportunities offered by differents types of company in other countries and differences in the regulations of

712 See, *inter alia*, Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, §13; Case 115/78 *J. Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, §25; Case C–61/89 *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I–3551, §14.

713 It should be noted that minimum capital requirements is still a popular shareholder and creditor protection in many European nations. Its first objective is to protect company's creditors. Public authorities such as tax authorities and social security bodies cannot protect themselves by bargaining for securities, and so need to be protected by law reinforcing the financial stability of companies. Private creditors are protected by minimum capital requirements because these reduce the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capital was inadequate. The second objective is to provide incentive for managers and shareholders to maintain the company's solvency. See **Conard, Alfred F.:** One Hundred Years of Uniform State Laws: The European Alternative to Uniformity in Corporations Law, Michigan Law Review, Vol. 89, 1991, p. 2174 *et seq.*; See also Opinion of AG La Pergola, §6.

714 See Opinion of AG La Pergola, §7.

715 On this argument see Opinion of AG La Pergola, §5–9.

Member States does not in itself constitute unlawful circumvention of national rules. On the other hand, when there is no coordination at the EU level, the Commision considers the Member State in which it is sought to set up a secondary establishment may impose conditions for the registration of the branch based on its domestic rules. According to the Commission an appropriate and less restrictive means of protecting creditors in this case would be make registration of the branch subject to the condition that foreign parent company have paid–up capital corresponding to that required under the relevant national provisions for the establishment of companies of that type in Denmark[716].

3. The Judgment of the CJEU

First of all, the CJEU swiftly rejected the contantion of the Danish Government arguing that the dispute was purely internal to Denmark. According to the Court, when a company formed in accordance with the law of a Member State in which it has registered office wants to set up a branch in another Member State, this situation falls within the scope of the EU law. The Court made it clear that the *Centros* case falls within the ambit of the freedom of establishment provisions of the EC Treaty. The Court also emphasized that it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business to be conducted. Thus, in the Court's opinion, the incorporation of a business in a Member State in which the cooperation can be reached through its registered office suffices to trigger the application of articles of the Treaty on freedom of establishment. The question of application of the freedom was different from the question of whether measures could be adopted by a Member State in order to prevent attempts by certain of its nationals to evade domestic legislation[717].

The CJEU found that the refusal to register the branch was an obstacle to exercise of freedom of establishment. Member States were entitled to take measures designed to prevent certain of its nationals from attempting, undercover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals

716 See Opinion of AG La Pergola, §10.

717 Case C–212/97 *Centros,* §17–18.

from improperly or fraudulently taking advantage of provisions of the EU law. However, this was to be assessed by national courts, case by case, taking account of abuse or fraudulent conduct on the basis of objective evidence[718].

The CJEU ruled that there was no abuse of the right of establishment here. The provisions of the Treaty on freedom of establishment were intended specifically to enable companies formed in accordance with the law of one Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in another Member State through an agency, branch or subsidiary[719].

Very importantly, the Court of Justice concluded that the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States was not, in itself, an abuse of the right of establishment. "The right to form a company in accordance with the law of a Member State and to set up branches in other Member States [was] inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty"[720].

The fact that company law was not completely harmonized in the Community "was of little consequence". Also, the fact that Centros Ltd did not conduct any business in its Member State of incorporation but carried on all its activities in the Member State where the branch was established was not sufficient to prove the existence of abuse or fraudulent conduct[721].

As mentioned earlier, it was argued that the restriction was justified on the basis of protecting public or private creditors by paying a minimum share capital. The CJEU did not accept this argument. According to the Court, the practice in question was not such as to attain this objective because, if the company had conducted business in the UK,

---

[718] Case C–212/97 *Centros,* §24–25.

[719] Case C–212/97 *Centros,* §26.

[720] Case C–212/97 *Centros,* §27.

[721] Case C–212/97 *Centros,* §28–30.

then its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk[722].

In solving the case, the CJEU took position in favor of Centros, remarking its ruling in *Segers*. In particular, the CJEU ruled that it was contrary to the freedom of establishment "to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital"[723].

4. Commentary

a. Refinement of the CJEU's Position Regarding the Freedom of Establishment

As mentioned earlier, the *Centros* decision marks a milestone in the CJEU's jurisprudence on the scope of the freedom of establishment[724]. *In Centros*, the Court was considered as having redrawn the map with regard to the free movement of companies and the rights of companies to establish themselves within the Internal Market[725]. Arguably, the Court gave a very expansive interpretation of freedom of establishment and a rather narrow interpretation of the concept of abuse. Formation according to the laws of a Member State was sufficient to trigger freedom of

---

722 Case C–212/97 *Centros,* §35.

723 Case C–212/97 *Centros,* §39.

724 **Micheler, Eva:** The Impact of the *Centros* Case on Europe's Company Laws, The Company Lawyer, Vol. 21, No. 6, 2000, p. 180. The Court has given judgment in three further cases in the area of the freedom of establishment of companies. For detailed examination of these cases which delivered after *Centros* see **Edwards, Vanessa:** Case–Law of the European Court of Justice on Freedom of Establishment after *Centros*, European Business Organization Law Review, Vol. 1, Issue 1, 2000, p. 147. *Wymeersch* argued that *Centros* immediately provoked "*great waves of unrest on the continent*". According to the author, "*there is no doubt that this judgment will belong to the leading cases affecting company law in the second half of the twentieth century*". See **Wymeersch,** *Centros: A Landmark Decision*, p. 1 *et seq*. The case has been also regarded as "*an epoch–making decision*". See **Werlauff, Erik:** Using a Foreign Company for Domestic Activities, European Business Law Review, Vol. 10, 1999, p. 310.

725 **Omar, Paul J.:** *Centros*, *Uberseering* and Beyond: A European Recipe for Corporate Migration: Part 1, International Company and Commercial Law Review, Vol. 15, 2004, p. 405–406.

establishment and enable a company set up a branch in another Member State. The fact that entire business was to be conducted through the branch was irrelevant. The reasoning behind this approach was that the EU is built on mutual trust and respect. There is no reason to assume that the laws of one Member State on the formation of companies are inferior to the laws of another Member State. It suffices that a company complies with the laws of any Member State. Once it has been lawfully established somewhere in the EU, a company may carry out business anywhere else[726].

Through a particularly generous functional interpretation of the EU Treaty provisions on the right of establishment, *Centros* has given the possibility for citizens from one Member State to chose freely the Member State where to set up a company with the law that most pleases them. The company will subsequently have to be recognized, as such, in another Member State where it conducts all its activity through a branch. Concequently, a Member State will be forced to recognize corporations that may differ in structure and requirements from its national law. As a result, a Member State will not be able to enforce the safeguards it has in its law against a foreign corporation[727].

b. Re–thinking the Real Seat Principle?

As mentioned earlier, on the question of determining the nationality of a company, private international law has hitherto been divided between two mutually incompatible theories. The decision in the *Centros* case is one of the most hotly debated decisions of the CJEU. Although theories on the import of the *Centros* judgment vary widely, there is a broad agreement among commentators that the stakes of the debate over *Centros'* impact on seat theory are high. But the most important question arising from the judgment is the extent to which affects national rules on the question of a company's nationality.

---

726 **Panayi,** *Corporate Mobility in PIL*, p. 151; **Micheler,** *The Centros Case*, p. 180.

727 **Jankolovits, Laura:** No Borders–No Boundaries–No Limits, An Analysis of Corporate Law in the European Union after the *Centros* Decision, Cardozo Journal of International and Comparative Law, Vol. 11, Issue 3, 2004, p. 980.

It must be noted that the *Centros* case says nothing about the Courts's preference whether for the incorporation doctrine, or for the seat theory[728]. But the judgment of the CJEU in the *Centros* case was received by most continental civil lawyers as a direct abolition of the theory of the real seat as criterion for the determination of the *lex societatis.* These commentators argued that the real seat theory is not compatible with the freedom of establishment guaranteed by the Treaty provisions. It has been argued that the CJEU, in handing down the decision, sounded the death knell for the seat theory in the EU. According to this legal scholars, the main consequence of *Centros* for EU law could be interpreted to be a *de facto* abolition of the theory of the real seat and a clear adoption of the theory of incorporation. These authors believe that the CJEU in *Centros*, in effect, recognized the incorporators' right to the "most favorable" corporation law[729].

As a consequence of *Centros* there is an unconditional requirement for all Member States to recognise any company which is validly incorporated in a Member State as a legal person, even though the company's actual head office (real seat) was relocated to another Member State. To the extent that this interpretation was found to be correct, the real seat doctrine could no longer be used to deny recognition of a company, which is covered by the Treaty rules on freedom of establishment[730]. This argument based on the

728 **Wymeersch, Eddy:** Company Law in the 21st Century, Financial Law Institute Working Paper Series, WP 1999–14, p. 5, available at SSRN: <http://ssrn.com/abstract=190429>; **Rose, Paul:** EU Company Law Convergence Possibilities after *Centros*, Transnational Law & Contemporary Problems, Vol. 11, Spring 2001, p. 126; **Özel, Sibel:** Avrupa Birliğinde Şirketlerin Yerleşim Serbestisinin *Lex Societatis* İle Olan İlişkisi, Erdoğan Teziç'e Armağan, İstanbul 2007, p. 913.

729 On this argument see **Ebke, Werner F.:** *Centros*–Some Realities and Some Mysteries, American Journal of Comparative Law, Vol. 48, 2000, p. 627 *et seq*.; **Xanthaki, Helen:** *Centros*: Is This Really the End for the Theory of *Siège Reel*, The Company Lawyer, Vol. 22, 2000, Issue 1, p. 2 *et seq*.; **Lauterfeld, Marc:** *Centros* and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo–Foreign Companies in German International Company and Insolvency law?, European Business Law Review, Vol. 12, Issue 3/4, 2001, p. 79 *et seq*.; **Wymeersch,** *Centros: A Landmark Decision*, p. 12; **Behrens, Peter:** *Centros* and the Proper Law of Companies, in: Capital Markets in the Age of the Euro: Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague 2002, p. 503; **Wouters,** *Companies' Freedom of Establishment*, p. 101; **Dammann,** *Codetermination After Centros*, p. 617; **Rappaport, Ilan:** Freedom of Establishment–A New Perspective, Journal of Business Law, 2000, pp. 631–633; **Omar,** *Corporate Migration–Part 1*, p. 406; **Buxbaum, Richard M.:** Back to the Future? From "*Centros*" to the "Überla–gerungstheorie", in Festschrift für Otto Sandrock zum 70 Geburtstag, (Klaus Peter Berger *et al*. Eds), Heidelberg 2000, p. 158; **Jankolovits,** p. 990; **Ringe,** *The European Company Statute,* p. 190.

730 It has been argued that the real seat doctrine is invalidated only in as far as freedom of establishment is concerned, not for other purposes. See **Rose,** p. 126.

idea that the rights, which Centros Ltd has in Denmark, according to the CJEU's interpretation of the Treaty, would apply equally if Centros Ltd had instead chosen to register a branch in Germany for example[731].

On the other hand, a narrow majority of legal commentators, most of them coming from Germany[732], rejected this interpretation of the *Centros* case, as they continued to consider that the real seat doctine was compatible with the EU law and still alive[733]. According to this interpretation, the *Centros* case has considerably reduced the impact of the seat doctrine for company law purposes, but the seat doctrine will continue to be applied at the member state level and it will remain one of the often followed connecting factors[734].

In support of the real seat doctrine it has been argued that the Treaty implicitly recognises the real seat doctrine, since all the original Member State used this doctrine in 1957, when the Treaty was agreed. However the Netherlands already adopted the incorporation theory in 1959[735]. It has also been argued that a general rejection of the real seat doctrine would constitute a breach of the principle of subsidiarity. For this

731 On this argument see **Hansen, Soren Friis:** Free Movement of Companies: The 'Real Seat Doctrine' is Dead–Long Live the 'Incorporation State Doctrine'!, Scandinavian Studies in Law, Vol. 45, 2003, p. 150 and the authors mentioned in footnote 11. *Behrens* argues that the CJEU interpreted the Art. 54 of TFEU (ex Art. 48 of TEC) so as to fully support the incorporation doctrine. See **Behrens, Peter:** International Company Law in view of the *Centros* Decision of the ECJ, European Business Organization Law Review, Vol. 1, Issue 1, 2000, p. 125 *et seq*.

732 Already prior to the *Centros*, some writers had questioned the compatibility of the real seat doctrine with the Treaty rules on the right of establishment of companies. The *Daily Mail* decision was interpreted by a majority of, primarily German writers, as evidence that the real seat doctrine did not constitute a violation of the EU law. **Hansen,** *Free Movement of Companies,* p. 154.

733 **Roth, Wulf–Henning:** Case C–212/97, Centros Ltd v. Erhvervs–og Selskabsstyrelsen, Judgment of 9 March 1999, Common Market Law Review, Vol. 37, Issue 1, 2000, p. 147 *et seq*. For arguments for maintaining the real seat doctrine see **Hansen,** *Free Movement of Companies,* p. 151.

734 **Wymeersch,** *Company Law in the 21st Century*, p. 8**; Wymeersch,** *Centros: A Landmark Decision*, p. 14. It has been argued that it is not the task of the CJEU to decide dogmatic controversies between the Member States. The CJEU is limited to the interpretation and implementation of the EU law. Therefore, in the *Centros* decision, the Court interpreted the EU law and subsequently examined the compatibility of the particular national norms with its interpretation. See **Behrens,** *Centros Decision of the ECJ*, p. 144.

735 **Cerioni, Luca:** A Possible Turning–Point in the Development of EC Company Law: the *Centros* Case, International and Comparative Corporate Law Journal, No**:** 2/2000, p. 166. It should be noted that analysis has shown that in both Netherlands and in Germany there are doubts about which theory should be regarded as having been applicable in 1957. Thus, the Treaty itself cannot be taken as evidence that the real seat doctrine should be given special status in EU law. See **Hansen,** *Free Movement of Companies,* p. 151, footnote 15 and accompanying text.

reason Member States' rules on private international law should not be subject to review under the EU law[736].

A number of legal commentators have argued that the *Centros* decision concerned two Member States which both applied the incorporation theory. The *Centros* decision should therefore only be understood as meaning that, it should be possible for a company from one incorporation state to move its real seat to a branch in another incorporation state. According to this argument, *Centros* did not affect Member States whose international company law was based on the real seat doctrine[737].

However, this argument was significantly weakened shortly after the *Centros* judgment. In its two parallel decisions in July 1999, the Austrian Supreme Court (*Oberster Gerichtshof*) held after *Centros* that the real seat doctrine could not be used to deny registration of an Austrian branch of a United Kingdom company. The facts were almost identical to the *Centros* case: an English private company with a share capital of GBP 100 validly established under English law, without a head office in England, applied to register a branch in Austria. According to the *OGH*'s interpretation, the freedom of establishment favors all companies duly incorporated under the laws of a Member State and having their headquarters or principal place of business within the EU. Consequently, the freedom of establishment equally includes companies having their real seat in a Member State but not necessarily in the state of incorporation. The *OGH* concluded that with a view to the registration of a branch, a state subscribing the "real seat doctrine" would violate the freedom of establishment by refusing to recognize a company duly established in a state subscribing to the "incorporation doctrine"[738].

---

736 **Hansen,** *Free Movement of Companies,* p. 152.

737 See **Hansen,** *Free Movement of Companies,* p. 153, footnotes 20–21 and accompanying text.

738 On this argument see **Nemeth, Kristin:** The Austrian Supreme Court (*Oberster Gerichtshof*), Case 6 Ob 123/99b, Judgment of 15 July 1999, Common Market Law Review, Vol. 37, Issue 5, 2000, p. 1277 *et seq.*; **Behrens, Peter:** Reactions of Member State Courts to the *Centros* Ruling by the ECJ, European Business Organization Law Review, Vol. 2, Issue 1, 2001, p. 162 *et seq.*; **Omar,** *Corporate Migration–Part 1,* p. 406–407; **Roth,** *From Centros to Überseering*, p. 187, footnote 59. **Micheler, Eva**: Recognition of Companies Incorporated in Other EU Member States, International and Comparative Law Quarterly, Vol. 52, Issue 2, 2003, p. 522; **Wymeersch,** *Centros: A Landmark Decision*, p. 12.

The most common argument, and the most plausible one, against considering the CJEU's decision in the *Centros* case to be relevant to the real seat doctrine has been that in the *Centros* case the Court did not refer to its judgment in the earlier *Daily Mail* case. Following the *Centros* decision, opponents of the real seat theory argued that as a consequence of the failure of the CJEU to refer to the *Daily Mail* in its decision in *Centros*, *Daily Mail* was "still good law", and since *Daily Mail* had approved the real seat doctrine under the EU law, this theory was still to be regarded as compatible with the Treaty[739].

c. "Race to the Bottom" in EU Company Law?

The ruling in *Centros* goes to the heart of an important debate concerning European company law. It concerns the question of how to protect the creditors of a company from the risk arising out of limited liability. As mentioned above, much of the debate regarding the justification for real seat theory centers on the idea that unless real seat theory is maintained, regulatory competition[740] will spawn a "race to the bottom" among Member States in the area of company law[741]. Consequently, many commentators fear that those Member States with the most rigorous standards for, *inter alia*, creditor protection will lose the "race" and their standards will therefore erode[742].

As debated in earlier sections, the example of regulatory competition resulting in a "race to the bottom" most often cited by European legal writers is that of the U.S. and

---

739 **Looijestijn–Clearie, Anne:** Centros Ltd – A Complete U–Turn in the Right of Establishment for Companies?, International and Comparative Law Quarterly, Vol. 49, Issue 3, 2000, pp. 635–637; **Neville, Mette/Sorensen, Karsten Engsig/Sorensen, Niels Winther:** Free Movement of Companies under Company Law, Tax Law and EU Law, in: The Internationalization of Companies and Company Laws (Mette Neville & Karsten Engsig Sorensen eds.), DJOF Publishing 2001, p. 222; **Nemeth,** p. 1281 *et seq*.; **Hansen,** *Free Movement of Companies,* p. 154.

740 One of the principal implications of Centros was the introduction –an even the encouragement– of the possibility of regulatory competition for incorporations, or the competition among European jurisdictions for company charters. See **Rose,** p. 127.

741 **Wymeersch,** *Centros: A Landmark Decision*, p. 2; **Munari, Francesco/Terrile, Paolo:** The *Centros* Case and the Rise of an EC Market for Corporate Law, in: Capital Markets in the Age of the Euro–Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague, 2002, p. 529 *et seq*.

742 **Holst, Catherine:** European Company Law after *Centros*: Is the EU on the Road to Delaware?, Columbia Journal of European Law, Vol. 8, Issue 2, 2002, p. 332.

so called "Delaware effects" of its internal affairs doctrine[743]. Under the traditional U.S. choice of rules, a company may incorporate in whichever state is chooses. From that point on in its internal affairs are governed by the law of the state of incorporation, regardless of whether the company has any business contacts with that state[744]. As mentioned earlier, according to the CJEU's interpretation, formation according to the laws of a Member State was sufficient to trigger freedom of establishment and enable a company to set up a branch in another Member State. The fact that the entire business was to be conducted through the branch was irrelevant. In this context, freedom of establishment is not to be circumscribed by a requirement of economic activity.

Arguably, if economic activity is de–linked from freedom of establishment, this opens the gateways for regulatory competition and a race to the bottom. Empirical studies are not conclusive on this point, but there is evidence that allowing the possibility to choose the state of incorporation for setting up a company, has led to regulatory competition and business migration to more flexible company law regimes[745]. Because a director, when determining the hub of his company, will most likely consider many factors in the decision, including the convenience and benefit to himself, as well as to the corporation. The *Centros* decision could be interpreted to give the director two

---

743 **Barnard, Catherine:** Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware, European Law Review, Vol. 25, Issue 1, p. 58; **Wymeersch,** *Centros: A Landmark Decision*, p. 18.

744 Once a business is incorporated in a state, the state will impose a franchise tax for the privilege of incorporation and this tax can represent a potentially enormous source of revenue to a state with a small fiscal base. See **Holst,** p. 333.

745 On this argument see **Drury, Robert R.:** The "Delaware Syndrome": European Fears and Reactions, Journal of Business Law, November 2005, p. 709; **Ringe, Wolf–Georg:** Sparking Regulatory Competition in European Company Law–The Impact of the *Centros* Line of Case–Law and its Concept of 'Abuse of Law', in: Prohibition of Abuse of Law–A New General Principle of EU Law (Ritea de la Feria & Stefan Vogenauer eds.), Hart Publishing 2010; **Rose,** p. 127 *et seq.*; **Becht, Marco/Mayer Colin/Wagner, Hannes F.:** Where do Firms Incorporate? Deregulation and the Cost of Entry, Journal of Corporate Finance, Vol. 14, 2008, p. 241; **Armour, John:** Who Should Make Corporate Law? EU Legislation versus Regulatory Competition, Current Legal Problems, Vol. 58, 2005, p. 369 *et seq.*; **Deakin, Simon:** Legal Diversity and Regulatory Competition: Which Model for Europe?, European Law Journal, Vol. 12, No 4, 2006, p. 440; **Enriques, Luca:** EC Company Law and the Fears of a European Delaware, European Business Law Review, Vol. 15, Issue 6, 2004, p. 1259; **Moran,** p. 165; **Deakin, Simon:** Regulatory Competition versus Harmonization in European Company Law, in Regulatory Competition and Economic Integration–Comparative Perspectives (Daniel Esty and Damien Geraldine eds.), Oxford University Press, 2001, p. 190 *et seq.*; **Grundmann, Stefan**: Regulatory Competition in European Company Law–Some Different Genius?, in Capital Markets in the Age of the Euro: Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al.* eds.), Kluwer Law International, The Hague, 2002, p. 561 *et seq.*

choices: first, which laws of incorporation from which Member State are most beneficial, and second, which Member State will provide the most agreeable environment for his business concerns. It has been interpreted that the *Centros* decision will allow directors to shop for corporate law as well as governing law[746].

C. Inspire Art (Case C–167/01)

1. The Facts and The Procedure

The facts of the *Inspire Art* case[747] were similar to *Centros*[748]. Inspire Art was a limited liability company formed in accordance with the law of England and Wales on July 28th, 2000. The registered office of the company was located in Folkestone, United Kingdom but the domicile of the company's sole director was the Hague and the director was authorized to act alone and independently in the name of the company. Immediately after its formation, the company started doing business in the Netherlands, no business was ever to be conducted in the United Kingdom. In fact, from the very beginning the shareholder only intended to take advantage of the liberal rules of British company law. The company decided to open a branch in Amsterdam through which conduct all its business since August 17th, 2000[749].

This branch was registered in the commercial register of the Amsterdam Chamber of Commerce and Industry (*Kamer van Koophandel en Fabrieken voor Amsterdam* (the 'Chamber of Commerce'). Inspire Art was considered as a formally foreign company (*formeel buitenlandse vennootschap*) and had to be indicated as such under the

746 **Jankolovits,** p. 980; **Pellé,** p.10.

747 Case C–167/01 *Kamer van Koophandel en fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] ECR I–10155.

748 It should be noted that the District Court of Groningen (*Kantongerecht te Groningen*) referred a similar case to the CJEU on October 19, 1999. In the case of *Kamer van Koophandel en Fabrieken voor Groningen v. Challenger Trading Company Ltd.* [OJEU (C 20), 22.01.2000], the national court referred to the CJEU the question of whether the application of Articles 2 *et seq.* of the Dutch Law on Pseudo–Foreign Companies (*Wet op de formeel buitenlandse vennootschappen*) of December 17, 1997 are in accordance with the freedom of establishment provisions of the Treaty. A couple of months after the referral, Challenger Trading Company Ltd. was removed from the companies' register in England, its state of incorporation. This change in circumstances technically rendered the question referred to the CJEU moot. See OJEU (C 118), 22.04.2001, p. 22. On this argument see also **Ebke,** *Centros–Some Realities*, p. 645.

749 Case C–167/01 *Inspire Art,* §34.

registration of the branch in the commercial register in accordance with the Law on Formally Foreign Companies of 17 December 1997, No. 697 (*Wet op de Formeel Buitenlandse Vennootschappen*) (the 'WFBV')[750].

Inspire Art registered a branch in the Netherlands but failed to give indication of the formally foreign nature of the company. As a consequence, the Chamber of Commerce objected to this and applied to the Amsterdam District Court (*Kantongerecht te Amsterdam*) on 30 October 2000 for an order that there should be added to the company's registration the statement that it is a formally foreign company. Inspire Art objected to this, claiming that it was not a formally foreign company and, if adjudged as such, then this was contrary to freedom of establishment[751].

In an order of 5th February 2001, the Amsterdam District Court decided that Inspire Art was a formally foreign company within the meaning of provisions of WFBV, and that the company would therefore have to meet the conditions set up under that Act. The Court also decided to stay the proceeding and referred to the CJEU for a preliminary ruling on the compatibility of the Dutch law on formally foreign companies with the provisions on the freedom of establishment of the Treaty[752].

The Amsterdam District Court's first question was essentially whether Arts. 2 to 5 of the WFBV imposing certain obligations on pseudo–foreign companies are contrary to Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) and, secondly, if this is indeed the case, whether these provisions can be justified under Art. 46 TEC (now, Art. 52 TFEU)[753].

---

750 As the Netherlands adhered to the incorporation theory, it recognized foreign companies which carry out their businesses in the national territory. However the Dutch government had enacted a law on formally foreign companies, requiring them to fulfill certain additional requirements. For details of the WFBV, see Case C–167/01 *Inspire Art,* §22 *et seq.* In particular, the Dutch law on formally foreign companies was designed to apply to companies formed under foreign laws which enjoy legal personality and carry out their businesses entirely or almost entirely in the Netherlands. In addition, for this law to apply, it was necessary that the company did not have any economic connection with the state of incorporation. See **Casoli,** p. 59.

751 Case C–167/01 *Inspire Art,* §35–37.

752 Case C–167/01 *Inspire Art,* §38–39.

753 Case C–167/01 *Inspire Art,* §39.

The dispute arosen between the parties came from Dutch legislation on formally foreign companies. Art. 1 of WFBV defined a 'formally foreign company' as "a capital company formed under laws other than those of the Netherlands and having legal personality, which carries on its activities entirely or almost entirely in the Netherlands and also does not have any real connection with the State within which the law under which the company was formed applies[754]."

Arts. 2 to 5 of the WFBV impose on formally foreign companies various obligations concerning the company's registration in the commercial register and it also provides for penalties in case of non–compliance with those provisions. Accorinng to this law, the company had to indicate the status of formally foreign company in all its corporate documents and it prohibits the making of statements in documents or publications which give the false impression that the undertaking belongs to a Netherlands legal person (Art. 3 of WFBV)[755].

The company falling within the definition of a formally foreign company had to comply with the minimum share capital requirements applicable to Dutch limited companies. Until the conditions relating to capital and paid–up share capital have been satisfied, the directors are jointly and severally liable with the company for all legal acts carried out during their directorship which are binding on the company. The directors of a formally foreign company are likewise jointly and severally responsible for the company's acts if the capital subscribed and paid up falls below the minimum required, having originally satisfied the minimum capital requirement. The directors' joint and several liability lasts only so long as the company's status is that of a formally foreign company (Art. 4 of WFBV)[756].

[754] Case C–167/01 *Inspire Art,* §22.

[755] Case C–167/01 *Inspire Art,* §23–26.

[756] According to the Art. 4(1) of WFBV, the company's subscribed capital had to be at least equal to the minimum amount that Article 178 *Burgerlijk Wetboek* (Dutch Civil Code) required for Dutch companies with limited liability. If the minimum capital requirements were not complied with, Dutch law requires the directors of the company to be jointly and severally liable for the debts of the company. See Case C–167/01 *Inspire Art,* §27–28. For a detailed overview of the contents of the WFBV, see Case C–167/01 *Inspire Art,* §23–33; **Rammeloo,** *Corporations in PIL*, p. 103 *et seq*.

2. Submissions of the Parties and the Intervening Bodies

The Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments submitted that the Dutch law on formally foreign companies was not contrary to the provisions on the freedom of establishment. According to this argument, the rules laid down by the WFBV concern neither the formation of companies under the law of another Member State nor their registration. The validity of those companies was in fact recognised and they were not refused registration, with the result that freedom of establishment was not compromised[757].

The Netherlands Government maintained that for companies formed under the law of another Member State and intending to carry on their activities in the Netherlands, the system of incorporation applied in the Netherlands was extremely liberal. The Government argued that the existence of companies validly formed under the law of another Member State was recognised without further formality in the Netherlands. Those companies were subject to the law of the State of formation; it was as a rule important that those companies should carry on some activity in that State. According to the Government, more and more frequently companies that carried on their activity principally or even exclusively on the Netherlands market were formed abroad with the aim of evading the overriding requirements of Netherlands company law[758]. In order to tackle that development, Article 6 of the Rules–of–Conflict Law has established a limited exception to that liberal regime, by providing that provisions of the WFBV should be applied preferably[759].

[757] Case C–167/01 *Inspire Art,* §74–75.

[758] Since the 1980s an increase in the number of formally foreign or pseudo–foreign companies has been detected in the Netherlands. The classic example is the window–cleaning firm operating in a small Dutch village (Appingedam) which was incorporated under the law of the state of Delaware. The only link which such pseudo–foreign companies have with the state of incorporation is the fact that they have their registered office in this country. All the activities of the company are carried out by a branch set up in the Netherlands. On this argument see **Looijestijn–Clearie, Anne:** *Have the Dikes Collapsed,* pp. 396–397; **De Kluiver, Harm–Jan**: Inspiring a New European Company Law?–Observations on the ECJ's Decision in *Inspire Art* from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member States–, European Company and Financial Law Review. Vol. 1, Issue 1, 2004, p. 123 *et seq.*

[759] On the arguments of Dutch Government see Case C–167/01 *Inspire Art,* §77–80.

The Chamber of Commerce and the Netherlands, German, Italian and Austrian Governments observed that the provisions of the WFBV did not concern freedom of establishment but were confined to imposing on companies with share capital formed under a law other than that of the Netherlands a limited number of additional obligations relating to the exercise of their business activities and the running of the company. In their opinion, those conditions were non–discriminatory since they corresponded to the mandatory rules of Netherlands company law applicable to limited–liability companies formed in the Netherlands. Moreover, the purpose of those conditions was to safeguard non–economic interests –recognised at Community level– concerning the protection of consumers and creditors[760].

As a result, it has been argued that a company goes beyond merely exercising its right to freedom of establishment and where it was formed in another Member State for the purpose of circumventing the body of rules applying to the formation and running of companies in the Member State in which it carries on all its activities, those Governments maintain that the result of allowing that company to rely on freedom of establishment would be an unacceptable evasion of national law. Adoption of measures such as those set out in the WFBV is therefore justified as Community law now stands[761].

On the other hand, Inspire Art, the United Kingdom Government and the Commission argued that the provisions of the WFBV constitute interference with the freedom of establishment guaranteed by the Treaty, in that they imposed on formally foreign companies obligations which render the right of establishment markedly less attractive for those companies. They submitted that the rules on freedom of establishment were applicable to a situation such as that concerned in the main proceedings. It has been argued that a company may also rely on freedom of establishment where it was formed in one Member State for the sole purpose of being able to establish itself in another Member State where it carries on the essential part, or even all, of its activities. It was immaterial that the company was formed in the first Member State solely in order to

760 Case C–167/01 *Inspire Art,* §81–82.

761 Case C–167/01 *Inspire Art,* §89.

avoid the statutory provisions of the second Member State and there was no abuse, merely the exercise of the freedom of establishment guaranteed by the Treaty[762].

According to the Chamber of Commerce and the Netherlands, German and Austrian Governments, the provisions of the WFBV were justified both by the Art. 46 TEC (Art. 52 TFEU) and by overriding reasons relating to the public interest. They argued that the purpose of the WFBV was to counter fraud, protect creditors and ensure that tax inspections are effective and that business dealings are fair. Those aims have been recognised in the Court's decisions to be legitimate sources of justification. The purpose of the Art. 4 of WFBV on minimum capital was to strengthen the financial capacity of companies and thus to provide greater protection of private and public creditors[763].

The Chamber of Commerce submitted that measures regulated in the WFBV did not go beyond what is necessary if the objective pursued was to be attained. Non–compliance with the obligations imposed by the WFBV did not result in refusal to recognize the foreign company but only in the joint and several liability of its directors[764].

Inspire Art, the United Kingdom Government and the Commission put forward the opposite argument and they considered that there was no justification for the WFBV to be found in Art. 46 TEC (Art. 52 TFEU). As regards abuse of the law, the mere fact that a company does not carry on any activity in the State of formation cannot constitute such abuse. It was instead for the national authorities and courts to establish in every case whether the conditions on which such a restriction might be justified have been satisfied[765].

The UK Government and the Commission maintained that the WFBV would not have been applicable if Inspire Art had carried out even minor activity in another Member State. According to Inspire Art, the minimum capital requirements did not guarantee

---

[762] Case C–167/01 *Inspire Art,* §90 and 91. On this argument, see also **Rehberg, Markus:** *Inspire Art* – Freedom of Establishment for Companies in Europe Between "Abuse" and National Regulatory Concerns, The European Legal Forum, Year 4, Vol. 1/2004, p. 1 *et seq*.

[763] Case C–167/01 *Inspire Art,* §108–110.

[764] Case C–167/01 *Inspire Art,* §117.

[765] Case C–167/01 *Inspire Art,* §118–120.

any protection for creditors. Thus, the minimum capital might, for example, be converted into a loan immediately once it had been contributed and the company registered, even if the company was governed by Netherlands law. It would not therefore satisfy the creditors. Consequently, the provisions of the WFBV concerning minimum capital were not such as to achieve the intended purpose of protecting creditors[766].

3. The Judgment of the CJEU

The CJEU first considered the disclosure requirements of Dutch legislation imposed on pseudo–foreign companies in light of the 11th Company Law Directive[767]. It observed that a number of these requirements[768] concerned the implementation into Dutch law of the obligations set out in the 11th Company Law Directive. Such requirements could not, therefore, be regarded as forming an impediment to the freedom of establishment[769]. However, the remaining disclosure requirements[770] were not covered by the 11th Company Law Directive which contains an exhaustive list of the information to be disclosed by a branch set up in the host member state. The CJEU held that these requirements were thus contrary to the 11th Company Law Directive and

766 Case C–167/01 *Inspire Art,* §126–127.

767 Eleventh Council Directive 89/666/EEC of 21 December 1989 Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Company Governed by the Law of Another State, See OJEU (L 395), 30.12.1989, p. 36.

768 These are: entry into the commercial register in the Netherlands demonstrating registration in a foreign register and the number under which the company is recorded in that register, filing in the commercial register in the Netherlands of a certified copy of the instrument constituting the company and of its memorandum and articles of association in Dutch, French, English or German and the annual filing in that register of a certificate of registration in the foreign register. See Case C–167/01 *Inspire Art,* §57.

769 However, this did not automatically mean that the sanctions attached by the Dutch legislation for non–compliance with the measures were also compatible. Case C–167/01 *Inspire Art,* §58–59.

770 These are: entry into the commercial register of the fact that a company has the status of pseudo–foreign company, filing with the commercial register of the Netherlands of the date of first registration in the foreign commercial register, information concerning sole members and the mandatory filing of an auditor's certificate showing that the company meets the requirements regarding minimum, subscribed and paid–up share capital. Similarly, mention of the status of pseudo–foreign company on all documents produced by the company in question is not covered by the 11th Company Law Directive. See Case C–167/01 *Inspire Art,* §65.

were incapable of justification under the EU law[771]. Because the 11th Company Law Directive did not permit any disclosure rules going beyond the rules contained in it.

The CJEU proceeded to examine the issue of compatibility with freedom of establishment. Throughout the ruling, the Court made numerous references to its judgment in *Centros*. In answering the first question, it repeated the observation made in both *Segers* and *Centros* that it was irrelevant with regard to the application of the Treaty provisions on the right of establishment that a company was formed in one member state for the sole purpose of establishing itself in another member state where its main, or indeed entire, business is to be conducted. The fact that Inspire Art Ltd was incorporated in England for the sole purpose of circumventing certain provisions of Dutch company law does not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty[772].

The Dutch Government had argued that since a formally foreign company was not denied access to the Netherlands, and since such a company was fully recognised as legal person in the Netherlands, the WFBV did not infringe in any way the right of establishment for such companies. But this argument was not accepted by the Court. The CJEU ruled that the effect of the WFBV was that company law provisions on minimum capital and directors' liability were applied mandatorily to foreign companies such as Inspire Art when they carried on their activities exclusively, or almost exclusively, in the Netherlands. The Court held that the provisions of the WFBV on minimum capital and the liability of directors constituted restrictions[773] on the exercise of the right of secondary establishment in the Netherlands by companies validly incorporated in another Member State where they have their registered office[774].

---

771 Case C–167/01 *Inspire Art,* §71; **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 399.

772 Case C–167/01 *Inspire Art,* §95 *et seq.*; Case 79/85 *Segers*, §16; Case C–212/97 *Centros,* §17; **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 401. The only relevant factor for the application of the freedom of establishment is therefore the incorporation in a Member State and not the existence of economic activities in the state of incorporation.

773 It has been pointed out by AG Alber in his Opinion on the *Inspire Art* case that application of the WFBV has precisely the same effect as the application of the real seat doctrine. See Opinion of AG Alber on Case C–167/01 [2003] ECR I–10159, §99–106.

774 Case C–167/01 *Inspire Art,* §100 and §101; **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 401; **Panayi,** *Corporate Mobility in PIL*, p. 158.

The Court of Justice considered whether the restriction as a result of the minimum capital rules and the penalties for non–compliance was justified[775]. The following justifications were considered: the protection of creditors, combating improper recourse to freedom of establishment, the protection of effective tax inspections and fairness in business dealings. The CJEU found that none of these fell within the public policy exception of Art. 46 TEC (Art. 52 TFEU), nor did they serve overriding requirements in the public interest[776].

As regards the protection of creditors, the CJEU thought that as Inspire Art held itself out as a United Kingdom company, its potential creditors were put on sufficient notice that it was covered by law other than Dutch law. Such creditors can also turn to the Fourth and Eleventh Company Law Directives for protection. Thus the relevant provisions of the WFBV were not necessary for the protection of creditors[777]. As regards combating improper recourse to freedom of establishment, the Court reiterated the point made in *Centros* that just because a company was formed in one Member State in order to benefit from less restrictive rules, this is not sufficient to prove the existence of abuse[778]. As regards the protection of fairness in business dealings and the efficiency of tax inspections, no evidence had been adduced to prove that. The CJEU stated that neither the Chamber of Commerce nor the Dutch government has submitted any evidence to prove that the relevant provisions of the WFBV meet the requirements of efficacy, proportionality and non–discrimination[779].

---

775 Because the Dutch government maintained that the provisions of the WFBV were justified both by Art. 46 TEC (now Art. 52 TFEU) and by overriding reasons relating to the public interest. It argued that the purpose of the WFBV was to protect creditors, to combat abuse of freedom of establishment and to ensure that tax inspections are effective and that business dealings are fair. See Case C–167/01 *Inspire Art,* §108–109.

776 Case C–167/01 *Inspire Art,* §131–132.

777 Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, See OJEU, (L 222), 14.08.1978, p. 11.

778 Case C–167/01 *Inspire Art,* §136–139.

779 Case C–167/01 *Inspire Art,* §140.

In solving the question, the CJEU took position in favor of Inspire Art and concluded that Dutch legislation on formally foreign companies breached freedom of establishment and was contrary to the EU law[780].

4. Commentary

a. Real Seat Theory Incompatible with the EU Law

The major consequence of the *Inspire Art* decision is that freedom of establishment is directly applicable to companies[781]. This obliges every Member State to recognise a foreign company validly formed under the laws of another Member State in its entirety according to the law of the state of incorporation. This applies even in cases where all of its activities are carried out in the territory of a Member State other than that of the company's incorporation[782]. For this reason, it has been argued that by its decision in *Inspire Art*, the CJEU has definitely put an end the debate over the fate of the real seat doctrine[783] and the decision ousted the real seat theory for inbound cases[784].

b. Application of Host State Law

It is important to note that in this case, the CJEU entertained the idea that in certain circumstances, the host State may demand adjustments to the internal affairs of the

---

780 **Özel, Sibel:** Avrupa Adalet Divanı'nın Inspire Art Kararı Üzerine Bir İnceleme, Prof. Dr. Tuğrul Ansay'a Armağan, Ankara 2006, p. 474 *et seq*.; **Panayi,** *Corporate Mobility in PIL*, p. 158; **Casoli,** p. 60.

781 **Rammeloo, Stephan:** At Long Last: Freedom of Establishment for Legal Persons in Europe Accomplished: *ECJ Case C–167/01 Kamer van Koophandel en fabrieken voor Amsterdam v Inspire Art Ltd.* [2003] ECR not yet reported, Maastricht Journal of European and Comparative Law, Vol. 11, Issue 4, 2004, p. 379 *et seq*.

782 **Lowry,** p. 342; **Zimmer, Daniel:** Case C–167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Common Market Law Review, Vol. 41, Issue 4, 2004, p. 1127 *et seq*.; **Ottersbach, Christina:** The Effects of *Inspire Art*: A Critical Comparison of the Formation of German and English Companies, Journal of International Trade Law & Policy, Vol. 4, No. 1/2, 2005, p. 35.

783 On this argument see **Hansen,** *Free Movement of Companies,* p. 168; **Ringe,** *The European Company Statute,* p. 190.

784 For outbound cases, i.e. cases of domestic companies wanting to leave their state of incorporation, *Inspire Art* does not result in any change. The state of incorporation as the 'creator' of the company continues to be at liberty to prohibit the transfer of the head office and/or registered office to another state. On this argument, see **Kersting, Christian/Schindler, Philipp:** The ECJ's *Inspire Art* Decision of 30 September 2003 and its Effects on Practice, German Law Journal, Vol. 4, Issue 12, 2003, p. 1282, footnotes 21, 22 and accompanying text.

migrating company. Whilst refusing to recognize the legal capacity of a company or requiring it to reincorporate may no longer be an option following *Überseering*, the host State may impose rules to protect creditors or the capital maintenance of foreign companies if these fall within the 'general goods' exception and are suitable and proportional. However, it is still unclear when the host State can apply its own law in the internal affairs of the company and whether the application of host State law would be '*in lieu of*' or '*in addition to*' the law of the home State. The situation becomes even more complicated if both laws apply and the internal affairs of the company are governed by rules in both the home State and host State[785].

D. *Segers*, *Centros* and *Inspire Art*: A General Evaluation

In both *Segers* and *Centros* as well as in *Inspire Art*, it is possible to see a common general scheme: An entrepreneur chooses to incorporate in a Member State and then carried out its activities entirely through a secondary business premise in another jurisdiction. In all the cases, the incorporated company was just a mere mail–box. In these cases the CJEU seemed to take position in favor of both the freedom of establishment and re–incorporation, leaving little room to the host country for hindering corporate mobility[786].

1. Pursuing of a Genuine Economic Activity is not Required for Primary Establishment

The applicability of the EU law has been challenged on the basis that, as far as the company was a mere mailbox, it had no right to exercise the freedom of secondary establishment at all. The Treaty's provisions would have presupposed a genuine economic link with the country of incorporation, so that a company which lacks it entitles to exercise the freedom of primary, but not secondary, establishment[787].

---

785 On this argument see **Hirt, Hans C.:** Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd, European Business Law Review Vol. 15, Issue 5, 2004, p. 1189 *et seq.*; **Kersting/Schindler,** p. 1283.

786 **Casoli,** pp. 60–61.

787 In *Centros*, the Board argued that Centros had never traded since its formation in the State of incorporation. See Case C–212/97 *Centros,* §11. In *Inspire Art*, the Italian government argued that

As mentioned earlier[788], The Council adopted the General Programme for the Abolition of Restrictions on Freedom of Establishment on 18 December 1961. It has been argued that the General Program which makes the exercise of the freedom of secondary establishment conditional upon the pursuit of a genuine economic activity in the host state would have been equally applicable to the freedom of primary establishment[789]. On the other hand, it has been argued that Art. 54 TFEU does not mention the pursuit of genuine economic activity as a condition to enjoy the freedom of establishment[790]. Moreover, the developments occurred in the integration process reinforce the view that a company should be free to decide to carry out its activities through a primary as well as a secondary establishment, provided that it is connected to a Member State at least one of three grounds (*i.e.* the registered office, the place of central administration or the principal place of business) listed in the Treaty[791].

As mentioned above, the Court ruled that the situation in which a company incorporates in a Member State and then decides to expand its activities in another country in order to entirely carry out its business there falls under the application of the provisions on the freedom of establishment[792]. The CJEU stressed that the wording of General Programme for the Abolition of Restrictions on Freedom of Establishment was clear in indicating that the pursuit of a genuine economic activity was required solely in the case in which the company has nothing but its registered office within the EU[793]. In all

---

by placing the sole center of its activities in a State other than that to which it formally belongs, such company must be considered to be primarily established in that first State. Case C–167/01 *Inspire Art,* §85; **Casoli,** p. 62.

788 See above the section §2–III–B–2.

789 **Barnard,** *Some Lessons for the EU,* p. 62 *et seq.;* **Casoli,** p. 62.

790 In *Centros*, the plaintiff argued that the fact that the company has never traded since its formation in the UK has no bearing on its right to freedom of establishment. See Case C–212/97 *Centros,* §11. In *Inspire Art*, the Commission and the U.K. government considered that the connecting factor used in Article 1 of the WFBV is actual activity, which does not correspond to any of the criteria laid down in Article 48 EC and therefore infringes the freedom of establishment. See Case C–167/01 *Inspire Art,* §96.

791 **Casoli,** p. 63.

792 The Court ruled that the Danish government was wrong when arguing the situation as a purely domestic concern to Denmark. According to the Court, a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another State falls within the scope of the EU law. See Case C–212/97 *Centros,* §17.

793 Case C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I–9919, §33.

the other cases, only the exercise of the freedom of secondary establishment requires a genuine intent to participate in a stable and continuous basis in the economic life of a Member State other than the state of origin[794].

It has been observed in *Inspire Art*, the TFEU does not mention the carrying out of a business in the country of formation as a condition to establish a secondary establishment in other Member States. For this reason, the fact that a company does not carry on any business in the country of formation does not deprive it of its right to rely on the freedom of establishment. As a result, the permanent presence in the host state is enough to rely on this right[795].

Therefore, the CJEU dismissed the argument that the freedom of establishment would have required the pursuing of a genuine economic activity as far as the freedom of primary establishment is concerned. According to the Court, a company is entitled to exercise the freedom of secondary establishment even if it is a mere mailbox[796].

2. Choosing the 'Most Favorable' Legislation Does Not Constitute an Abuse

a. A General Principle of the Prohibition of Abuse of Rights in the EU Law

The concept of abuse of right is invoked in diverse areas of law and in many legal systems[797] to serve a variety of purposes. It refers to situations in which a right is

794 See, *inter alia*, Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631, §21; Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §25; Case C–196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I–07995 §53; Case C–451/05 *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public* [2007] ECR I–8251, §63.

795 **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 412; **Casoli,** p. 64; See Opinion of AG Alber in *Inspire Art*, §80.

796 Case 79/85 *Segers*, §16; **Casoli,** p. 64.

797 In some legal systems, the principle of the prohibition of abuse is codified. For example Art. 2 of Turkish Civil Code regulates that: "*Every person must act in good faith when exercising his/her rights and performing his/her obligations. The law does not protect the obvious abuse of rights*." Art. 226 of German Civil Code states that: "*The exercise of a right is unlawful, if its purpose can only be to cause damage to another*." It must be noted that the prohibition of abuse of rights is generally based on Art. 242 of German Civil Code, which contains a general principle of good faith by wording "*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*."

formally exercised in conformity with the conditions laid down in the rule granting the right, but where the legal outcome is against the objective of that rule[798].

In the law of the European Union, the principle of prohibition of abuse of rights has been developed over thirty years, principally in the case–law of the CJEU, as one of the general principles of the EU law[799], through preliminary rulings on the basis of Art. 267 of TFEU (ex Art. 234 TEC). Since the Treaties make very few references[800] to the general principles of the EU law, these principles have mainly been developed in the case–law of the CJEU.

The CJEU began to articulate the elements of the general principles of abuse of rights for two factors: Firstly, as litigants sought to the maximum the scope of Treaty freedoms, defendant government resorted to the doctrine of abuse as a countervailing force. Secondly, the proliferation of EU legislation in the areas such as indirect tax and subsisies increased opportunities for misuse of EU benefits[801].

The developments of the case–law of the CJEU which eventually resulted in the 'entry' of the concept of abuse into EU law started with the 1974 *Van Binsbergen* ruling[802], involving a Dutch national who was acting as a legal representative in a case before a

---

798 **Lenaerts, Annekatrien:** The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law, European Review of Private Law, Vol. 18, Issue 6, 2010, p. 1121 *et seq*.

799 General principles of EU law refer mainly to a body of unwritten principles which underpinthe EU legal order and constitute a genuine, autonomous source of Union law. These principles are equal, in terms of hierarchy, to the Treaties. In other words, the Treaties and the general principles of EU law are at the top of the hierarchy, and are known as primary legislation. On this argument, see **Kaczorowska, Alina:** European Union Law, 3rd Edition, Routledge 2013, p. 108 *et seq*.

800 Art. 340(2) of TFEU [ex Art. 288(2) TEC] refers to 'the general principles common to the laws of the Member States' in the context of non–contractual liability and expressly allows judges of the CJEU to apply these general principles. However, the CJEU has not limited the application of the general principles to this area, but has applied them all aspects of EU law. See **Kaczorowska,** p. 115. Art. 6(3) of the TEU [ex Art. 6(2) of the EU Treaty] also refers to 'general principles of Union law' in the context of human rights protection. On the basis of Art. 6(3) of the TFEU, the ECHR became a primary source of EU law.

801 On this argument see **Tridimas, Takis:** Abuse of Right in EU Law: Some Reflections with Particular Reference to Financial Law, Queen Mary School of London, School of Law Legal Studies Research Paper No. 27/2009, p. 3, available at SSRN: <http://ssrn.com/abstract=1438577>.

802 Case 33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

Dutch court[803]. In this case, the CJEU considered that the Dutch law restricting legal representation to residents constituted in principle a restriction on the free movement of services. However, the Court ruled that it is legitimate for a Member State to impose restrictions on the freedom to provide services when a person exercises this freedom for the purpose of circumventing national law, in casu more stringent professional rules of conduct. The Court specified that such circumvention may arise where the activity is entirely or principally directed towards the territory of the Member State of which the domestic rules are avoided[804].

In this early case law, the CJEU has had a very broad concept of situations covered by the prohibition of abuse of EU law. It might indeed be implied from its rulings that the CJEU regards all circumvention cases as falling within the scope of abuse of Union law, more specifically of the right of free movement. The CJEU does not subject the right for Member States to take national anti–abuse measures, preventing the circumvention of national law, to particular conditions[805].

The CJEU narrowed down its broad conception of the abuse of rights in subsequent cases[806] referred to the Court by the Greek courts, concerned the alleged abuse of

---

[803] In the case at issue, a Dutch lawyer, after having been entrusted to act as legal representative before Courts in the Netherlands for a local party, had transferred its residence from Netherlands to Belgium during the course of the proceedings, losing its capacity to represent the party in question due to a Dutch requirement that legal representatives be permanently established in the Netherlands. See Case 33/74 *van Binsbergen* [1974] ECR 1299, §2–5.

[804] Case 33/74 *van Binsbergen* [1974] ECR 1299, §12–13. Subsequently, the CJEU's application of the concept has spread to various areas of EU law, and significantly to all fundamental freedoms. See, for example, Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others* [1985] ECR 1, §27; Case 39/86 *Sylvie Lair v. Universität Hannover* [1988] ECR 3163, §43; Case 115/78, *J. Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399, § 25; Case C–370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I–4265, §24.

[805] On this argument, see **Lenaerts,** p. 1129; **Sorensen, Karsten Engsig:** Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?, Common Market Law Review, Vol. 43, No. 2, 2006, p. 425 *et seq.*; **Cerioni, Luca:** The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re–reading of the ECJ Case Law and the Quest for a Unitary Notion, p. 2, available at: <http://bura.brunel.ac.uk/bitstream/2438/4141/3/Law.pdf> (published also in European Business Law Review, Vol. 21, Issue 6, 2010, pp. 783–813)

[806] Case C–441/93 *Panagis Pafitis and Others v. Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I–1363; Case C–367/96 *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I–2843; Case C–373/97 *Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [2000] ECR I–1705.

provisions of the Second Company Law Directive[807]. In cases *Kefalas* and *Diamantis*[808] the CJEU explicitly accepted the possibility for a national court to apply domestic provisions or principles on the prohibition of abuse of rights in order to assess whether a right granted by a Union provision has been exercised in an abusive manner[809]. However, this right was deemed to be subject to certain conditions: (i) the application of such national provisions or principles may not prejudice the full effect and uniform application of the EU law in the Member States; (ii) and moreover, the national provisions or principles may neither alter the scope of the Union law provision in question nor compromise the objectives pursued by it[810]. These cases might be considered as a first step towards the creation of a EU concept of the abuse of rights. It might even be considered as the origin for the recognition of a general principle of Union law on the prohibition of abuse of rights[811].

In *Emsland–Stärke* ruling[812], the CJEU took the first steps towards defining the elements of abuse as a matter of Uninon law[813]. In this case, the Court explicitly

---

[807] Directive 2012/30/EU (before 4 December 2012, Second Council Directive 77/91/EEC).

[808] The facts of the case, in summary, were as follows: According to Art. 29(1) of the Directive 2012/30/EU [ex Art. 25(1) of the Directive 77/91/EEC], any increase in capital must be decided upon by a general meeting of shareholders. Contrary to this rule, in these cases, the capital of public limited companies in financial difficulties was increased by administrative act, according to Art. 8 of Greek Law No. 1386/1983. This Greek provision openly infringed Art. 29(1) of the Directive 2012/30/EU [ex Art. 25(1) of the Directive 77/91/EEC] and was therefore amended in conformity with the Directive (Greek Law No. 1882/1990). However, in the meantime, several of the former shareholders of these companies had asked the Greek courts for a declaration of invalidity of the capital increase on the grounds that it violated Art. 29(1) of the Directive 2012/30/EU [ex Art. 25(1) of the Directive 77/91/EEC]. The Greek State raised the objection that the shareholders had abusively relied on Art. 29(1) of the Directive 2012/30/EU [ex Art. 25(1) of the Directive 77/91/EEC] on the basis of Art. 281 of the Greek Civil Code. Art. 281 of the Greek Civil Code provides that *"the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right"*. The national court supported this objection. See Case C–367/96 *Kefalas* [1998] ECR I–2843, §1–12; Case C–373/97, *Diamantis* [2000] ECR I–1705, §14–29.

[809] See Case C–367/96, *Kefalas* [1998] ECR I–2843, §20–21.

[810] See Case C–441/93 *Pafitis* [1996] ECR I–1363, §68; Case C–367/96 *Kefalas* [1998] ECR I–2843, §22; Case C–373/97 *Diamantis* [2000] ECR I–1705, §34.

[811] See **Lenaerts,** p. 1132; **Feria, Rita De La:** Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax, Common Market Law Review, Vol. 45, No. 2, 2008, p. 405; **Cerioni,** *Abuse of Rights in EU Law,* p. 4, available at: <http://bura.brunel.ac.uk/bitstream/2438/4141/3/Law.pdf>; **Tridimas,** *Abuse of Right in EU Law,* p. 5

[812] Case C–110/99 *Emsland–Stärke GmbH v. Hauptzollamt Hamburg–Jonas* [2000] ECR I–1569.

[813] The facts of the case were as follows: Emsland–Stärke GmbH, a German company, exported several consignments of a potato–based product to Switzerland, for which it received an export refund on the basis of Regulation 2730/79/EEC. Subsequently, inquiries conducted by the German customs

formulated an 'abuse test': (i) first, a finding of an abuse requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Union rules, the purpose of those rules has not been achieved ('objective test'); (ii) second, it requires the intention to obtain an advantage from the Union rules by creating artificially the conditions laid down for obtaining it ('subjective test')[814]. It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Union law is not thereby undermined[815]. It must be noted that the significance of the ruling in *Emsland–Stärke* lies in the fact that, for the first time, the CJEU provided criteria for determining the existence of abuse for the purposes of EU law. For this reason, the case can be perceived as a crucial step towards the recognition of a general principle of Union law prohibiting the abuse of rights[816].

The new 'abuse test' has been progressively applied to other areas of Union law, particularly to the field of taxation by the cases *Halifax*[817] and *Cadbury Schweppes*[818]. In case of *Halifax*[819] the CJEU ruled that the principle of the prohibition of abuse of

---

authorities revealed that immediately after their release for home use in Switzerland, the exported consignments in question were transported –unaltered and by the same means of transport– back to Germany. In respect of those consignments, the German customs authorities revoked the decisions granting an export refund and demanded repayment. The case was referred to the CJEU concerning the question of whether the Regulation at stake should be interpreted as precluding the company's right to an export refund. See Case C–110/99 *Emsland–Stärke* [2000] ECR I–1569, §7–20.

814 Case C–110/99 *Emsland–Stärke* [2000] ECR I–1569, §52–53.

815 Case C–110/99 *Emsland–Stärke* [2000] ECR I–1569, §54.

816 On this argument, see **Lenaerts,** p. 1135; **Feria,** p. 410; **Tridimas,** *Abuse of Right in EU Law,* p. 7–8; **Cerioni,** *Abuse of Rights in EU Law,* p. 5–6, available at: <http://bura.brunel.ac.uk/bitstream/2438/4141/3/Law.pdf>.

817 Case C–255/02 *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise* [2006] ECR I–1609.

818 Case C–196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I–7995. This case will be examined in next paragraphs. See chapter §7–II–D–2–c of the thesis.

819 The factual circumstances of the case were as follows. A British banking company, who was able to recover less than 5% of its input VAT, needed to construct call centres in different sites. Following the advice of its tax advisers, the company had entered into an overall set of agreements involving several transactions as between companies belonging to its own group. As a result of these arrangements, it had managed to entirely deduct the VAT paid on invoices received from its suppliers for construction works. These transactions were allegedly concluded with the sole purpose of tax avoidance. See Case C–255/02 *Halifax* [2006] ECR I–1609, §12–42.

rights[820] also applied to the sphere of Value–Added Taxation ("VAT")[821]. Thereafter, the Court confirmed the two–part 'abuse test' established in *Emsland–Stärke*[822]. The CJEU concluded that it is for the national courts to establish the existence of an abusive practice, according to the rules of evidence of national law. However, the effectiveness of Union law may not be undermined[823]. The significance of *Halifax* for the doctrine of abuse in Union law is twofold: (i) first, this case tends to generalize the scope of application of the Union concept of abuse by applying the 'abuse test' to another area of Union law; (ii) second, it further develops the substance of the Union concept of abuse by refining the subjective element of the 'abuse test'[824].

Moreover, in a recent case, *Kofoed*[825], the CJEU obviously referred to the prohibition of abuse of rights as a general principle of Union law. The case concerned the charging of income tax in respect of an exchange of shares undertaken by Mr Kofoed. *Inter alia*, the case focused on the interpretation of an anti–abuse clause set out Art. 11(1)(a) of the Merger Directive[826]. The Court ruled that Art. 11(1)(a) of Directive 90/434 reflects the general Union law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Union law. The application of Union legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely

---

820 For an expansive discussion on the principle prohibiting abuse of Union law Opinion see Opinion of AG Maduro in Case C–255/02 *Halifax* [2006] ECR I–1609, §60–101.

821 See Case C–255/02 *Halifax* [2006] ECR I–1609, §70.

822 First, an abuse exists if the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Common VAT System Directive and the national legislation transposing it, result in the accrual of a tax advantage, the grant of which would be contrary to the purpose of those provisions ('objective test'). Second, it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage ('subjective test'). See Case C–255/02 *Halifax* [2006] ECR I–1609, §74–75.

823 Case C–255/02 *Halifax* [2006] ECR I–1609, §76.

824 See **Lenaerts,** p. 1136; **Vanistendael**, **Frans:** *Halifax* and *Cadbury Schweppes*: One Single European Theory of Abuse in Tax Law?, EC Tax Review, Vol. 15, Issue 4, 2006, p. 192 *et seq*.; **Terra, Ben:** The European Court of Justice and the Principle of Prohibiting Abusive Practices in VAT, New Zealand Journal of Taxation Law and Policy, Vol. 13, 2007, p. 382 *et seq*.

825 Case C–321/05 *Hans Markus Kofoed v. Skatteministeriet* [2007] ECR I–5795.

826 Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States**,** OJEU (L 225), 20.08.1990, p. 1. Art. 11(1)(a) of the Directive provides that a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions set out in the Directive, where it appears that the exchange of shares has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.

for the purpose of wrongfully obtaining advantages provided for by Union law[827]. It must be noted that the important aspect of the case is the Court's reference to prohibition of abuse of law as a 'general Community [Union] law principle'. This ruling clearly points to a formal recognition of a general principle prohibiting the abuse of rights on a Union level[828].

In conclusion, both the existence of a common concept of abuse of rights in the laws of the Member States[829] and the definition of a Union concept of abuse of rights by the case–law[830] of the CJEU confirm the existence of a general principle of EU law prohibiting the abuse of rights[831]. It is not wrong to argue that such concept appears as a general concept of abuse of law in EU law, applicable in all domains covered by EU law, despite the differences with respect to its intervention depending on the subject matter involved[832].

b. Assessmenf of the Case–Law of the CJEU

In the above–mentioned judgments, the Court has been asked to clarify whether it can be deemed as constituting abuse to incorporate in a Member State with a light substantive company law regulation and then operate totally in another Member State. In all of them, the CJEU pointed out that companies could not be denied access to the

---

827 Case C–321/05 *Kofoed* [2007] ECR I–5795, §38.

828 See **Feria,** p. 433; **Lenaerts,** p. 1138.

829 According to the Art. 340(2) of TFEU [ex Art. 288(2) TEC] laws of the Member States constitute the most important source for the establishment of general principles of Union law. In the Member States with a Civil Law tradition, the principle of the prohibition of abuse of rights is generally recognized. See, *inter alia*, Arts. 226 and 242 of German Civil Code (English version is available at: <http://www.gesetze-im-internet.de/englisch_bgb>); Art. 281 of Greek Civil Code (English version is available at Case C–367/96 *Kefalas* [1998] ECR I–2843, §12); Art. 3.13 of the Dutch Civil Code (English version is available at: <http://www.dutchcivillaw.com/civilcodebook033.htm>); Art. 7(2) of Spanish Civil Code (English version is available at: <http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6329>).

830 Case 33/74 *van Binsbergen* [1974] ECR 1299; Case C–441/93 *Pafitis* [1996] ECR I–1363; Case C–367/96 *Kefalas* [1998] ECR I–2843; Case C–373/97 *Diamantis* [2000] ECR I–1705; Case C–110/99 *Emsland–Stärke* [2000] ECR I–1569; Case C–255/02 *Halifax* [2006] ECR I–1609; Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995; Case C–321/05 *Kofoed* [2007] ECR I–5795.

831 **Lenaerts,** p. 1139; **Feria,** p. 433 *et seq.*; **Tridimas,** *Abuse of Right in EU Law,* p. 36; **Sorensen,** *Abuse of Rights*, p. 458.

832 Feria considering that *Cadbury Schweppes* is the final confirmation of prohibition of abuse of law as a general principle of EU law, capable of being used as an instrument of judicial review where national legislation falls within the scope of EU law. See **Feria,** p. 438.

market of another Member State solely on the ground that the company does not conduct any business in the country of incorporation. In this respect, as nationality does not hamper the right of an individual to carry out a business activity in a Member State other than the one of origin, so entrepreneurs should be able to do the same when deciding to organize their activities in the company's form[833]. In the *Centros* and *Inspire Art* cases, the CJEU made it perfectly clear that the sole fact that an EU citizen incorporates his business as a pseudo–foreign company cannot itself qualify as an abuse[834].

The Court made is clear that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment[835].

Thus, European citizens can incorporate a new company in any Member State, even if the company does not operate in the country of incorporation at all, provided that the latter accepts an original divergence between the registered office and the administrative seat. After incorporation, the administrative seat can be transferred to another Member State, which cannot impose unjustified obstacles on this transfer[836].

---

833 On this argument see also **Edwards,** *Case–Law of the ECJ*, p. 150; **Casoli,** p. 66.

834 **De Kluiver**, p. 128; **Andenas, Mads**: Free Movement of Companies, The Law Quarterly Review, Vol. 119, 2003, p. 221 et seq.; **Looijestijn–Clearie,** *Have the Dikes Collapsed,* p. 404; **Mucciarelli,** *Company Emigration,* p. 278. See also Case C–212/97 *Centros,* §27; Case C–167/01 *Inspire Art,* §138 *et seq*. The Court specifically confirmed that the fact that the company is set up in a foreign member state simply for the purpose of escaping national rules on minimum capital, is not an abuse of company law. In its *Inspire Art* decision it sticks to this position. See Case C–212/97 *Centros,* §30; Case C–167/01 *Inspire Art,* §136–137.

835 Case 79/85 *Segers*, §16; Case C–212/97 *Centros,* §29; Case C–167/01 *Inspire Art,* §139.

836 **Mucciarelli,** *Company Emigration,* p. 277.

c. Impact of the *Cadbury Schweppes* Decision

The most significant case in field of the concept of abuse is the *Cadbury Schweppes*[837] case, because the CJEU appeared to be revisiting the doctrine of abuse. The case is concerned the compatibility of UK legislation on controlled foreign companies ('CFC')[838] with the Treaty provisions on the freedom of establishment. In this case, the Cadbury Schweppes Group established and incorporated two subsidiaries, Cadbury Schweppes Treasury Services and Cadbury Schweppes Treasury International in International Financial Services Center in Ireland, where it was subject to a more favourable tax regime. Cadbury Schweppes plc, the parent company of the Cadbury Schweppes Group, owns the subsidiaries indirectly through a chain of subsidiaries headed by Cadbury Schweppes Overseas Ltd. The case concerned the taxation of parent company (i.e. Cadbury Schweppes Overseas) by UK in respect of the protifs made in 1996 by Irish subsidiary (i.e. Cadbury Schweppes Treasury International)[839]. The Court was asked to decide whether freedom of establishment precludes national tax legislation which provides under certain conditions for the imposition of a charge upon a company resident in that Member State in respect of the profits of a subsidiary company resident in another Member State and subject to a lower level of taxation[840].

It should be noted that the most fundamental issue in this case is whether or not Cadbury Schweppes plc was actually exercising its freedom of establishment rights in Ireland, or whether this purported use of the EU Treaty freedom was an abuse of

---

837 Case C–196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I–7995.

838 Various EU Member States have adopted this type of legislation, as recommended by the OECD, with a view, in particular, to counteracting harmful tax competiton. See **Terra,** p. 387, footnote 20; **Lyden–Horn, Alex:** Cadbury Schweppes: A Critical Look at the Future and Futility of U.K. Controlled Foreign Company Legislation, Temple International and Comparative Law Journal, Vol. 22, Spring 2008, p. 191 *et seq.*; **O'Shea, Tom:** The UK's CFC Rules and the Freedom of Establishment: Cadbury Schweppes plc and its IFSC Subsidiaries–Tax Avoidance or Tax Mitigation?, Vol. 16, No. 1, 2007, p. 13 *et seq.*; **Simpson, Philip:** Cadbury Schweppes plc v Commissioners of Inland Revenue: The ECJ Sets Strict Test for CFC Legislation, British Tax Review, Vol. 6, 2006, p. 677 *et seq.*; Case Comment: ECJ Sets Limits on Controlled Foreign Company Legislation, EU Focus, Vol. 195, 2006, pp. 25–26.

839 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §13–22.

840 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §28.

rights[841] and consequently a nullity[842]. The CJEU conceded that nationals of a Member State cannot 'improperly or fraudulently take advantage of provisions of Community [Union] law' by using their rights under EU Treaties to circumvent domestic legislation[843]. The Court went on the state that the fact that a company establishes itself in a Member State to benefit from a favorable tax regime does not, by itself, constitute an abuse of freedom of establishment[844]. Thus, the fact that UK parent company established subsidiaries in Ireland to benefit from the favorable tax regime does not necessarily constitute abuse. That fact does not therefore preclude reliance by UK parent company on Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC)[845].

Next, the CJEU examined the compatibility of UK's CFC legislation with the Treaty provisions on the freedom of establishment[846]. The Court ruled that, in principle, the CFC legislation restricted the freedom of establishment[847]. However, such a restriction

841 See **Vinter, Nikolaj/Werlauff, Erik:** Tax Motives Are Legal Motives–The Borderline Between Use and Abuse of the Freedom of Establishment with Reference to the Cadbury Schweppes, European Taxation, Vol. 46, No. 8, 2006, p. 383 *et seq*.

842 AG Léger found that the establishment by a parent company of a subsidiary in another Member State for the purpose of enjoying the more favourable tax regime does not constitute, in itself, an abuse of the principle of freedom of establishment. The AG opined that UK parent company was exercising its freedom of establishment rights provided that it was operating a genuine and active economic activity in Ireland. See Opinion of AG Léger delivered on 2 May 2006 on Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7997, §40–42. See also Case Comment: Advocate General Delivers Opinion in Cadbury Schweppes Case, Company Lawyer, Vol. 27, No. 8, 2006, pp. 244–245; Case Comment: ECJ Advocate General Issues Cadbury–Schweppes Opinion, European Newsletter, Vol. 35, May 2006, pp. 2–3.

843 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §35 (citing Case 115/78 *Knoors* [1979] ECR 399, §25; Case C–61/89 *Bouchoucha* [1990] ECR I–3551, §14; Case C–212/97 *Centros* [1999] ECR I–1459, §24).

844 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §37 (citing Case C–212/97 *Centros* [1999] ECR I–1459, §27; Case C–167/01 *Inspire Art* [2003] ECR I–10155, §96).

845 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §38.

846 AG Léger opined that the UK legislation works against the parent company to which it applies compared to, on the one hand, a resident company which has established its subsidiary in the UK and, on the other, a resident company which has established such a subsidiary in a Member State where the tax rate is not low enough for the legislation to apply. In the first case, the resident company is never taxed on the profits of its domestic subsidiary. In the second case, the resident company is not taxed on the profits of its foreign subsidiary as they arise. It cannot be taxed until those profits are paid to it in the form of dividends. As a result, AG Léger argued that that differentiated tax treatment deters resident companies from exercising their right to set up subsidiary in an establishment in a very low tax Member State. See Opinion of AG Léger in Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7997, §74–75.

847 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §46.

could be justified if it aimed to prevent 'wholly artificial arrangements'[848]. In order to establish the existence of a wholly artificial arrangement, the CJEU referred to the two part 'abuse test' applied in *Emsland–Stärke* and *Halifax*[849]. The CFC legislation must not be applied as soon as it is proven on the basis of objective factors that the incorporation of a CFC reflects an economic reality, namely that the CFC is actually established in the host Member State and carries on genuine economic activities there[850]. It is for the national court to carry out this test[851].

The Court recalled, however, that a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned[852]. It held that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, "the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory"[853].

The case is important for several aspects. Firstly, in Cadbury Schweppes, the scope of application of the Union concept of the abuse of rights was further generalized. Because, for the first time, the CJEU applied the 'abuse test' to a non–harmonized area of Union law. Thus, the Court seems to be favourable to a harmonization of the concept of abuse of rights: the same concept of abuse can be used for all operations between Member States within the internal market[854].

---

848 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §57.

849 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §64.

850 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §75. In this regard, the CJEU considered that the freedom of establishment requires a genuine intent to participate in a stable and continuous basis in the economic life of a Member State other than the State of origin. See Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §53.

851 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §72.

852 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §51.

853 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §55.

854 **Feria,** p. 425, 429–430; **Lenaerts,** p. 1138.

Secondly, the Court made a distinciton between the terms '*circumvention*' and '*abuse*' in a way that it clarified '*circumvention*' is not a synonym to '*abuse*'. Contrary to the *Van Binsbergen*[855] case law, which identified circumvention with abuse, *Cadbury Schweppes* distinguished '*legitimate circumvention*' and '*wholly artificial arrangements*'. If an economic operator performs a genuine economic activity[856], the fact that he chose a Member State with more favourable legislation is of no relevance[857].

Finally, the impact of the *Cadbury Schweppes* on *Centros* and *Inspire Art* should be examined. Both the *Centros* and the *Inspire Art* cases involve a two–step U–turn operation[858] and each of those steps is grounded on an invocation of the exercise of the community right of establishment. In both cases, nationals of a member state wishing to do business through a company exclusively in their state of origin (Denmark, respectively the Netherlands) first set up a company in the UK and then a branch of this company in the state of origin.

The CJEU in *Centros* and in *Inspire Art* focused exclusively on the second step of the operation (i.e. setting up, by Centros and Inspire Art, of a branch in Denmark and the Netherlands, respectively, as an exercise of the right of establishment by the company)[859]. But the first step of the operation (i.e. the setting up of Centros and Inspire Art in the UK, as an exercise of the right of establishment by the companies' founders) was overlooked by the Court. This first step on exercise of the right of

---

855 Case 33/74 *van Binsbergen* [1974] ECR 1299.

856 In that regard, the CJEU concluded that the finding that a corporation should qualify as a letter–box company should be 'based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the controlled foreign company physically exists in terms of premises, staff and equipment.' Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §67.

857 Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §75.

858 This term describes the case where a person or company attempts to inject a cross–border or Union element into a situation in order to be able to invoke the relevant provisions of EU law for the sole purpose of circumventing the application of certain provisions of domestic law. See **Looijestijn–Clearie,** *Centros Ltd–A Complete U–Turn*, p. 638; **Looijestijn–Clearie,** *Have the Dikes Collapsed*, p. 409.

859 As mentioned above, with regard to this second step, the CJEU decided that prohibition of registration of the branch in Denmark (or the imposition of the conditions upon Inspire Art) was incompatible with the right of establishment, provided that the Treaty provisions on freedom of establishment were intended specifically to enable companies to pursue activities in other Member States, namely through the establishment of branches there. See Case C–212/97 *Centros,* §26; Case C–167/01 *Inspire Art,* §137.

establishment is similar to the establishment of a subsidiary abroad in *Cadbury Schweppes*[860]. As regards the second step of the U–turn operation in *Centros* and *Inspire Art*, there are no doubts that those two companies intended to carry out a genuine economic activity in Denmark and the Netherlands, respectively. As regards the first step, however, there was an invocation of the right of establishment, by foreign citizens, to set up those two companies in the UK, but there was no genuine economic activity involved in the UK. Consequently the setting up of those two companies in the UK, respectively by the Danish and Dutch citizens, could have been regarded as failing to meet the *Cadbury Schweppes*' genuine economic activity test[861].

In conclusion, as Advocate General Maduro pointed out in its opinion on *Cartesio*[862], the *Cadbury Schweppes* case represents a significant qualification[863] of the rulings in *Centros* and *Inspire Art*, as well as a reaffirmation of established case–law on the principle of abuse of Union law.

3. Compatibility of National Protective Rules with the EU Law

The EU Member States have introduced in their legislations rules which aim to protect the interest of creditors and other stakeholders of the company (*e.g.* rules on minimum capital requirement, rules on directors' liability and disqualifications *etc.*). These national rules are compatible with the EU law only to the extent that they could be justified on one of the grounds written in article 52 of TFEU and under the *Gebhard* test of the CJEU.

---

860 With regard to this establishment the CJEU ruled that Member States may take measures when the company that was set up in another Member State is merely a 'letter–box company' deprived of genuine economic activity there. Case C–196/04 *Cadbury Schweppes* [2006] ECR I–7995, §68.

861 On this issue see **Edwards, Vanessa/Farmer, Paul:** The Concept of Abuse in the Freedom of Establishment of Companies: A Case of Double Standards? in: Continuity and Change in EU Law– Essays in Honour of Sir Francis Jacobs, Oxford University Press 2008, p. 218.

862 See Opinion of AG Maduro on Case C–210/06 *Cartesio* [2008] ECR I–09641, §29.

863 It has been argued that the CJEU adopted two parallel and irreconcilable approaches in two different domains of company law and tax law. Sousa argued that the CJEU seems to adopt a less theoretical notion of abuse in the tax law's field, while it remains an 'empty concept'as fas as company law concerned. As a result, Member States' company law rules seem to be regarded by the CJEU less mandatory than Member States' mandatory tax law provisions. On this argument see **Sousa,** p. 32.

Art. 52 TFEU listed the public policy, public security and public health as valid justification grounds. According to the Court's case–law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: (i) they must be applied in a non–discriminatory manner; (ii) they must be justified by imperative requirements in the general interest; (iii) they must be suitable for securing the attainment of the objective which they pursue; and (iv) they must not go beyond what is necessary in order to attain it[864].

In the cases above–examined, the CJEU construed the grounds on which the Member States can advance justifications narrowly. In all of them, the Court accepted that in some situations the Member States may justify restrictions on corporate mobility. However, it never found it as being the case in practice[865].

In *Segers*, the CJEU considered that, in principle, a Member State can reserve a special treatment to companies formed under the law of another state if there is the need to combat fraud. However, the Court ruled that, on the basis of the justifications put forward by the Association, i.e. the need to combat abuse and ensure that Netherlands social security legislation was properly implemented, it was not possible to deny insurance benefits to an employee of a foreign company duly incorporated under the law of one of the Member State[866].

In *Centros* and *Inspire Art* the Court ruled that the Member State can take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of the European law[867].

In particular, according to the CJEU, the Treaty did not prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or

---

864 See Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165, §37; Case C–212/97 *Centros,* §34; Case C–167/01 *Inspire Art,* §133.

865 **Casoli,** p. 72.

866 See Case 79/85 *Segers*, §17.

867 Case C–212/97 *Centros,* §24; Case C–167/01 *Inspire Art,* §136.

penalizing fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its Members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private of public creditors established in the territory of the Member State concerned[868].

In the above–examined cases, national authorities generally tried to justify the national provisions able to hinder the exercise of the freedom of establishment claiming the need to combat abuse as well as the one to protect the rights of certain categories of company's stakeholders. In particular, compliance with the national rules is generally required on the basis that it ensures the financial soundness of a company, this way protecting creditors and employees' rights. Moreover it is generally argued that no less restrictive way to attain these objectives was available[869]. But the Court ruled that the national legislations did not attain the objective of protecting creditors and other company's stakeholders since, had the company conducted business in the home state, its secondary establishment would have been registered, even though some host country's stakeholders might have been equally exposed to risk. As a result, the CJEU invited the Member States to focus on less restrictive and more efficient means to protect the interests of the third parties[870].

The Court has also reinforced its strict reading of the justifications a Member State can put forward by considering the national measures as pursuing purely economic objectives. Moreover, the CJEU has dismissed many national justifications on the basis that they did not pass the Gebhard test to the extent that they did not satisfy the criteria of efficacy, proportionality and non–discrimination[871].

In *Inspire Art*, with particular regard to minimum capital requirements and directors' liability rules of WFBV, the CJEU concluded that they could not have been justified according to Art. 52 TFEU (ex Art. 46 TEC). The Court also stressed in *Inspire Art* that

---

[868] Case C–167/01 *Inspire Art,* §142.

[869] Case C–212/97 *Centros,* §33; Case C–167/01 *Inspire Art,* §108; **Casoli,** p. 77.

[870] Case C–212/97 *Centros,* §34; Case C–167/01 *Inspire Art,* §126; **Casoli,** p. 77.

[871] Case C–167/01 *Inspire Art,* §40.

no additional measure could be imposed by a Member State in a harmonized field. In particular, several provisions of Dutch law on formally foreign companies were found to fall within the scope of the 11th Company Law Directive and so to be incompatible with European law. As the Directive had been enacted to select those additional disclosure requirements which can be imposed on a branch, there was no room for other national provisions[872].

The CJEU's above–examined rulings seem to imply that all the internal affairs of a company are to be governed by the law of incorporation. In other words, in the field of corporate law, the *lex loci incorporationis* could play the role of the general rule, while room may be left for the application of certain rules of the host state in certain circumstances, when the protection of relevant interests are at stake. Consistently the Court ruled in *Segers* that neither the need to combat fraud, nor the one to ensure proper implementation of the Dutch social security legislation can justify the enactment of national provisions hindering the freedom of establishment. In addition, the CJEU reiterated this conclusion in *Centros* and *Inspire Art* where it dismissed all the grounds on which the national authorities tried to justify the restrictions at issue. As a result, the Court concluded that a measure denying legal capacity to a company properly incorporated in another Member State solely because it transacts business in another Member State is tantamount to a negation of the freedom of establishment and cannot be justified under the EU law[873].

III. THE RIGHT TO STAND IN A COURT AND CROSS–BORDER MERGER

A. Überseering (C–208/00)

1. The Facts and the Procedure

The facts of the *Überseering* case[874] are sufficiently well known and rather simple. Überseering BV (the 'Überseering') was incorporated under the law of the Netherlands

---

872 Case C–167/01 *Inspire Art,* §106; **Casoli,** p. 75.

873 See **Hirt,** p. 1192; **Casoli,** p. 76.

874 See Case C–208/00 *Überseering v. Nordic Construction Company Baumanagement GmbH* [2002] ECR I–9919. See also **Thoma, Ioanna:** ECJ, 5 November 2002, Case C–208/00 Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH–The Überseering Ruling: A Tale of

as a Dutch limited liability company (*Besloten Vennootschap met beperkte aansprakelijkheid*) and registered in the company registers of Amsterdam and Haarlem in August 1990. In the same year, the company acquired a piece of land for business purposes in Düsseldorf, Germany. Subsequently, the Überseering engaged the Nordic Construction Company Baumanagement GmbH (the 'NCC'), a company formed under the law of Germany, to refurbish a garage and motel on the site.

On 1 January 1995, two German nationals residing in Düsseldorf acquired all the shares in Überseering. In 1996 Überseering brought an action against the NCC before the *Landgericht* (Regional Court), Düsseldorf, on the basis of the non–fulfilment of its project–management contract with NCC signed in 1992. The case was concerned defective maintenance work, which had been carried out on the property owned by Überseering. Notwithstanding that NCC performed its contractual obligations Überseering claimed that the paint work was defective.

The Regional Court dismissed the action on the grounds that Überseering had transferred its actual centre of administration to Düsseldorf once its shares had been acquired by two German nationals resident in Düsseldorf. The Court ruled that when German nationals purchased the shares, the company's centre of administration inadvertently shifted to Germany. Since the current German practice did not recognise the legal capacity (*Rechtsfähigkeit*) of the company, it could not be a party to legal proceedings before the German courts. Consequently, Überseering lacked *locus standi* to bring the action. The *Oberlandgericht* (Higher Regional Court), Düsseldorf, upheld the decision to dismiss the action[875]. This was because neither court recognised Überseering's legal capacity or, consequently, its capacity to be a party to legal proceedings. The German Courts argued that since its centre of administration had been moved to Düsseldorf, the company had ceased to possess legal capacity under Dutch

Serendipity, European Review of Private Law, Vol. 11, Issue 4, 2003, pp. 545–554; **Wooldridge, Frank:** *Überseering*: Freedom of Establishment of Companies Affirmed, European Business Law Review, Vol. 14, Issue 3, 2003, pp. 227–235.

[875] See Case C–208/00 *Überseering,* §6–10.

law, because the application of real seat theory imposed a change of applicable law on the company in favour of German law[876].

After that Überseering appealed to the *Bundesgerichtshof* (Germany's Federal Supreme Court) and the Court referred two questions to the CJEU for a preliminary ruling. The *Bundesgerightshof* questioned whether the refusal to recognise the legal capacity of a company validly incorporated in another Member State and allow it to bring legal proceedings was compatible with freedom of establishment. The *Bundesgerichtshof* also questioned whether a company's legal capacity and capacity to bring legal proceedings had to be determined according to the laws of the State of incorporation.

The national court was, in essence, asked whether, a company formed in accordance with the legislation of a Member State (A) in which it has its registered office was deemed, under the law of another Member State (B) to have moved its actual centre of administration to Member State (B), Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) preclude Member State (B) from denying the company legal capacity. Or, put another way, whether Member State (B) would be forced to recognize the legal capacity and therefore the capacity to bring legal proceedings before its national courts in order to enforce rights under a contract with a company established in Member State (B)[877].

2. Submissions of the Parties and the Intervening Bodies

Each side, (the NCC and the German, Spanish and Italian Governments on the one side, and Überseering, the Commission, the Governments of the UK and Netherlands and the EFTA Surveillance Authority on the other), submitted several observations to support

[876] Since § 50(1) of the German Code of Civil Procedure (*Zivilprozessordnung*) requires legal capacity as a precondition to be a party to legal proceedings, the company could not have brought an action before a German court. And according to the settled case–law of the *Bundesgerichtshof* a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established. Since a company's legal capacity is determined by reference to the German law, it cannot enjoy rights or to be the subject of obligations or to be a party to legal proceedings unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law. See Case C–208/00 *Überseering,* §3–4; See also Opinion of AG Colomer on Case C–208/00 [2002] ECR I–9922, §10 *et seq*. But it is also worth noting that German law will recognize an unregistered foreign corporation as a defendant. Before bringing this case, Überseering defended a case in German court against one of its architects. See Case C–208/00 *Überseering,* §12.

[877] Case C–208/00 *Überseering,* §22; **Cerioni, Luca:** The "Überseering" Ruling: The Eve of a "Revolution" for the Possibilities of Companies' Migration Throughout the European Community?, Columbia Journal of European Law, Vol. 10, Issue 1, 2003, p. 120.

their conclusions, and in so doing, gave different interpretations of the CJEU's previous case–law. For example, both sides provided differring interpretations of the *Daily Mail* case[878].

In their submissions in the *Überseering* case, the NCC and the German, Spanish and Italian Governments gave three major arguments in favor of the German interpretation of the freedom of establishment. First, they claimed that corporate recognition was not mandatory under the EU law without individual state consent, because a state is under no obligation to recognize a foreign company unless it consents by convention or treaty. Second, they maintained that the facts of *Daily Mail*, and not *Centros*, are analogous to the proceeding at issue. They argued that the Court's reasoning in the *Daily Mail* judgment ought to be applied also to the issue of the relations between a company validly incorporated in one Member State and another Member State (the host state) to which the company has moved its actual centre of administration. On that basis, they claimed that the criteria by reference to which companies' identities are determined do not pertain to the exercise of the right of establishment but fall to be dealt with under national law. The general wording of the Court's statements in *Daily Mail* case, and the realization that neither directives regarding the transfer of a company's seat nor a Convention pursuant to (repealed) Art. 293 TEC have entered into force, led them to conclude that the application in Germany of the real seat criteria and the implications thereof regarding recognition of a company's legal capacity are compatible with the EU law[879]. And third, they argued that protecting German substantive labour and capital laws justified sanctions against foreign companies that operated in Germany[880].

On the other side, the Commission, the Netherlands and the UK Governments and the EFTA Surveillance Authority submitted that the *Daily Mail* ruling was irrelevant in the

[878] The *Daily Mail* case was the only case, before Überseering, to address the freedom of 'primary establishment'. As it will be shown at subsequent pages (paragraph §8–II of the thesis), the Court examined the conflict of laws problems arising from coexistence within the EU of both the 'real seat' and the 'incorporation' systems from the underlying absence of a Convention ensuring the retention of legal personality in the event of seat transfer under (repealed) Art. 293 TEC. See **Cerioni,** *The Überseering Ruling*, p. 121.

[879] See Case C–208/00 *Überseering,* §23–35; **Cerioni,** *The Überseering Ruling*, p. 122.

[880] See Case C–208/00 *Überseering,* §88–89.

Überseering case, because that decision applies only to the relationship between the Member State of incorporation and the company that wishes to leave that State whilst remaining the legal personality conferred on it by the legislation thereof. They argued that the *Daily Mail* case did not decide the question whether a company formed under the law of one Member State must be recognized by another Member State. In their view, the appropriate ruling to which reference had to be made to find a solution for the case at stake was not *Daily Mail* but the *Centros* judgment. As a result, the Commission and its supporters argued that where a company validly incorporated under the law of a Member State (A) is found, under the law of another Member State (B) to have moved its actual centre of administration to Member State (B), Arts. 43 and 48 TEC (Arts. 49 and 54 TFEU) preclude the conflict rules applying in Member State (B) from providing that the company's legal capacity, and its capacity to be a party to legal proceedings, are to be determined by reference to the law of Member State (B)[881].

3. The Judgment of the CJEU

The Court began its analysis by arguing that *Überseering* was a case in which the Treaty provisions on freedom of establishment applied to national law. The CJEU found that the rules which a Member State applies to a company, validly incorporated in another Member State, which is found to have moved its actual centre of administration to its jurisdiction do not outside the scope of the EU provisions on freedom of establishment[882], on the grounds that: (i) the (repealed) Art. 293 TEC does not constitute a reserve of legislative competence vested in the Member Stat, but rather that it gives them the opportunity to enter into negotiations with a view, *inter alia*, to facilitating the retention of legal personality in the event of the transfer of their seat from one country to another 'so as far as necessary', i.e. if the Treaty's provisions do not enable this objective to be achieved[883]; (ii) although the conventions which may be

---

[881] See Case C–208/00 *Überseering,* §36–51.

[882] See Case C–208/00 *Überseering,* §52. In Überseering, the CJEU clarified that the exercise of the freedom of establishment is not dependent upon the adoption of a convention on the mutual recognition of companies within the meaning of (repealed) Art. 293 TEC. See **Ebke, Werner F.:** The European Conflict of Corporate Laws Revolution: *Überseering, Inspire Art* and Beyond, The International Lawyer, Vol. 38, No. 3, 2004, p. 825–826.

[883] See Case C–208/00 *Überseering,* §54.

entered into pursuant to (repealed) Art. 293 TEC facilitate the attainment of the freedom of establlishment, the exercise of that freedom can nonetheless not be dependent upon the adoption of such conventions, for Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU), which confers upon EU nationals a complete freedom of establishment and which give companies and firms the right to be treated in the same way as natural persons who are nationals of Member States, imply as immediate consequence that companies or firms are entitled to carry on their business in another Member State[884]; and (iii) because a necessary precondition for the exercise of the freedom of establishment granted by Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) is the recognition of those companies by any Member State in which they wish to establish themselves, and because such Articles have been directly applicable since the end of the transitional period, it is not necessary for the Member States to adopt a convention on the mutual recognition of companies[885].

The Court then referred to its earlier *Daily Mail* judgment, interpreting it in favour of the freedom of establishment. The Court noted that *Daily Mail* only concerned the relations between a company and the Member State under whose law it has been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State while retaining its legal personality in the state of incorporation. By contrast, *Überseering* concerned the recognition by one Member State of a company incorporated under the law of another Member State, such a company being denied all legal capacity in the host Member State where it takes the view that one company has moved its actual centre of administration to its territory, irrespective of whether in that regard the company actually intended to transfer its seat[886]. For this reason, *Daily Mail* should not be regarded as a case concerning freedom of establishment and recognition between two Member States but, more modestly, as a case concerning the compatibility of internal regulations with Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) in relation to the transfer of the centre of

[884] See Case C–208/00 *Überseering,* §55–57.

[885] In other words, the (repealed) Art. 293 and 44(2)(g) TEC [now Article 50(2)(g) of TFEU] were only an auxiliary means to exercise freedom of establishment and not an essential one. In Europe, companies have enjoyed freedom of establishment since the end of the transitional period on 31 December 1969. See Case C–208/00 *Überseering,* §59–60.

[886] See Case C–208/00 *Überseering,* §62.

administration out of a Member State[887]. Despite the general terms in which *Daily Mail* was cast, the Court did not intend to recognize a Member State as having the power, *vis–à–vis* companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law[888].

On the basis of a discussion of the relevant articles and past case–law, the CJEU then examined whether the refusal by the German authorities to recognise the legal capacity[889] and capacity to be a party to legal proceedings of a company that was validly incorporated under the law of another Member State violated Treaty provisions on freedom of establishment. The Court observed that Überseering, given its status as a company validly incorporated in the Netherlands and having its registered office there, was entitled under Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) to exercise its freedom of establishment in Germany. The Court found that it was of little significance in that regard that, after the company was formed, all its shares were acquired by German nationals residing in Germany, since that has not caused Überseering to cease to be a legal person under Netherlands law and Überseering's very existence is inseparable from its status as a company incorporated under Netherlands law since, as the Court has observed, a company exists only by virtue of the national legislation which determines its incorporation and functioning[890].

The Court ruled that the requirement of reincorporation of the same company in Germany, deriving from the application in Germany of the real seat criteria, is therefore tantamount to outright negation of freedom of establishment. In those circumstances,

---

887 See Case C–208/00 *Überseering,* §66–70. It has been argued that the Court used a disproportionate amount of time to explain why the decision in *Daily Mail* was not relevant to the case before it. See **Hansen,** *Free Movement of Companies,* p. 158

888 See Case C–208/00 *Überseering,* §72.

889 The Court defined the "*legal capacity*" as the "*capacity to enjoy rights and be the subject to obligations*" in accordance with the German Code of Civil Procedure. See Case C–208/00 *Überseering,* §3. It is worthy to note that the Court has not only used the term "*legal capacity*" but also mentioned the term "*legal personality*" and seems to have made reference to the two terms as synonymous. But in some jurisdictions following the real seat criteria the two concepts do not coincide. On this argument, see **Cerioni,** *The Überseering Ruling*, p. 125.

890 See Case C–208/00 *Überseering,* §80–81.

the refusal by a host Member State (B) to recognize the legal capacity of a company formed in accordance with the law of another Member State (A) in which it has its registered office on the ground that the company moved its actual centre of administration to Member State (B) constitutes a restriction on freedom of establishment which is, in principle, incompatible with Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU)[891].

The Court also analyzed whether the restriction of freedom of establishment caused by the refusal to recognise legal capacity and capacity to be a party to legal proceedings was justified for the protection of general interest. The German Government sought to argue that the restriction could be justified on the grounds that the real seat doctrine protects the company's creditors, minority shareholders, employees and tax authorities. The CJEU conceded that in certain circumstances and subject to certain conditions, these overriding requirements justified restrictions on freedom of establishment. Nevertheless, such objectives could not justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office[892].

In *Überseering* the Court conferred, in essence, to every company in the EU, as long as it is regarded in its Member State of origin as an existing and validly incorporated company, the right to be fully recognized and conduct its activity in any other Member State to where its centre of administration and control has, meanwhile, been transferred. On the basis of this decision, the *Bundesgerichtshof* has finally recognised Überseering's legal capacity and legal personality. In other words, it has recognised the company in accordance with the terms of its original Dutch company statute.

4. Commentary

a. Compatibility of the Real Seat Theory with the EU Law

It should be noted that the CJEU avoided stating explicitly that real seat theory was incompatible with the provisions of freedom of establishment. But the Court's

[891] See Case C–208/00 *Überseering,* §81–82.

[892] See Case C–208/00 *Überseering,* §87–93.

judgment in *Überseering* case has clarified the incompatibility of real seat theory as a conflict of law rule with the provisions on freedom of establishment as laid down in the Treaty[893]. Following *Überseering*, it is clear that real seat doctrine can no longer be used in its previous form to deny the legal capacity of foreign companies which can claim a right of establishment under Art. 54 TFEU (ex Art. 48 TEC)[894].

After *Überseering*, Member States are clearly required to fully recognise the legal capacity a company enjoys under the laws of state of incorporation. The most important feature of the ruling in *Überseering* was the prohibition of the use by the immigration state of the national conflict of laws rules (the 'real seat' theory) in order to ignore the existence of a foreign company which has transferred its seat to that state and has failed to reincorporate under its law. For the abovementioned reasons, the case has been regarded as a natural development and expansion of and complement to *Centros.* Because the Court expanded *Centros*, by once again finding that the freedom of establishment preempts state conflict of law theories[895].

Following *Überseering,* the *Bundesgerichtshof* has also declined to pursue its attempt to rescue real seat theory by recharacterising foreign companies (*Requalifikation*) as German partnerships (*Personengesellschaften*) and even in Germany the real seat doctrine could not be maintained in its previous form.

---

893 **Robertson, Dominic E.:** *Überseering*: Nailing the Coffin of Sitztheorie?, The Company Lawyer, Vol. 24, Issue 6, 2003, p.184; **Baelz, Kilian/Baldwin, Teresa:** The End of the Real Seat Theory (*Sitztheorie*): the European Court of Justice Decision in *Überseering* of 5 November 2002 and its Impact on German and European Company Law, German Law Journal, Vol. 3, Issue 12, 2002, available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=214>; **Lowry,** p. 331, 343; **Ebke,** *Conflict of Corporate Laws*, p. 828; **Dammann,** *Freedom of Choice,* p. 480. **Micheler,** *Recognition of Companies*, p. 525.

894 After *Überseering* some writers still maintained that a Member State could require foreign companies to comply with certain national mandatory company law rules. But this possibility has been finally rejected by the Court with its judgement in the *Inspire Art* case. See **Hansen,** *Free Movement of Companies,* p. 161, footnote 43 and accompanying text.

895 **Lombardo, Stefano:** Conflict of Law Rules in Company Law after *Überseering*: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union, European Business Organization Law Review, Vol. 4, Issue: 2, 2003, p. 304; **Gildea, Andrea J.:** *Überseering*: A European Company Passport, Brooklyn Journal of International Law, Vol. 30, No: 1, 2004, p. 281; **Robertson,** p. 185.

On this issue, the decision of the *Bundesgerichtshof* on 13th March 2003[896] was very important, since the Court has taken an important step towards the liberalisation of German company law. According to the *Bundesgerichtshof*, it was not enough to recognise a company duly formed in another Member State as a civil partnership with the capacity to be a party to legal proceedings. Under the right of establishment guaranteed by the Treaty, the company sought to assert its rights as a company of another Member State, and it should be recognised as such by the German courts. In the view of the *Bundesgerichtshof*, 'recognition' as a civil partnership would be contrary to the right of establishment, as expressed by the decision of the Court of Justice in the *Überseering* case[897].

Another decision by a German court to deal with the recognition of a foreign company came from the *Oberlandgericht* (Provincial Court of Appeal) in Bavaria. This case concerned a United Kingdom private company, which had transferred its real seat to Germany. In connection with a registration of title, the local Registrar required the UK company to show that its head office was not situated in Germany. The *Oberlandgericht* Bavaria directed the Registrar to make the registration, since such evidence could not be required of a foreign company, formed in accordance with the law of a Member State[898].

b. Forum–Shopping and Arbitrage After *Überseering*

The right to move corporate headquarters or set up a branch in any EU Member State could cause companies to forum–shop for corporate charters[899], favourable tax regimes

---

896 The facts of the case were straightforward. A Dutch private company (BV), which had been incorporated in 1990, entered into an agreement in 1992 with a German company for painting and decorating work. In the view of the company, the work was poorly carried out. At the lower court the case was dismissed on the grounds that in 1994 the Dutch company had moved its head office to Germany so that, under the German practice, which then applied, the company could not have capacity to be a party to legal proceedings before a German court. See **Hansen,** *Free Movement of Companies,* p. 164.

897 For details of this decision and other decisions of the *Bundesgerichtshof* on this issue see **Lombardo,** pp. 307–308, footnotes 19–20 and accompanying text; **Hansen,** *Free Movement of Companies,* p. 164.

898 **Hansen,** *Free Movement of Companies,* p. 163.

899 **Dammann, Jens C.:** The U.S. Concept of Granting Corporations Free Choice among State Corporate Law Regimes as a Model for the European Community, available at SSRN: <http://ssrn.com/abstract=418660>, p. 6–7; **Allmendinger, Christoph:** Company Law in the European Union

or mobility. Scholars speculate that the *Überseering* decision pushes Europe further towards a regime of free choice in the adoption of corporate charters. Scholars also speculate that the *Überseering* decision will prompt existing companies to move their headquarters to host states with the most favourable tax regime[900]. Because if a company registers in a state that allows domestic companies to move out, then the company can later relocate for better proximity to labor or natural resources, or to alter its tax regime.

B. Sevic (C–411/03)

1. The Facts and the Procedure

Shortly before the promulgation of the Tenth Company Law Directive, the CJEU delivered its decision in *Sevic* case[901]. In 2002 Sevic Systems Aktiengesellschaft (‘Sevic’) established in Neuwied/Germany, and Security Vision Concept SA (‘SVC’) established in Luxembourg, entered into a merger agreement in which they agreed to dissolve SVC without liquidation and to transfer the whole of its assets to Sevic. The merger contract provided for the dissolution without liquidation of the latter company and the transfer of the whole of its assets to Sevic, without any change in the latter’s name. This merger was supposed to be a merger by acquisition (or absorption)[902].

---

and the United States: A Comparative Analysis of the Impact of the EU Freedoms of Establishment and Capital, William & Mary Business Law Review, Vol. 67, No. 4, 2013, p. 68 *et seq.*; **Cerioni,** *The Überseering Ruling*, p. 129.

900 **Cerioni,** *The Überseering Ruling*, p. 130, 139; **Gildea,** p. 290; **Omar, Paul J.:** *Centros*, *Uberseering* and Beyond: A European Recipe for Corporate Migration: Part 2, International Company and Commercial Law Review, Vol. 16, No. 1, 2005, p. 23 *et seq.*; **Birkmose, Hanne Sondergaard:** A Market for Company Incorporations in the European Union?–Is Überseering the Beginning of the End?, Tulane Journal of International and Comparative Law, Vol. 13, Spring/2005, p. 55 *et seq.*; **Heine, Klaus:** Regulatory Competition Between Company Laws in the European Union: the *Überseering* Case, Intereconomics March/April 2003, p. 102 *et seq.*

901 Case C–411/03 *SEVIC Systems AG v Amtsgericht Neuwied* [2005] ECR I–10805; for detailed discussions on the case see **Behrens, Peter:** Case Note–Judgment of 13 December 2005, SEVIC Systems AG, Common Market Law Review, Vol. 43, Issue 6, 2006, p. 1669 *et seq.*; **Hansen, Lone L.:** Merger, Moving and Division Across National Borders–When Case Law Breaks through Barriers and Overtakes Directives, European Business Law Review, Vol. 18, Issue 1, 2007, p. 181 *et seq.*; **Ronfeldt, Thomas/Werlauff, Erik:** Merger as a Method of Establishment: on Cross–Border Mergers, Transfer of Domicile and Divisions, Directly Applicable under the EC Treaty’s Freedom of Establishment, European Company Law, Vol. 3, Issue 3, 2006, pp. 125 *et seq.*

902 For this type of merger, see Articles 3 and 19 of Third Company Law Directive.

The merger, in order to become legally effective, required registration in the commercial register at the respective 'seat' (place of incorporation of both the acquiring company (i.e. Sevic) and the acquired company (i.e. SVC)[903]. Since the SVC located in Luxembourg, the Local Court (*Amtsgericht*) Neuwied denied registration of the merger between Sevic and SVC precisely on the ground that the §1(1) of German Law on transformations (*Umwandlungsgesetz*–UmwG) lacked provisions for cross–border mergers and it provides only for megres between legal entities established in Germany (i.e. internal mergers), therefore did not accept them as legally possible transactions[904].

Sevic brought and action against the rejection decision before the High Court (*Landgericht*) Koblenz, because Sevic felt it was denied its right of establishment. Since the *Landgericht* had doubts as to whether §1(1) of UmwG complies with Arts. 43 and 48 TEC (Arts. 49 and 54 TFEU), it decided to stay proceeding and referred to the CJEU for a preliminary ruling on the compatibility of the refusal with the EU law. In particular, the national judge questioned if the provisions on the freedom of establishment were "*to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that Paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?*"[905].

2. Submissions of the Parties and the Intervening Bodies

According to the submissions of the German and the Netherlands governments, Arts. 43 and 48 TEC (Arts. 49 and 54 TFEU) were not applicable to cross–border merger,

903 §16 of German Law on Transforming Companies (*Umwandlungsgesetz*), of 28 October 1994, as amended in 1995.

904 Case C–411/03 *SEVIC Systems AG,* §7 and §12.

905 Case C–411/03 *SEVIC Systems AG,* §10. This question includes several pillars. Firstly, the national court asked the applicability of Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) in the main proceedings. In other words, it should be discussed whether a cross–border merger could be regarded as an "establishment" in the sense of Art. 43 TEC (now, Art. 49 TFEU). Secondly, it should be examined the compatibility of German law with the EU law. Thirdly it should be answered whether there was any proper basis for a potential justification. On this argument, see **Behrens,** *Case Note,* p. 1673.

because it did not give rise to an "establishment" within the meaning of these Treaty provisions. The two governments relied on the wording of Art. 43 TEC (Art. 49 TFEU) which seems to define "establishment" narrowly, in terms of the setting up of a principal or secondary place of business in other Member State, and the setting up of such "establishment" seems to require a cross–border movement of persons of transfer of resources. Since the cross–border merger under consideration here did not involve anything like this, but merely led to the dissolution of SVC and the loss of legal personality, SVC could not be said to have set up a primary or secondary establishment in Germany[906].

Advocate General Tizzani pointed out that the dissolution of one of the participating companies cannot possibly be a proper ground for denying that company the right to participate in a merger while it still exists. It is only at the very end of the merger proceedings, i.e. upon registration, that the acquired company is finally dissolved as a consequence of the merger. Until then, it necessarily takes active part in the whole process. The Advocate General therefore found the German and the Netherlands governments' reasoning was not acceptable. Furthermore, based on established jurisprudence of the CJEU, according to which the right of establishment is understood to allow in very general terms "to participate, on a stable and continuous basis, in the economic life of another Member State", the Advocate General argued that this right covers all aspects of doing business in another Member State on a permanent basis and that this includes all relevant transactions irrespective of their form, including cross–border mergers[907].

3. The Judgment of the CJEU

There were three pillars to the *Sevic* case. The first was the applicability of the EU law on establishment, in particular Arts. 43 and 48 TEC (Arts. 49 and 54 TFEU); the second was an investigation into the existence of a restriction to the freedom of

[906] See Opinion of AG Tizzano on Case C–411/03 *SEVIC Systems AG* [2005] ECR I–10808, §20 *et seq.*; **Behrens,** *Case Note,* p. 1674.

[907] See Opinion of AG Tizzano, §24–29.

establishment, while the final pillar was an analysis of a possible justification to such a restriction.

First, the Court examined applicability of the EU law on freedom of establishment. It could have been argued –as the German and the Netherlands governments submitted– that the Luxembourg company did not want to establish a seat in Germany and that the German company did not want to establish a seat in Luxembourg, as the Luxembourg company ceased to exist and the existence of the German company was independent of the merger. The Court rejected this very formal line of reasoning. The Court denied the notion that the freedom of establishment was not applicable, because the transferring company cannot establish a (primary or secondary) place of business abroad after losing its legal personality as a result of the merger[908].

Secondly, th Court examined the concept of restrictions on the freedom of establishment in the context of Art. 43 TEC (Art. 49 TFEU). As the Court pointed out, mergers are an important part of a company's activity[909]. As the freedom of establishment covers the effective participation of the company in economic life, a limitation of mergers to domestic companies is to be regarded as a restriction of the right to establishment[910]. With the decision of the CJEU, it was clarified that both the

908 According to the Court, Arts. 43 and 48 TEC (Arts. 49 and 54 TFEU) apply to a merger situation such as that at issue in the main proceedings and cross–border merger operations constitute particular methods of exercise of freedom of establishment. See Case C–411/03 *SEVIC Systems AG,* §16 and §19; **Behrens,** *Case Note,* p. 1676. Although, in *Sevic*, the CJEU examined a merger between a German and a Luxemburg public limited liability company, the CEJU's ruling could have a wider effect by embracing other types of companies within the meaning of Art. 54 TFEU (ex Art. 48 TEC), e.g. cooperatives, mutual friendly societies, partnerships and foundations. On this argument, see **Vossestein, Gert–Jan***:* Companies' Freedom of Establishment After SEVIC, European Company Law, Vol. 3, Issue 4, 2006, p. 178; **Pieper, J.:** European Cross–Border Mergers after SEVIC, Company Lawyer, Vol. 30, 2009, p. 173; **Papadopoulos***, Regulatory Approaches,* p. 78.

909 The CJEU made specific reference to the benefits associated with mergers, being an effective means of transforming companies. See Case C–411/03 *SEVIC Systems AG,* §21.

910 Case C–411/03 *SEVIC Systems AG,* §16–19. AG Tizzano had reached the same conclusion but with a more elaborate analysis. The AG argued that the right of establishment concerned not only the right to move to another Member State in order to purse an activity there, but also all the aspects which were linked in any way in complementary or functional terms with the pursuit of that activity and thus the exercise in full of the freedom. See Opinion of AG Tizzano, §32.

transferring company as well as the acquiring company enjoy the protection of the freedom of establishment[911].

Agreeing with its Advocate General, the CJEU pointed out that a merger such as the one at issue in the main proceedings constituted an effective means of transforming companies in that it made it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter[912]. As recourse to such means of company transformation was limited to domestic companies, there was a difference in treatment between companies according to the internal or cross–border nature of the merger. This was likely to deter the exercise of freedom of establishment. In other words, this difference in treatment between domestic and cross–border mergers (the former were allowed but the latter were prohibited) constituted a restriction on the exercise of the freedom of establishment by companies that wish to enter into cross–border mergers[913].

Thirdly, the Court examined whether this restriction on freedom of establishment could be justified. Imperative grounds on the public interest could, in certain circumstances, justify a measure dealing with special problems caused by cross–border mergers. The German and Netherlands governments attempted to justify the restriction and they have argued that the rules were designed to protect the interests of creditors, minority shareholders and employees, and to preserve the effectiveness of fiscal supervision and the fairness of commercial transactions[914]. Also, in the absence of Community harmonization measures[915], it was not possible for a Member State to recognize cross–

[911] **Schindler, Clemens Philipp:** Cross–Border Mergers in Europe –Company Law is Catching Up!– Commentary on the ECJ's Decision in SEVIC Systems AG, European Company and Financial Law Review, Vol. 3, Issue 1, 2006, p. 113.

[912] Case C–411/03 *SEVIC Systems AG,* §21.

[913] Case C–411/03 *SEVIC Systems AG,* §22; **Behrens,** *Case Note,* p. 1679; **Papadopoulos***, Regulatory Approaches,* p. 78.

[914] Case C–411/03 *SEVIC Systems AG,* §24.

[915] At the relevant time, the Tenth Company Law Directive on Cross–Border Mergers had not been adopted yet.

border mergers that involve the application of several national legal systems in a single legal operation[916]. On this issue, the Court simply referred to its previous decisions in *Überseering* and *Inspire Art*[917]. The Court ruled that imperative reasons in the public interest such as protection of the interests of creditors, minority shareholders and employees and preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions can justify a restriction of the freedom of establishment. But, regardless of these different approaches, a general prohibition of cross–border mergers goes beyond what is necessary to pursue these objectives[918]. As a result, Germany must not prohibit the merger by acquisition of the Luxembourg company SVC with the German company Sevic[919].

4. Commentary

Several aspects of *Sevic case* were significant. Because *Sevic* was the first case dealing with a cross–border merger and before the enactment of Tenth Company Law Directive on Cross–Border Mergers, it was highly disputed whether such transaction can be implemented under the laws in effect at the relevant time[920]. First, and most obviously, the Member States of the EU accelerated the enactment of the Tenth Company Law Directive on Cross–Border Mergers[921]. Whether or not Member States have enacted the relevant provisions in their national law, corporations have the right under *Sevic* case and the freedom of establishment under the TFEU to engage in cross–border mergers. Because the Court explicitly accepted that provisions on the freedom of establishment

---

916 Case C–411/03 *SEVIC Systems AG,* §24; Opinion of AG Tizzano, §53.

917 At this point, the CJEU followed its previous corporate mobility case law, which demands the imposition of justified restrictions "in fact" (*Centros*) where the existence of an abuse is established in a case–by–case basis (*Inspire Art,* §143). On this argument, see **Storm,** p. 131; **Papadopoulos**, *Regulatory Approaches,* p. 80.

918 Case C–411/03 *SEVIC Systems AG,* §30.

919 **Schindler,** p. 115.

920 On this argument, see **Schindler,** p. 110. Until *Sevic*, direct cross–border mergers were prohibited in some Member States. See **Cornette de Saint–Cyr, A.S.:** Cross–Border Mergers, International Company and Commercial Law Review, 2002, p. 343.

921 See above paragraph §4–II of the thesis; **Behrens,** *Case Note*, p. 1688.

[Arts. 49 and 54 TFEU (ex. Arts. 43 and 48 TEC)] grant a legal authority for cross–border mergers[922].

Second, and more importantly, the CJEU in its *Sevic* ruling held that corporate engagement in cross–border mergers constitutes the exercise of a fundamental freedom, the freedom of establishment[923]. At this point, it should be discussed that whether the decision in *Sevic* is still really significant after enactment of new directive. Had such mergers been governed by harmonization through the Directive on Cross–Border Mergers alone, Member States need only have complied with the minimum standards of that Directive, leaving them otherwise free to enact more stringent provisions to protect national interests or pursue other policy objectives. After *Sevic*, national regulations that exceed the minimum standards of the Directive on Cross–Border Mergers are subject to scrutiny as restrictions on a fundamental freedom. As such, they must meet the standards of the imperative requirements doctrine, including nondiscrimination between foreign and domestic entities and the least restrictive means test. As a result, Member State restrictions on cross–border mergers will be very difficult to uphold when they exceed the Directive on Cross–Border Mergers mandates[924]. For this reason, the *Sevic* decision will still remain significant because of its wider effect.

It must be noted that the German rule at stake denied the registration of an inbound merger. Hence, the CJEU did not analyze the legal situation of outbound mergers[925].

---

922 **Schindler,** p. 114; **Behrens,** *Case Note*, p. 1686; **Papadopoulos***, Regulatory Approaches,* p. 76, 94.

923 **Hansen, Lone L.:** Merger, Moving and Division Across National Borders–When Case Law Breaks through Barriers and Overtakes Directives, European Business Law Review, Vol. 18, Issue 1, 2007, p. 181 *et seq*. The Court ruled that cross–border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment. See Case C–411/03 *SEVIC Systems AG,* §19.

924 On this argument, see **Angelette, Benjamin:** The Revolution That Never Came and the Revolution Coming–*de Lasteyrie du Salliant, Marks & Spencer, Sevic Systems* and the Changing Corporate Law in Europe, Virginia Law Review, Vol. 92, Issue 6, 2006, p. 1214. Despite harmonization rules might facilitate cross–border mergers, the Court restated that the existence of such rules cannot be made a precondition for the implementation of the provisions on freedom of establishment. See Case C–411/03 *SEVIC Systems AG,* §26; **Schindler,** p. 114.

925 An inbound merger pertains to the setting up of a foreign secondary establishment by the domestic company that acquires the foreign company. On the other hand, an outbound merger includes the

Some parts of the decision mentioned inbound mergers only[926], wehereas other parts talked about cross–borders in general[927]. Given the judicature of the recent years, it seems unclear whether the fundamental freedoms grant a right to exit. As it will be shown later, for outbound cases[928], i.e. cases of domestic companies wanting to leave their state of incorporation, the CJEU shared a very restrictive view. The state of incorporation as the 'creator' of the company is at liberty to prohibit the transfer of the head office and/or the statutory seat to another state. Thus, the state of incorporation is not obliged to continue to respect the legal personality it had granted prior to the relocation of the company's seat. If, on the other hand, the state of incorporation allows the transfer, the host state is obliged to acknowledge the foreign company as such[929]. This results in a differentiation between inbound and outbound situations. But since the adopted 10th Company Law Directive on Cross–Border Mergers provides for outbound mergers, now this problem is one of limited relevance[930].

But there was an important decision of the Amsterdam District Court (*Kantongerecht*) at the date of 29 January 2007[931], after the judgement of the CJEU in the case *Sevic* and before the implementation of the 10th Company Law Directive in Netherlands and Germany's national law. From the Dutch point of view the case was an outbound cross–border merger. Because there was a merger[932] where a Dutch company

---

setting up a domestic secondary establishment by the foreign acquiring company. **Behrens,** *Case Note*, p. 1687; **Papadopoulos***, Regulatory Approaches,* p. 80.

926 Case C–411/03 *SEVIC Systems AG,* §18, 20 and 22.

927 Case C–411/03 *SEVIC Systems AG,* §19, 21 and 30.

928 See below the section §8 of the thesis.

929 **Kersting/Schindler,** p. 1282; **Siems, Mathias M.:** SEVIC: Beyond Cross–Border Mergers, European Business Organization Law Review, Vol. 8, No. 2, 2007, p. 309; **Ronfeldt /Werlauff,** p. 127; **Schindler,** p.116, **Papadopoulos***, Regulatory Approaches,* p. 80.

930 On this argument, see **Schindler,** p. 116; **Siems,** *Sevic,* p. 309.

931 For details of the case, see **Gesell, Harald/Riemer, Pieter:** Outbound Cross–Border Mergers Protected by Freedom of Establishment–Annotation to the Decision of the Amsterdam District Court (*Kantongerecht*) 29 January 2007, EA 06–3338 166, European Company and Financial Law Review, Vol. 4, No: 2, 2007, p. 308 *et seq*.

932 On 22 May 2006, a Dutch company (the C.B.V., registered in the Commercial Register of the Chamber of Industry and Commerce for Amsterdam) and a German company (the B. GmbH, registered in the Commercial Register of the Local Court of Ludwigshafen am Rhein) concluded a merger proposal according to Dutch law and a merger agreement according to German law. After complying with the further formal requirements of Dutch and German merger laws, on 30 June 2006 the merger was registered in the Commercial Register of the Local Court of Ludwigshafen am Rhein. Equally on 30 June 2006 the Commercial Register of the Chamber of Commerce and

transferred its entire assets and liabilities to a German absorbing company by way of universal legal succession and the Dutch entity ceased to exist. In this case, the Amsterdam District Court confirmed the legality of the first cross–border merger after the *Sevic*. The Court ruled that the legal merger is a special method for the purpose of exercising the freedom of establishment and in the event of a cross–border merger it is instrumental in ensuring the proper effective operation of the internal market. According to the Court, the German company was entitled to be treated on an equal footing with a comparable case of a legal merger of two Dutch companies and registration the German company as legal successor of the Dutch company was not incorrect[933].

In his opinion in *Sevic*, Advocate General Tizzano made the general statement that it followed from Art. 43 EC (Art. 49 TFEU) that 'restrictions "on entering" or "on leaving" national territory are prohibited'[934]. The CJEU did not pick up this sentence, but it is possible to argue that the permissibility of cross–border mergers also leads to the permissibility of seat transfers[935]. The reason for this is that cross–border mergers already enable companies to transfer their statutory seat. This requires two steps: first, the company that wants to change its statutory seat establishes a new company in the designated country; second, this new company merges by acquisition with the existing company so that without going into liquidation the latter ceases to exist[936].

Industry for Amsterdam registered the German company as legal successor of the Dutch company upon request of the Dutch Notary who had notarized the completion of the merger. On 11 July 2006 the Chamber of Commerce and Industry for Amsterdam filed a petition with the Amsterdam District Court requesting the original registration of the Dutch company to be restored. It argued that the merger with the German company and thereby the ceasing of the Dutch company's existence was not correct or contrary to public policy. See **Gesell/Riemer,** p. 309.

933 In this case, the Dutch court taking into account the CJEU's decision in *Sevic* had examined the case of outbound cross–border merger and concluded that categorical prohibition of an outbound merger therefore would indeed have to be considered as a discrimination of the absorbing entity. For important parts and evaluation of the case see **Gesell/Riemer,** p. 311 *et seq.*

934 See Opinion of AG Tizzano, §45.

935 On this discussion see **Vaccaro,** p. 1348; **Moran,** p. 157.

936 On this argument, see above §4–II–D of the thesis; **Siems,** *Sevic,* p. 312.

C. Cross–Border Mergers an the Right to Stand in a Court: When Company's Nationality is Portable Outside of the Home State Borders

In both *Überseering* and *Sevic*, the host state, i.e. Germany, adhered to the real seat doctrine and failed to recognized as validly formed a company incorporated under the law of another country which transferred its head office in the German territory. Similar with the previous jurisprudence, the CJEU took position in favour of corporate mobility.

In *Überseering* the host state questioned the capacity of a company incorporated under the law of the Netherlands to be a part in a legal proceeding, while in *Sevic* it was the possibility to merge with a foreign company without the latter incurring dissolution and re–incorporating under the German law that was put in doubt. In both cases, a dispute arose because the company transferred (*Überseering*) or would have transferred (the Security Vision in *Sevic* after the merger) its head office in Germany without re–incorporating there.

In both *Überseering* and *Sevic*, it was the possibility to exercise the freedom of establishment that was debated. The host country not merely required the company to meet additional obligations because it did not conduct any business in the home country, but asked a primary establishment to wind up in the home state and reincorporate in the host country. In both cases, the CJEU declared the incompatibility of the host country's provisions with the EU law.

In *Überseering*, the Court reasoned that the company did not intend to wind up its activities in the Netherlands, nor wanted to reincorporate in Germany. Überseering wished to remain a Dutch company and its existence was not called into question by the Netherlands. For this reason, the CJEU ruled that the requirement to reincorporate in the host country was tantamount to an outright negation of the freedom of establishment[937]. In *Sevic*, the Court seemed to reiterate this reasoning: As far as a merger for dissolution without liquidation of the merging company is tantamount to a transfer of the head office without the company incurring liquidation and

[937] See Case C–208/00 *Überseering,* §72; See also **Hirt,** p. 1192; **Casoli,** p. 83.

reincorporating in the host state, it is not possible to ban the operation to the extent that the home country permits it.

Hence, a company dully formed in accordance with the law of one of the Member States enjoys the right to be recognized also in the other European jurisdictions and mutual recognition cannot be denied on the sole basis that the company has transferred its real seat, this being true even if, under the law of the host state, such a transfer would have resulted in a lost of the legal personality[938]. Indeed, this has to apply in the case in which the company wants to exercise the freedom of secondary establishment in the host state as well as in the situation in which the exercise of the freedom of primary establishment, i.e. the right to merger or the one to stand in a court, is concerned[939].

Imposing to a company to reincorporate in the host state in order to be considered as a valid legal entity clearly hampers corporate mobility. The examined line of cases demonstrated that the Court adopted a broad interpretation of what constitutes freedom of establishment and ruling that also measures which infringe it indirectly are contrary to the European law. Moreover, the Court pooled together the discrimination and the market access model when examining the justification grounds, leaving only theoretically room for justify the national provisions able to jeopardize corporate mobility.

IV. CROSS–BORDER CONVERSIONS: THE *VALE* JUDGMENT

A. The Facts and the Procedure

On July 12, 2012 the CJEU adjudicated on set of preliminary questions concerning the corporate mobility in *VALE Építési Kft*[940], which is the most recent and a fundamental

---

938 **Petronella, Vittoria:** The Cross–Border Transfer of the Seat after Cartesio and the Non–Portable Nationality of the Company, European Business Law Review, Vol. 21, Issue 2, 2010, p. 260; **Wymeersch,** *Transfer of the Company's Seat*, p. 661 *et seq*.; **Garcia–Riestra,** p. 1318.

939 **Casoli,** p. 84.

940 Case C–378/10 *Vale Építési Kft v. Hungary* [2012] ECR I–0000 (not yet published in ECR). While pending, this case was given notice in **Rammeloo, Stephan:** Case C–378/10, *VALE Építési Kft.*, pending, lodged on July 28, 2010, Freedom of Establishment: Cross–Border Transfer of Company "Seat", Maastricht Journal of European and Comparative Law, Vol. 18, No. 3, 2011, p. 353 *et seq.*; **Şandru, Daniel Mihail**: Freedom of Establishment of Companies in the European Union: Possible Effects of the Case VALE, C–378/10 Pending on the Case–Law of the Romanian Courts,

judgment in the area of corporate mobility in the EU. *VALE* was based on facts that are almost the reverse of those in *Cartesio*[941]. The case dealt with the cross–border conversion of a company incorporated under Italian law, Vale Costruzioni Srl, into a company governed by Hungarian company law.

Vale Costruzioni Srl (a limited liability company governed by Italian law, hereafter referred to as 'Vale'), established on 27 September 2000, was registered in Rome's commercial register on 16 November 2000. On 3 February 2006, Vale asked to be removed from that register on the ground that it intended to transfer its seat and its business to Hungary, and to discontinue business in Italy. The entry relating to Vale was deleted from the register on 13 February 2006, and replaced with an entry under the heading 'Removal and transfer of seat', stating that 'the company ha[d] moved to Hungary'[942].

On 14 November 2006, the director of Vale and another natural person adopted, in Rome, the articles of association of Vale Építési Kft (a limited liability company governed by Hungarian law) with a view to registration in the Hungarian commercial register. On 19 January 2007, the representative of Vale Építési Kft applied to the Budapest Metropolitan Court, acting as Commercial Court, to register the company under Hungarian law. The application stated that Vale Costruzioni was the predecessor in law to Vale Építési. Both the Commercial Court and the Budapest Regional Court of Appeal rejected the request, as a company which was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. Under the Hungarian law in force, a company which is not Hungarian cannot be listed as a predecessor in law[943]. In the Supreme Court, Vale submitted that the contested order infringes Arts. 49 and 54 TFEU, which are directly applicable, stating, *inter alia*, that the order failed to

International Journal of Academic Research in Accounting, Finance and Management Sciences, Vol. 2, No: 1, 2012, p. 141 *et seq*.

941 See §8–III–A of the thesis.

942 Case C–378/10 *VALE Építési Kft.,* §9.

943 For details of Hungarian Law V of 2006 on Company Information, Company Registration and Winding–up Proceedings see Case C–378/10 *VALE Építési Kft.,* §2–8; Hungarian Law on Conversion of Companies Criticized, EU Focus 2012, 299, pp. 15–16.

recognize the fundamental difference between the international transfer of the seat of a company without changing the national law which governs that company, on the one hand, and the international conversion of a company, on the other[944].

The Hungarian Supreme Court upheld the order of the commercial court but stayed the proceedings and referred several questions[945] regarding the conformity of the Hungarian legal regime with the right of establishment to the CJEU. The questions dealth with mainly with two issues: First, if national law allows domestic companies to convert into another (national) company form, must it also enable cross–border conversions? Second, if the first question is to be answered in the affirmative, to what extent is the receiving Member State required to recognise a foreign company as a predecessor of the company resulting from the conversion, and step taken abroad as fulfilling the national requirements for a conversion?

B. Submissions of the Parties and the Intervening Bodies

The plaintiff, Vale Építési, argued that contested order of Hungarian authorities infringes Arts. 49 and 54 TFEU, which are directly applicable. It stated that the order failed to recognise the fundamental difference between the international transfer of the seat of a company without changing the *lex societatis*, on the one hand, and the international conversion of a company, on the other. The Court clearly recognised that difference in *Cartesio* case[946].

The Hungarian, German and UK governments, as well as Ireland, submitted that the cross–border conversion of companies did not fall within the scope of application of Arts. 49 and 54 TFEU. They relied on the well–established principle stemming from *Daily Mail*, confirmed in *Cartesio*, that 'companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and

[944] Case C–378/10 *VALE Építési Kft.,* §10–15.
[945] Case C–378/10 *VALE Építési Kft.,* §16.
[946] Case C–378/10 *VALE Építési Kft.,* §14.

functioning'. In other words, the four Member States argued that it should be left to the host State to decide whether to allow an international conversion or not[947].

C. Opinion of AG Jääskinen

AG Jääskinen delivered his Opinion on 15 December 2011 about this case[948]. Due to the importance of this case for the further development of corporate mobility in the EU and the issues which arise in that context, it is worth commenting on AG's Opinion[949]. The AG focused on three issues: (i) whether VALE can rely on the freedom of establishment; (ii) how far this fundamental freedom is applicable to such a 'cross–border reincorporation' situation; (iii) and whether there is a restriction to said freedom, if so, whether there is a justification.

Regarding the first issue, the AG was confronted with a number of government representatives who argued that VALE cannot rely on Art. 49 of TFEU. The problem was that the Italian VALE (i.e. VALE Costruzioni) no longer existed according to Italian rules, because it was deleted from the Italian commercial register. At the same time, the Hungarian VALE (i.e. VALE Építési) did not yet exist as a legal person under Hungarian law since registration of the company in Hungary was refused[950]. The AG proposed that the Italian VALE (i.e. VALE Costruzioni) should be regarded as an economic entity. According to the AG, Hungarian VALE (i.e. VALE Építési) or its shareholders must be able to rely on Art. 49 of TFEU in order to continue the company's activities in Hungary, despite losing its corporate personality under Italian law and not gaining such personality under Hungarian law. As a result, in the AG's view, there were shareholders who carried out economic activities first in one Member

---

947 Case C–378/10 *VALE Építési Kft.,* §25.

948 See Opinion of AG Jääskinen delivered on 15 December 2011 in Case C–378/10 *VALE Építési Kft v. Hungary* [2012] ECR I–0000 (not yet published in ECR).

949 On this issue, see also **Biermeyer, Thomas/Holtrichter, Thore:** Opinion of Advocate General Jääskinen in Case C–378/10 VALE, Delivered on 15 December 2011, Not Yet Reported. The Missing Puzzle in Judge–Made European Law on Corporate Migration?, Columbia Journal of European Law, Vol. 18, No. 1, 2011.

950 It should be noted that the Hungarian courts regarded the application as a new company formation, thus granted Hungarian VALE (i.e. VALE Építési) the status of 'company in formation', which grants limited capacity to the company, before the final registration. This is how VALE Építési was capable of starting the litigation about its registration. See Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §37.

State (i.e. Italy) and then in another (i.e. Hungary), with the result that the situation falls within the scope of Art. 49 of TFEU[951].

With regard to the second issue, the AG refers to the *Cartesio* judgment[952] where the CJEU had stated that Art. 49 of TFEU applies to situations in which a company seeks to convert itself into a company governed by the law of another Member State[953]. The AG further refers to the *SEVIC* judgment[954] in which the CJEU determined that the scope of Art. 49 of TFEU also includes provisions regulating the access to a Member State different to the Member State of incorporation. On this issue, the AG argued that companies within the Internal Market should be recognised as having the right to choose freely the company law applicable to them and that freedom of choice enables them to choose the most favourable economic conditions and the most advantageous company law regime. As a result, the AG concluded that the TFEU articles relating to the freedom of establishment apply to the cross–border reincorporation of a company entailing a change in the *lex societatis*, the transfer of the seat and the formation of a company in accordance with the law of the host Member State which takes on as the legal successor the rights and obligations of the first company[955].

Concerning the third issue, the AG referred to paragraph 112 of the *Cartesio* judgment in which the CJEU had determined that a company conversion is possible 'to the extent that it is permitted under that law to do so'. The AG argued that the words 'that law' refer to the law of the host Member State to which the seat is transferred[956], and in accordance with *SEVIC*, such a Member State has to accept the 'cross–border reincorporation'[957].

The AG opined that host Member State may require the company to fulfil all the conditions which, under national law, are applicable to similar situations. But,

---

[951] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §43–52.

[952] Case C–210/06 *Cartesio,* §111–112.

[953] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §65.

[954] Case C–411/03 *SEVIC Systems AG,* §18,

[955] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §66–69.

[956] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §70.

[957] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §72.

according to the AG, this does not mean that national law rules can prohibit a cross–border reincorporation merely on the ground that the national law on companies does not contemplate a cross–border operation of that kind[958]. Thus, the AG concluded that the host Member State (i.e. Hungary) had the right to apply the national law concerning the formation and conversion of a limited liability company and therefore to require VALE Építési to fulfil the obligations laid down by national law in such cases[959]. The AG also argued that a Member State may also apply specific rules to cross–border situations in as far as they are proportionate and not discriminatory[960].

After this findings, the AG stated that the most important question was whether the company in formation, in this case the Hungarian VALE (i.e. VALE Építési) could require a company from another Member State to be entered into the commercial register as its legal predecessor. According to the AG, this has to be determined in accordance with the Member State of the company in which the legal predecessor is incorporated. He considered that a transfer of the assets from the predecessor company to the company in formation could take place only by virtue of the legal system of the Member State of origin[961].

D. The Judgment of the CJEU

As mentioned above, Hungary, Germany, the United Kingdom and Ireland argued that the case did not fall within the scope of the provisions of the Treaty on freedom of establishment. First of all, the CJEU was not impressed by this argument and it concluded that national legislation which enables national companies to convert, but

---

958 Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §73.

959 Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §74. Therefore, the Hungarian VALE (i.e. VALE Építési) must comply with all requirements of national law in relation to limited liability companies concerning, for example, the share capital, shareholders and the terms of the articles of association. Furthermore, in order to verify the transfer of assets and liabilities of the new company, the host Member State may require continuity in terms of accounting between the companies and the balance sheets correspond. The host Member State may also require the company's assets and liabilities to be recorded and verified by an auditor so as to ensure compliance with the rules on share capital. See Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §75.

960 Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §76.

961 Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §77.

does not allow companies governed by the law of another Member State to do so, falls within the scope of Arts. 49 and 54 TFEU[962].

The CJEU once again mentioned that companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning[963] and indeed the questions of whether Art. 49 TFEU applies to a company which seeks to rely on the fundamental freedom enshrined in that article is a preliminary matter which, as the EU law now stands, can be resolved only by the applicable national law[964]. Consequently a Member State unquestionably has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status[965].

In light of the settled case–law set out above, the CJEU noted that any obligation, under Arts. 49 and 54 TFEU, to permit a cross–border conversion neither infringes the power of the host Member State, nor that State's determination of the rules governing the incorporation and functioning of the company resulting from a cross–border conversion[966]. In other words, the Court distinguished between the undisputed authority of the Member States to establish the conditions for incorporation and the obligation to permit cross–border conversions in the first place. In the Court's view, it was not a contradiction to argue that the latter question was caught by the TFEU, while the former was not[967].

Secondly the Court found a restriction of the right of establishment because Hungary allowed domestic companies (with their seat in Hungary) to convert into another

[962] Case C–378/10 *VALE Építési Kft.,* §33.

[963] Case C–378/10 *VALE Építési Kft.,* §27, citing §19 of the *Daily Mail* and §104 of the *Cartesio* cases.

[964] Case C–378/10 *VALE Építési Kft.,* §28; Case C–371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECR I–12273, §26.

[965] Case C–378/10 *VALE Építési Kft.,* §29.

[966] Case C–378/10 *VALE Építési Kft.,* §30.

[967] Case C–378/10 *VALE Építési Kft.,* §32.

company type, but prohibited cross–border conversion[968]. In that respect the Court observed that legislation treating companies differently according to whether the conversion is domestic or of a cross–border nature, is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment laid down by the Treaty and, therefore, amounts to a restriction within the meaning of Arts. 49 and 54 TFEU. In other words, the differential treatment impeded the freedom of establishment of foreign companies[969].

Lastly, the Court moved on to discuss possible grounds for justification. Referring the *SEVIC* case, the CJEU mentioned the familiar, non–exhaustive list of 'overriding reasons in the public interest' that may justify a restriction of the Treaty freedoms, namely the 'protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions'. However, in the present case it was clear that the Hungarian government had failed to meet the proportionality test, since Hungarian law did not provide for targeted safeguards to protect any of above constituencies, but simply prohibited cross–border conversions. What would have been necessary rules that are specifically designed to pursue an objective in the public interest and that do not go beyond what is necessary to achieve that objective[970]**.**

The Court also discussed two well–established principles, i.e. the principle of equivalence and the principle of effectiveness[971]. The former provides that the rules governing cross–border conversions cannot be less favourable than those governing domestic conversions. In other words, if the Member State decides to allow national companies to convert, it must also make this transaction available to foreign companies

[968] See **O'Shea, Tom:** ECJ Says Hungarian Conversion Rules Unacceptable, Tax Notes International, Vol. 67, No. 13, 2012, p. 1215 *et seq.*; Case Comment: Hungarian Law on Conversion of Companies Criticised, EU Focus 2012, 299, pp. 15–16.

[969] Case C–378/10 *VALE Építési Kft.,* §36; Case C–411/03 *SEVIC Systems AG,* §22–23.

[970] Case C–378/10 *VALE Építési Kft.,* §39–40.

[971] "In that regard (…) it is settled case–law that, in the absence of relevant European Union rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the domestic legal order of each Member State, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness)". Case C–378/10 *VALE Építési Kft.,* §48.

and, in setting the terms of transaction, must not discriminate on the basis of nationality. The principle of effectiveness, which is a pervasive in EU law as the principle of equivalence and can be found in areas ranging from procedural law to administrative of tax law, requires Member States not to make the exercise of rights conferred under EU law excessively difficult[972].

As mentioned earlier, the Hungarian commercial court rejected Vale's application to be registered in the Hungarian commercial register because, pursuant to the Law on Company Information, Company Registration and Winding–Up Proceedings, the particulars of the predecessor company specified in that law referred to Hungarian companies. In the opinion of the Hungarian court, non–domestic companies could consequently not be listed as a predecessor in law. According to the CJEU, this rule constituted a clear violation of the principle of equivalence, since domestic companies were treated more favourably than foreign companies[973].

The Hungarian rules were further tested in light of the principle of effectiveness. In this context, it became relevant when during the process of the cross–border conversion, which necessarily involves the successive or cumulative application of two legal regimes, the law of the home Member State ceases to apply and the law of the host Member State begins to govern the transaction. The CJEU stipulated that the registration procedure in the host Member State is governed by the law of that State, which thus also determines, in principle, the evidence which must be furnished by the company seeking to be converted, certifying that conditions compatible with European Union law and required by the Member State of origin have been satisfied in that regard. The host Member State violates the principle of effectiveness if it refuses in a general manner, to take account of documents obtained from the authorities of the Member State of origin during the registration procedure and thus makes it impossible for the company seeking to convert to show that it actually complied with the requirements of the Member State of origin. EU law requires the host state to take due

[972] Case C–378/10 *VALE Építési Kft.,* §58–61.

[973] Case C–378/10 *VALE Építési Kft.,* §56–57.

account of such documents procured from the authorities of the Member State of origin[974].

Consequently, the Hungarian rules failed on both accounts. They discriminated on grounds of nationality by allowing for domestic, but not cross–border conversions (principle of equivalence), and they infringed the principle of effectiveness by requiring all phases in the process of conversion, including the existence of the predecessor in law, to have occurred in accordance with Hungarian law[975].

E. Commentary

1. A Clarification of the *Cartesio* Judgment

In *VALE*, the CJEU seems to have interpreted Arts. 49 and 54 TFEU as providing a firm legal basis for the right of cross–border conversions within the EU for all companies in a general manner, clarifying its earlier its *obiter dictum* in *Cartesio*.

As it will be mentioned later[976], in *Cartesio*, the CJEU ruled that if a company seeks to transfer its real seat from one Member State to another, the rules on freedom of establishment do not grant it the right to maintain the law of the Member State of incorporation (i.e. Member States are not forced by EU law to adopt the 'incorporation principle'). Importantly, though, the CJEU held that such a transfer of seat may not simply impose the compulsory winding–up of the company that wants to move its real seat. The Court stated that there is no immunity from Art. 49 of the TFEU for national legislation "preventing … [a] company from converting itself into a company governed by the law of the other Member State, *to the extent that it is permitted under that law to do so*"[977]. This phrase was ambiguous: did it mean this was only guaranteed if the host Member State had rules that allowed a cross–border company conversion? Or simply if the company fulfils the requirements of the new Member State. The Court has clarified that the latter interpretation is the right one.

---

974 Case C–378/10 *VALE Építési Kft.,* §59–61.

975 Case C–378/10 *VALE Építési Kft.,* §57 and §61.

976 See below, paragraph §8–III of the thesis.

977 Case C–210/06 *Cartesio,* §112, *emphasis* added.

The CJEU ruled that the phrase *'to the extent that it is permitted under that law to do so'* in paragraph 112 of Cartesio "cannot be understood as seeking to remove, from the outset, the legislation of the host Member State on company conversions from the scope of the provisions of the TFEU governing the freedom of establishment"[978].

This clarification provides more legal certainty for companies. On the one hand, the CJEU acknowledges the competence of the Member States to regulate 'the incorporation and functioning' of companies. Due to a lack of harmonization, it is for the Member States to determine the existence of a company. As a consequence, Member States may, for example, determine the connecting factor to their company law. On the other hand, this does not provide for immunity from EU law. If a company complies with the requirements set to constitute a company, it can rely on the freedom of establishment which, as the CJEU provides, confers a clear right to cross–border conversions[979].

2. Introduction of the Principles of Equivalence and Effectiveness

The real innovation of the CJEU lies in providing guiding principles on how the cross–border conversion should take place by the introduction of the principles of equivalence and effectiveness[980]. It must be noted that these principles are not new to EU law[981], but it would not be wrong to say that they are new to this field of EU company law[982].

As mentioned above, the principle of equivalence means that national procedural rules designated to ensure the protection of rights acquired under EU law should be governed by domestic law of the Member State provided those are not less favourable than those

978 Case C–378/10 *VALE Építési Kft,* §32.

979 Case C–378/10 VALE Építési Kft, §32. On this issue see **Biermeyer, Thomas:** Shaping the Space of Cross–Border Conversions in the EU. Between Right and Autonomy: *VALE* – Case C–378/10, *VALE Építési kft*, Judgment of the Court of Justice (Third Chamber) of 12 July 2012, Common Market Law Review, Vol. 50, Issue: 2, 2013, p. 578.

980 Case C–378/10 *VALE Építési Kft,* §48.

981 **Tridimas, Takis:** The General Principles of EU Law, 2nd Edition, Oxford University Press, 2006, p. 418 *et seq*.

982 As mentioned above in section §7–III–B of the thesis, in *SEVIC* the Court has indicated that rules for domestic mergers should also be applicable to cross–border mergers. But the Court in *SEVIC* has not used the term 'equivalence' and the complementary principle of 'effectiveness'was completely lacking in that case. See Case C–411/03 *SEVIC Systems* [2005] ECR I–10825, §14, 22, 23.

governing similar domestic situations. The principle of effectiveness requires that such procedural rules are not allowed to render impossible in practice or excessively impede the exercise of the rights acquired under EU law. Thus, whereas the principle of equivalence ensures that the Member State should use its existing rules on domestic conversion as a starting point, the principle of effectiveness may force Member States to deviate or adapt their domestic rules if that is necessary to make cross–border conversion possible[983].

By virtue of these principles the company wishing to convert cross–border should be able to rely on the rules of the host Member State applicable to similar domestic conversions[984]. This must make it significantly easier for companies to move from one Member State to another, whether the both Member States adhere the "real seat" theory as connecting factor. This fits with the principles of free movement in general within the Internal Market.

In this matter, the *VALE* judgment clarified that the rules of the Member State of reincorporation (i.e. the host Member State, in this case Hungary) fall within the scope of the TFEU provisions on the right of establishment, and must comply with the principles of equivalence and effectiveness. Consequently, the host Member State is under an obligation to recognise a predecessor in law incorporated under another jurisdiction or documents that were issued abroad and that show the assets and liabilities of the converting company as required under national law.

---

983 The CJEU referred to these principles in its previous case–law regarding the different areas of EU law. See, as examples, Case C–261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I–4025 §27; Joined Cases C–10/97 to C–22/97 *Ministero delle Finanze v. IN. CO. GE.'90 Srl and Others* [1998] ECR I–6307, §25; Joined Cases C–397/98 and Case C–410/98 *Metallgesellschaft Ltd and Others (C–397/98), Hoechst AG and Hoechst UK Ltd (C–410/98) v. Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I–01727, §85; Case C–443/03 *Götz Leffler v. Berlin Chemie AG* [2005] ECR I–9637, §50; Joined Cases C–222/05 to C–225/05 *van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I–4233, §28; Case C–445/06 *Danske Slagterier v. Bundesrepublik Deutschland* [2009] ECR I–2119, §31; Case C–115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein–Westfalen eV v. Bezirksregierung Arnsberg* [2011] ECR I–3701, §43.

984 It has been argued that the introduction of the principles of equivalence and effectiveness in the area of EU company law in relation to cross–border conversions raises difficult issues, both in terms of company law and other legal areas, such as tax law. For details on these issues see **Szabo, Daniel Gergely/Sorensen, Karsten Engsig:** Cross–Border Conversion of Companies in the EU: The Impact of the VALE Judgement, Nordic & European Company Law Working Paper No. 10–33, January 2013, available at SSRN: <http://ssrn.com/abstract=2198364>.

This is an interesting development, as up until now the principles of equivalence and effectiveness have applied to national judicial bodies, in order to assess national procedural rules within the scope of 'national procedural autonomy'[985]. Here, the CJEU suggests that these principles could also be applied in the context of administrative bodies, in the field of registration of companies.

3. The Requirement of Economic Activity

During the proceding, the legal status of the VALE companies was unclear. Because the Italian VALE (i.e. VALE Costruzioni) was removed from the Rome commercial register prior to the application for registration of Hungarian VALE (i.e. VALE Építési) in Hungary[986]. Thus, in this period, VALE Costruzioni did not legally exist any longer, and VALE Építési did not exist yet. Another problem was in the case that only existing companies can rely on the Art. 54 TFEU freedom of establishment. As explained above, AG Jääskinen solved this issue by arguing that at least the shareholders of the VALE companies could rely on Art. 49 of the TFEU[987].

It should be noted that the Court did not follow this approach but split this problem up into an issue related to the admissibility of the case and the economic activity of the companies. As the CJEU states in its *VALE* judgment, companies have a right to cross–border conversions. However, according to the Court in *VALE* and in accordance with case law such as *Cadbury Schweppes*, companies only have this right if they seek economic integration in the host Member State. The Court states "the concept of establishment within the meaning of the Treaty provisions on freedom of establishment

[985] In accordance with the principle of 'national procedural autonomy', in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law. See, for example, Case 33/76 *Rewe–Zentralfinanz eG et Rewe–Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, §5; Case C–312/93 *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* [1995] ECR I–4599, §12; Case C–453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others* [2001] I–06297, §29; *Case C–13/01 Safalero Srl v. Prefetto di Genova* [2003] ECR I–8679, §49; Case C–550/07P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* [2010] ECR I–08301, §113.

[986] Case C–378/10 *VALE Építési Kft,* §9–11.

[987] Opinion of AG Jääskinen in Case C–378/10 *VALE Építési Kft,* §48.

involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period"[988].

This is an important consideration in the context of seat transfers and company conversions. Companies have a right to a company conversion insofar as they comply with the above mentioned requirement. If a company situated in a Member State following the incorporation theory seeks to convert into a company law form of another Member State following this approach, the simplest way would be to transfer only the registered office. The national laws of both Member States might provide for this option, posing no problem. However, if the law of one of the Member States hinders the company in doing so, this legal entity will not be able to rely on a right to 'cross–border conversions' unless the company employs or seeks to employ economic activity in that country as defined in case law. The reason for this is that the registered office is merely an address. It does not imply any economic activity[989].

4. Concluding Remarks

In *VALE* decision, a general refusal to register a cross–border conversion has been held incompatible with the TFEU. Starting point for the assessment of conversions under the EU law should be the principle of *Daily Mail*, confirmed in *Cartesio*, which holds that Member States under whose national law the company is, or seeks to be, incorporated have 'the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status'[990].

In the context of the cross–border conversions, it falls to the host Member State to determine under which conditions the company can convert into a company governed by the law of that Member State. Where the host Member State permits the cross–border conversion, the Member State of incorporation is not able to prevent the

[988] Case C–378/10 *VALE Építési Kft,* §29; Case C–196/04 *Cadbury Schweppes*, §54

[989] For details on this issue see **Biermeyer,** *VALE,* p. 586–587.

[990] Case C–378/10 *VALE Építési Kft,* §29; Case C–210/06 *Cartesio*, §110; Case C–371/10 *National Grid Indus*, §27.

company from ‘converting itself into a company governed by the law of the other Member State’ by requiring the wingding–up or liquidation of the company[991]. In addition, as it has been held in *VALE*, if the host Member State allows conversions of domestic companies, it must also do so for cross–border conversions[992].

As a result of the judgment in *VALE*, corporate decision–makers now enjoy even greater freedom to determine the conditions under which companies operate. *Centros* and *Überseering* allowed promoters of new companies to choose the law under which the company would be established, regardless of the connecting factors required in the State in which the company would operate principally[993]. In *Inspire Art*, it was held that Member States may not require pseudo–foreign companies to comply with their laws, thereby consolidating a nascent market for incorporations[994]. *SEVIC* allowed companies to engage in cross–border mergers, thereby also allowing companies to change their governing law by establishing foreign subsidiaries and then engaging in reverse vertical mergers[995]. Following *VALE*, it is now clear that companies may convert to a new governing law in a single step through cross–border transformation[996].

In conclusion, the judgment in *VALE* constitutes a further step[997] forward in determining the boundaries of the right of establishment and the discretion of the Member States in regulating cross–border transactions in their company laws. It is consistent with, and refines, the framework established over the last three decades by judgments such as *Daily Mail*, *Centros*, and the most recently *Cartesio*. While the

991 That much is well established after *Cartesio*. See Case C–210/06 *Cartesio*, § 114.

992 See **Rammeloo, Stephan:** Case C–378/10 *VALE Építési Kft.*, Judgment of 12 July 2012, Not Yet Reported–Freedom of Establishment: Cross–Border Transfer of Company ‘Seat’–The Last Piece of the Puzzle?, Maastricht Journal of European and Comparative Law, Vol. 19, No: 4, 2012, p. 578.

993 Case C–212/97 *Centros,* §17; Case C–208/00 *Überseering,* §80.

994 Case C–167/01 *Inspire Art,* §105.

995 **Siems,** *Sevic*, p. 312–313; **Siems,** *Directive on CMBs*, p. 179–181; **Hansen, Lone L.,** p. 196–198; **Mucciarelli,** *Company Emigration*, p. 276–277.

996 **Gerner–Beurle, Carsten:** Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in Vale, available at SSRN: <http://ssrn.com/abstract=2249182>, p. 4 *et seq.*; **Biermeyer,** *VALE,* p. 571 *et seq.*; **Gelder, Gabriel Van:** The European Cross–Border Conversion from a Dutch Tax and Legal Perspective, EC Tax Review, Vol. 22, No. 4, 2013, p. 202 *et seq*.

997 **Van Eck, Gerco C./Roelofs, Erwin R.:** Vale: Increasing Corporate Mobility from Outbound to Inbound Cross–Border Conversion?, European Company Law, Vol. 9, Issue 6, 2012, p. 319 *et seq.*; **Hansen, Jesper Lau:** The *Vale* Decision and the Court’s Case Law on the Nationality of Companies, European Company and Financial Law Review, Vol. 10, Issue 1, 2013, p. 1 *et seq*.

interaction between the free movement provisions under the TFEU and rules of private international law remains intricate, contours of a European law on cross–border corporate restructuring are emerging[998]. This is quite remarkable in that the draft legislature for a 14th Company Law Directive has suffered a standstill over the past five years. The Opinion of the AG was delivered on 15 December 2011, and barely a month later the European Parliament had already strongly recommended reanimation of this legislative project[999]. In an earlier stage, the business world already unequivocally held a plea for harmonization in the field[1000]. It has been argued that this case is final call for 14th Company Law Directive[1001].

§8. CASE–LAW ON OUTBOUND ESTABLISHMENT OF COMPANIES

I. THE ROLE OF THE CJEU IN ENHANCING CORPORATE MOBILITY

If guaranteeing the freedom of establishment against host countries greatly contributes to enhance corporate mobility, also the importance of considering the matter from a home state perspective should not be overlooked. Since the exit of a company from its home jurisdiction is a precondition for the exercise of the freedom of establishment in the host state, its hindering would impose several restrictions on the European companies[1002].

As far as the freedom of establishment is concerned, Art. 49 TFEU provides that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited". This provision has been the object of the debate. On the one hand, it has been considered as covering emigration

---

[998] **Borg–Barthet,** *The VALE Judgment*, p. 7.

[999] European Parliament Resolution of 9 January 2012, with recommendations summed up from 'A to N' to the Commission on a 14th Company Law Directive on the cross–border transfer of company seats [2011/2046(INI)] See above, §6–II–D.

[1000] 'An overwhelming majority' of 79.6% of the respondents showed in favour of the 14th Company Law Directive. See Commission's Impact Assessment Report, p. 6.

[1001] **Rammeloo,** *The VALE Judgment,* p. 586. See also **Krarup, Mathias:** VALE: Determining the Need for Amended Regulation Regarding Free Movement of Companies within the EU, European Business Law Review, Vol. 24, Issue 5, 2013, p. 691 *et seq.*; **Cerioni, Luca:** The "Final Word" on the Free Movement of Companies in Europe Following the ECJ's VALE Ruling and a Further Exit Tax Case?, European Taxation, Vol. 53, Issue 7, 2013, p. 329 *et seq.*; **Szabo/Sorensen,** p. 17.

[1002] **Casoli,** p. 88.

and immigration cases alike; on the other hand, it has been claimed that it applies only to those restrictions imposed by the host country[1003].

Taken together *Segers*, *Centros*, *Überseering*, *Inspire Art* and *Sevic* make for companies possible to win the battle against those host countries challenging their right to exercise the freedom of establishment. However, what about if the home country prevents the company from carrying out its activities in another jurisdiction? Once again, the answer comes from an analysis of the CJEU's case–law. The Court has drawn a distinction between outbound and inbound situations, ruling in favor of corporate mobility only in the latter line of cases. The rationale behind seems to be that the Court still considers companies are creatures of national law and does not interfere with the Member States' power to determine the life and death of a company. In this respect, the *Daily Mail* and *Cartesio* judgments are good example of the way the CJEU reasons when home countries are concerned[1004].

II. THE BATTLE AGAINST HOME COUNTRY'S EXIT RESTRICTIONS: THE *DAILY MAIL* JUDGMENT

A. The Facts and the Procedure

Daily Mail and General Trust PLC (hereinafter "Daily Mail")[1005] was an investing holding company incorporated under the law of England and Wales. In 1984, Daily Mail decided to transfer its central management and control (i.e. its primary establishment) in the Netherlands whilst retaining its status as a UK company. The reason behind the transfer was to enable the company to sell a significant part of its non–permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under UK

[1003] On this argument, see **Szydlo, Marek:** Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the *Cartesio* Case, European Review of Private Law, Vol. 16, Issue 6, 2008, p. 986; **Casoli,** p. 89.

[1004] **Casoli,** p. 90.

[1005] See Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*. [1988] ECR 5483.

tax law, in regard, in particular, to the substantial capital gains on the assets which the Daily Mail proposed to sell[1006].

As both the United Kingdom and the Netherlands followed the incorporation theory, there was no issue of the company losing its legal personality or ceasing to be a company incorporated in the United Kingdom. Under English company law, a company incorporated in the United Kingdom and having its registered office there could transfer its central management and control outside of the United Kingdom, while preserving its personality. In this case, the company would have maintained its legal personality and no changes would have occurred in the law of incorporation[1007].

For this reason, an English company could have transferred its head office without fearing to lose its legal personality or ceasing to be a company duly incorporated in the United Kingdom. However, under section 482(1)(a) of the Income and Corporation Taxes Act 1970, applicable at the time of the decision, for such transfers, consent from the Treasury was required[1008].

Accordingly, the Daily Mail applied to the UK Treasury for transfer permission, but instead of waiting for the consent of the Treasury, the Daily Mail opened an investment management office in the Netherlands with a view to providing services to third parties[1009]. As a result, a dispute arose between Daily Mail and the UK Treasury. After a long period of negotiations, the Treasury agreed to give its consent on condition that the company would sell part of the assets before transferring its residence outside of the UK. But the Daily Mail initiated proceeding before the Queen's Bench Division of the High Court of Justice in 1986[1010].

[1006] Case 81/87 *Daily Mail,* §7. In other words, the reason why the Daily Mail wanted to transfer its residence to the Netherlands was that the tax situation, particularly with respect to capital gains tax payable on the sale of certain assets, was more favourable in the Netherlands than in the UK. See **Schmitthoff , Clive M.:** Daily Mail Loses in the European Court, Journal of Business Law, 1988, p. 454.

[1007] Case 81/87 *Daily Mail,* §3; **Casoli,** p. 91; **Panayi,** *Corporate Mobility in PIL*, p. 145 *et seq*.

[1008] As far as in England the tax residency of a company was determined on the basis of the place of its central management and control, it would have had to apply to the Treasury for consent before undertaking the transfer so as the settle its fiscal position. See Case 81/87 *Daily Mail,* §5.

[1009] Case 81/87 *Daily Mail,* §6.

[1010] Case 81/87 *Daily Mail,* §8.

In order to resolve the dispute, the national court stayed the proceedings and referred the case to the CJEU. The Court was basically requested to clarify whether the Treaty precluded a Member State from preventing a body corporate with its central management and control in that Member State from transferring, without prior consent or approval, that central management and control to another Member State in a case in which this would have, as a result, the avoidance of tax duties[1011].

B. Submissions of the Parties and the Intervening Bodies

The applicant, Daily Mail, argued that the condition regulated in the section 482(1)(a) of the Income and Corporation Taxes Act 1970 violated its freedom of establishment, which freedom gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally. In other words, it initiated the proceedings before the Court, arguing that the Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally[1012].

On the contrary, the United Kingdom denied that such a board meaning could have been given to the provisions on the freedom of establishment. In particular, while the Daily Mail argued that the establishment of an office in the Netherlands would had involved a genuine economic activity, the English Treasury was of the idea that, *per se*, the transfer of a company's central place of management and control would not have involved, automatically, the exercise of an effective business and so could have not been regarded as establishment within the meaning of the Treaty provisions[1013].

The European Commission essentially agreed with the UK Treasury, arguing that "in the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move" and only in the case in which "the transfer of central

[1011] Case 81/87 *Daily Mail,* §9.

[1012] Case 81/87 *Daily Mail,* §8.

[1013] Case 81/87 *Daily Mail,* §13; **Casoli,** p. 92.

management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty”[1014].

C. The Judgment of the CJEU

The CJEU started by analysing the scope of freedom of establishment. According to the Court, “even though the provisions [i.e. Arts. 49 and 54 TFEU (ex Arts. 43 and 48 EC)] are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 [Freedom of establishment] would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State”[1015].

In the case of a company, the right of establishment was generally exercised by the setting–up of agencies, branches or subsidiaries of a company. It was also exercised by taking part in the incorporation of a company in another Member State. Community law demanded that such companies receive the same treatment as nationals of that Member State as regards participation in the capital of the new company. Both forms of establishment (primary and secondary) had to be equally protected[1016].

However, this assertion later became heavily qualified. The CJEU ruled that, “unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning”[1017].

Member State legislation varied widely as regards the connecting factor required for the incorporation of a company and how that connecting factor could be subsequently modified. As the Court had emphasized, “Certain States require that not merely the

---

[1014] Case 81/87 *Daily Mail,* §14.

[1015] Case 81/87 *Daily Mail,* §16.

[1016] Case 81/87 *Daily Mail,* §17; **Panayi,** *Corporate Mobility in PIL*, p. 145 *et seq.*

[1017] Case 81/87 *Daily Mail,* §19.

registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding–up of the company with all the consequences that winding–up entails in company law and tax law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another"[1018].

The Treaty placed connecting factors such as the 'registered office', 'central administration' and 'principal place of business' on the same footing. Furthermore, (repealed) Art. 293 TEC encouraged, so far as is necessary, agreements between the Member States with a view to securing, *inter alia*, the retention of legal personality in the event of transfer of the registered office of companies from one country to another. However, no convention in this area had yet come into force and no directives on the coordination of company law were adopted. Therefore, the question of whether and how a registered office or head office already incorporated in one Member State may be transferred to another was not resolved by freedom of establishment but was the subject of national law. Any modification to this could only be achieved through future legislation or conventions[1019].

As a result, in *Daily Mail* case, the CJEU took position in favour of the United Kingdom Treasury and held that the provisions on the freedom of establishment "cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State"[1020]. As the EU law did not

[1018] Case 81/87 *Daily Mail,* §20.

[1019] Case 81/87 *Daily Mail,* §21–23.

[1020] Case 81/87 *Daily Mail,* §24.

confer on companies the right to such transfer, then there was no reason why the United Kingdom should be prevented from making the transfer subject to tax approval[1021].

D. Commentary

1. The pre–Europeanization Stage of Companies' PIL

Until the end of 90's, Member States' conflict of laws systems remained virtually 'state–centered' and private international lawyers could basically ignore the Community law. The 1980 Rome Convention on the Law Applicable to Contractual Obligations, which came into force in 1994, despite being a '*intra–communitarian convention*' adopted on an intergovernmental basis under the auspices of the then EEC, could be rightly regarded as an 'orphan' in the context of EC conflict of laws. At least until the 1st August of 2004, when the protocols conferring competence to the CJEU for the interpretation of the Convention came into force it could be regarded just as one multilateral conflict of laws convention like many others[1022].

With respect to companies' private international law, domestic private international law rules were basically regarded as a sort of reserved domain of the Member States not subject to EC primary law scrutiny. The *Daily Mail* judgment provides a good illustration of that pre–Europeanization stage of private international law on which national conflict of law rules were basically regarded as immune to the interference of Community Law. It has been considered that an explanation for *Daily Mail* was that this case was 'about lack of Community competence in private international law'[1023].

2. Affirmation of the Preliminary Matter (Creation) Theory

It is noteworthy that the CJEU interpreted the substantive scope of freedom of establishment in such way so as to avoid showing preference for one of the connecting factors concerning the formation of a company in international company law[1024].

1021 **Panayi,** *Corporate Mobility in PIL*, p. 147.

1022 **Sousa,** p. 13.

1023 **Sousa,** p. 14; **Rickford,** *Restructuring of Companies,* p. 1232.

1024 **Roth,** *From Centros to Überseering*, p. 189; **Panayi,** *Corporate Mobility in PIL*, p. 147

But the *Daily Mail* judgment affirmed what we may call the *preliminary matter* theory[1025], which is ultimately grounded on the assertion that companies, as legal persons '*are creatures of national law [and] exist only by virtue of varying national legislations*[1026] *which determines their incorporation and functioning*'[1027]. The complex relations between company's conflict of laws rules and TFEU provisions on freedom of establishment had, according to the CJEU, to be resolved by conventions concluded among Member States or harmonization measures adopted on the basis of Art. 50(2)(g) of TFEU [ex Art. 44(2)(g) TEC][1028].

According to this preliminary matter thesis, since the existence of a company depends on the law of the state where it was created and Member States remain exclusively competent to determine the relevant factor connecting the company to a given legal order which will govern its formation and functioning, those national provisions remain outside the scope of application of the Treaty provisions on freedom of establishment[1029]. When the relevant connecting factor chosen by a Member State (for example, the real seat) is broken, namely upon transfer of its real seat abroad, the Member State of origin which, on the basis of that connecting factor, conferred legal existence to the company and governs it, may impose its "legal death". The company,

---

1025 The CJEU expressly uses the term '*preliminary matter*'. See Case C–210/06 *Cartesio*, §109.

1026 Pursuant to Art. 12 of the Directive 2009/101/EC (ex Art. 11 of (repealed) Directive 68/151/EEC), once a company is registered, national law can only punish exhaustively listed incorporation errors with annulment; it is certainly not free to order annulment for breaches of emigration restrictions committed at a later stage. On the issue of the nullity of companies see **Dinç, İlhan:** 2009/101/AT Direktifi ve Türk Ticaret Kanunu Hükümlerine Göre Anonim Şirketin Butlanı, Journal of Turkey Justice Academy, Vol: 1, Year: 3, No: 10, June 2012, p. 305 *et seq.*

1027 Case 81/87 *Daily Mail,* §19. This theory is also named, for this reason, '*creation theory*' (*Geschöpftheorie*) in German academic writing. See **Sousa,** p. 15 and footnote 61. The application of EC freedom of establishment to companies is not clear, because legal entities do not exist and live *per se*, as human beings do, but only according to the law of a specific jurisdiction, which grants them legal personality and regulates their internal organization and their relations with the outside world. **Mucciarelli,** *Company Emigration,* p. 294.

1028 Case 81/87 *Daily Mail,* §21–22.

1029 In other words, Daily Mail has been interpreted to hold that the freedom of establishment cannot interfere at all with the national legislation relating to the emigration of companies. See **Schön,** *The Mobility of Companies*, p. 138; **Roth,** *From Centros to Überseering*, p. 189–190.

as long as it has ceased to exist, will not be able anymore to invoke the community freedom of establishment[1030].

The extinction of a company by a Member State, just like the decision to bring a company to life, would consequently fall outside the scope of application of Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC). In *Daily Mail* case, the CJEU apperas to allow Member States to place any limit on transfer abroad of the administrative seat or the registered office of nationally registered companies and, as a consequence, on identity–preserving company law changes[1031]. In other words, the Court ruled that the obstacles imposed by the country of departure was compatible with the EU law. This theory, understandable as it was at a pre–Europeanization stage of private international law, has the consequence that company's conflict of law rules of the Member State of origin of a company, which ultimately determine the company's existence, remain *a priory* exempted from primary Community Law scrutiny[1032].

3. *Daily Mail*: A Matter of Tax or Corporate Law?

It should be noted that the *Daily Mail* was an exit tax case that the Court decided as a company's conflict of laws case even though no conflict of laws problem was really involved. In effect, both United Kingdom and Dutch law allowed for the intended transfer of Daily Mail's centre of administration to the Netherlands whilst retaining its legal personality and continuing to be subject to UK company law. The case merely concerned the UK Treasury's right to refuse to allow Daily Mail to transfer its tax residence without paying accumulated tax in the UK. To have made such a transfer of residence would not have led to a loss of legal personality: Daily Mail would have simply become subject 'to a heavy fine under English tax law'[1033].

[1030] The decision was interpreted by some as precluding primary establishments from being able to invoke establishment rules, thereby hindering or restricting their exit to another Member State. See **Ringe,** *No Freedom of Emigration*, p. 625.

[1031] In other words, European companies can apparently freely to decide where to incorporate but are not free to change company law afterwards by deciding to reincorporate elsewhere. **Mucciarelli,** *Company Emigration,* p. 269.

[1032] **Sousa,** p. 16; **Edwards,** *Company Law,* p. 378; **Mucciarelli,** *Company Emigration,* p. 295.

[1033] **Sousa,** p. 14; **Rickford,** *Restructuring of Companies,* p. 1231.

In *Daily Mail*, also the AG Darmon noticed that '*the issue in the main proceedings lies at the point where company law meets tax law*'[1034]. It has been argued that in the 80's the CJEU did not feel comfortable in dealing with tax matters and rephrased the question as a conflict of laws problem, this way providing an answer to a question that the national judge did not really posed[1035].

This allowed the CJEU to handle the case as a companies' conflict of laws case, even though it did not concern whatsoever the issue of the conformity of the real seat theory with Community law or the problem of knowing if a company such as Daily Mail was allowed to transfer its centre of administration and control to another Member State whilst retaining its legal personality. Patently none of these problems was actually at stake in *Daily Mail* case since both the UK and the Netherlands followed the incorporation theory. From this perspective, the *Daily Mail* case was an exit tax case the CJEU decided as a conflict of law rules even though no conflict of laws problem was really involved[1036].

Following this case, there was speculation, especially in Germany, as to whether the Court of Justice in essence endorsed the real seat theory[1037]. Arguably, this was an over–expansive interpretation of the actual decision. The CJEU did not examine conflict of laws rules nor the issue of recognition of a foreign company. In essence, the *Daily Mail* judgment did not address the issue of winding up required by the country of incorporation but rather the requirement for Treasury consent for the transfer of residence of a company, in anticipation of the tax consequences[1038]. Furthermore, the CJEU's ruling was limited to situations in which companies wanted to transfer their central management and control and their central administration to another Member

---

[1034] See Opinion of AG Darmon on Case 81/87 [1998] ECR–5500, §1.

[1035] **Garcia–Riestra,** p. 1298; **Timmermans, Christian:** Impact of EU Law on International Company Law, European Review of Private Law, Vol. 18, Issue 3, 2010, p. 544; **Sousa,** p. 14; **Casoli,** pp. 92–93.

[1036] **Ringe, Wolf–Georg:** No Freedom of Emigration for Companies?, European Business Law Review, Vol. 16, Issue 3, pp. 624; **Sousa,** p. 14; **Casoli,** p. 93.

[1037] **Ringe,** *No Freedom of Emigration*, p. 625; **Ebke,** *Real Seat Doctrine*, p. 1020–1021.

[1038] **Panayi,** *Corporate Mobility in PIL*, p. 149.

State while retaining their status as companies incorporated under the legislation of the first Member State[1039].

III. STRIKING A BALANCE BETWEEN MOBILITY AND SOVEREIGNTY: THE *CARTESIO* JUDGMENT

A. The Facts and the Procedure

After *Daily Mail*, another decision[1040] of the CJEU on the compatibility of home countries' legislations hindering corporate mobility was the *Cartesio* case[1041]. Two decades after *Daily Mail*, the CJEU was being asked again to rule on the freedom of departure from the Member State in which the company was duly established. The circumstances of the case were, as usual, extensively described in the judgment itself and, consequently, were generally known; only a brief repetition of the most essential facts will be given here.

[1039] See Case 81/87 *Daily Mail,* §24.

[1040] After *Daily Mail*, the CJEU had a second occasion to rule on the compatibility of home countries' legislations hindering corporate mobility with the EU law in 2000. In that case *HSB–Wohnbau GmbH*, a company incorporated under German law, made an application for entry in the German Commercial Register of the transfer of its registered office from Germany to Spain, without changing the identity of the company. The national court, *Amtsgericht Heidelberg* (Local Court of Heidelberg), expressed doubts on this request and referred to the CJEU for a preliminary ruling. However, this preliminary reference was rejected by the CJEU due to procedural irregularities and no judgment followed. See Case C–86/00 *HSB–Wohnbau GmbH* [2001] ECR I–5355. For this reason, the question –whether the German registration authority was authorized to deregister such a company in Germany– remained unanswered, as the CJEU denied access pursuant to Art. 267 TFEU (ex Art. 234 TEC) on the ground that the EU registration authorities are not a 'court or tribunal' of a Member State. On this argument, see **Rammeloo,** *The 14th Company Law Directive*, p. 367; **Micheler,** *Recognition of Companies*, p. 523.

[1041] Case C–210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I–9641. See also this case notes: **Szydlo, Marek:** Case C–210/06, *CARTESIO Oktató és Szolgáltató bt*, Judgment of the Grand Chamber of the Court of Justice of 16 December 2008, Common Market Law Review, Vol. 46, Issue 2, 2009, p. 703 *et seq*.; **Biermeyer, Thomas:** Bringing Darkness into the Dark: European Corporate Cross–Border Mobility in Re Cartesio Case C–210/06 (16th December 2008), Maastricht Journal of European and Comparative Law, Vol. 16, Issue 2, 2009, p. 251 *et seq*.; **Bohrenkämper, Jan:** Corporate Mobility Across European Borders: Still No Freedom of Emigration for Companies? (Cartesio Oktató és Szolgáltató bt, ECJ (Grand Chamber) Judgment of 16 December 2008, C–210/06), European Law Reporter, No. 3, 2009, p. 82 *et seq*.; **Cains, Walter:** Case Note on *Cartesio* Decision by the European Court of Justice, Case C–210/06, Cartesio Oktató és Szolgáltató', European Review of Private Law, Vol. 18, Issue 3, 2010, p. 569 *et seq*.

Cartesio was a limited partnership (*betéti társaság*)[1042] formed on 20 May 2004 under the Hungarian law. It was registered in the commercial register on 11 June 2004. It established its registered office and its real seat (central administration) in Baja (Southern Hungary). Cartesio had two partners, both of whom were Hungarian nationals[1043].

On 11 November 2005, Cartesio filed an application with the Regional Court of Bacs–Kiskun for registration of the transfer of its seat[1044] to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's seat in the commercial register. By Court decision of 24 January 2006, that application was rejected on the ground that the Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law[1045]. The Court held that in order to change its operational headquarters

---

1042 This is a Hungarian company form, and it consists of at least one member with limited liability and at least one other with unlimited liability for the debts and obligations of the company. Although this kind of partnership is not formally a legal person, it has separate legal personality. Art. 54 TFEU (ex Art. 48 TEC) extends to "*companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non–profit–making*" and therefore covers Cartesio. See **Korom, Veronika/Metzinger, Peter:** Freedom of Establishment for Companies: the European Court of Justice Confirms and Refines its Daily Mail Decision in the Cartesio Case C–210/06, European Company and Financial Law Review. Vol. 6, Issue 1, 2009, p. 129, footnote 15.

1043 Case C–210/06 *Cartesio,* §21–22.

1044 It must be noted that, in *Cartesio* case there was confusion with regard to the legal terminology. Because the English translation of the Hungarian reference for a preliminary ruling seemed to ask whether a company that wished to transfer its "*registered office*" to another Member State could invoke the right to freedom of establishment. In contrast, the original English version of the Opinion delivered by the AG Maduro referred to the transfer of Cartesio's "*operational headquarters*". But the original Hungarian translation of the Opinion used the Hungarian company law term "*székhely*" referring to the company seat. However, the underlying issue at stake in *Cartesio* was neither the transfer of the registered office alone nor that of the real seat in itself, but the transfer of the "*székhely*", i.e. the simultaneous transfer of the real seat and the statutory seat. On this argument, see **Korom/Metzinger,** p. 135; **Bohrenkämper,** p. 85. See also Case C–210/06 *Cartesio,* §119.

1045 It is worth noticing that at the time, Hungarian law apparently followed a strict version of the real seat theory, at least in practical terms, with respect to companies incorporated in Hungary. Meanwhile, Hungary introduced an incorporation principle in its national law by the Act LXI of 2007, which entered into force on 1 September 2007. This new legislation allow a business to transfer its head office to another Member State while remaining registered (and keeping its registered office) in Hungary. See **Deak, Daniel:** Outbound Establishment Revisited in *Cartesio*, EC Tax Review, Vol. 17, Issue 6, 2008, p. 251; **Deak, Daniel:** *Cartesio*: A Step Forward in Interpreting the EC Freedom to Emigrate, Tax Notes International, Vol. 54, No. 6, 2009, p. 494. See also Commission's Impact Assessment Report, point 6.3.1., p. 42, footnote 95.

Cartesio would first have to be dissolved in Hungary and then reconstituted under Italian law[1046].

Cartesio then lodged an appeal against that decision with the Court of Appeal of Szeged, claiming that the Hungarian law was contrary to Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) to the extent that it drew a distinction between commercial companies according to the Member State in which they had their seat (i.e. real seat). According to Cartesio, on the basis of these Articles the Hungarian law cannot require Hungarian companies to establish their (real) seat in Hungary[1047].

The Court of Appeal of Szeged, referring to the ECJ's judgment in the *Daily Mail* case, noted that the freedom of establishment laid down in Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) did not include the right for a company incorporated under the legislation of a Member State and registered therein to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin. However, the Court did not exclude that the said principle might have been further refined in the later case law of the Court of Justice. Moreover, the Court of Appeal of Szeged pointed out that in *SEVIC Systems* the Court ruled that Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) precluded a general refusal of registration in the national commercial register of a Member State, of a merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company, in a situation where one of the two companies was established in another Member State, whereas such registration was possible, upon compliance with certain conditions, where the two companies participating in the merger were both established in the territory of the first Member State. Moreover –as the Hungarian Court recalled– it was the settled case law of the Court that national laws could not differentiate between companies according to the nationality of the person seeking their registration in the commercial register[1048].

[1046] Case C–210/06 *Cartesio,* §23–24.

[1047] Case C–210/06 *Cartesio,* §25–26.

[1048] Case C–210/06 *Cartesio,* §34–38.

Because of all these controversies concerning the compatibility of Hungarian law with Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC), the Court of Appeal of Szeged finally decided to stay the proceedings and referred questions[1049] to the CJEU for a preliminary ruling, including the following: "(i) If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?; (ii) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?; (iii) May Articles 43 and 48 EC be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?; (iv) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those Articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union, are incompatible with Community law?"[1050]

B. Submissions of the Parties and the Intervening Bodies

The CJEU received written and oral submissions from the parties, other related bodies and Member States. Cartesio, the Commission and the Netherlands Government submited that there has been a restriction on the right of establishment. On the other hand, the Hungarian Government, the Governments of Poland, Ireland, Slovenia and

---

[1049] It must be noted that the referring jurisdiction posed, on the first place, a series of three very interesting questions concerning the preliminary reference procedure, in particular on the issue of the compatibility with Art. 267 TFEU (ex Art. 234 TEC) of Hungarian legislation that allowed for a separate appeal to be brought against the decision making a reference for preliminary ruling and conferred jurisdiction to the appellate Court to vary the order for reference or even to set it aside. In spite of the practical and theoretical relevance of the answers provided by the CJEU on those procedural issues, the first part of the judgment where the Court addressed the first three questions posed by the referring jurisdiction will not be discussed in this thesis.

[1050] Case C–210/06 *Cartesio,* §40.

the United Kingdom argued that the case falls outside the scope of Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC)[1051].

Cartesio contended that the internal market needs an efficient solution to the necessity of relocating the seat of companies. Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) confer the right on a company formed in accordance with the laws of a Member State to move its seat to another Member State and demand the registration of the transfer in the national Companies Register. The plaintiff argued that the refusal by the Hungarian Company Court to register the transfer of its seat to Italy constituted an unlawful discrimination between companies from different EU Member States based on the location of their seat. Hungarian substantive law allows companies to move their seat within Hungary but denies them registration if they wish to move their seat outside Hungary. According to Cartesio, to prevent a company formed under Hungarian law from transferring its seat to another Member State of the EU constitutes a violation of EU law[1052].

The Commission argued that in 1988 the Court was right to acknowledge the supremacy of national law over EU law for the regulation of the transfer of the company seat. But, as it pointed out, that case law is 20 years old, reflects a certain time and stage in the development of EC law and has to be put into perspective. EC law has since moved on. The Commission concluded that national laws or practice, such as the Hungarian laws in question, which prevent a company from transferring its seat across borders without having to be wound–up and reincorporated in the new state of the seat, were contrary to Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC)[1053].

As mentioned above, the only intervening Member State which shared the Commission's liberal attitude, were the Netherlands. The Dutch Government argued that the right to transfer the seat follows directly from Arts. 49 and 54 TFEU (ex Arts.

[1051] See Opinion of Advocate General Maduro on Case C–210/06 *Cartesio* [2008] ECR I–09641, §24; See also **Korom/Metzinger,** p. 130 *et seq*.

[1052] **Korom/Metzinger,** p. 130.

[1053] See Commission of the European Communities, Written Submissions in the Case C–210/06 *Cartesio Oktató és Szolgáltató Bt*. reference for preliminary ruling, received by the Court on 14 September 2006, See **Korom/Metzinger,** p. 132.

43 and 48 TEC). Only conditions of public order, which are proportionate and necessary, could be imposed on such a transfer by the home state of the company[1054].

According to the Hungarian Government, the rules laid down by the Court in *Daily Mail* regarding primary establishment have not in any way been altered or superseded by the subsequent case–law, which related only to the secondary right of establishment. Hence, *Daily Mail* was still good law. Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) were not to be interpreted as granting a right to a company incorporated in accordance with the laws of one Member State to transfer its seat into another Member State whilst preserving the legal identity and applicable law of the state of incorporation. Furthermore, the Hungarian Government pointed out that a distinction must be drawn between the home state (state of departure) and the host state (state of arrival) of the company proposing to transfer its seat. The EU freedom of establishment does not prohibit the state of departure, here Hungary, from imposing or maintaining restrictions on the cross–border transfer of the company seat. Hungarian company law applies to companies having their seat within Hungary. If the seat is moved out of the country, the relationship between the company and Hungary ceases to exist and Hungarian law no longer applies. It was therefore not contrary to Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) to deny a company from keeping its Hungarian legal personality and registration in the Hungarian Companies Register if its seat was moved abroad[1055].

C. Opinion of AG Maduro

In order to try to clarify and give a different point of view of the case of *Cartesio*, the Opinion of AG Maduro[1056] will be discussed. Because, the AG's conclusion was unanimously welcomed by legal commentators accros Europe[1057] but, as will be discussed, the CJEU did not follow the path recommended by AG Maduro[1058].

1054 **Korom/Metzinger,** p. 133.

1055 **Korom/Metzinger,** p. 131.

1056 See Opinion of AG Maduro on Case C–210/06 *Cartesio* [2008] ECR I–09641.

1057 See **Korom/Metzinger,** p. 144, footnote 56 and accompanying text.

1058 **Gerner–Beuerle, Carsten/Schillig, Michael:** The Mysteries of Freedom of Establishment after *Cartesio*, International & Comparative Law Quarterly, Vol. 59, No: 2, 2010, p. 309.

As mentioned above, first three questions in *Cartesio* case deal with the procedure of a reference for a preliminary ruling and the only fourth question concerns the right of establishment. The AG reformulated question four as follows: 'whether Articles 43 EC and 48 EC [now, Arts. 49 and 54 TFEU] preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State'[1059].

The AG started the substantive analysis of the relevant Union law by pinning down that Cartesio seeks to transfer its operational headquarters to Italy, i. e. that it proposes the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period. Contrary to the views of the Hungarian, UK and certain other governments, the AG submitted that the case fell within the scope of EU Treaty rules on freedom of establisment[1060].

The AG then criticizes the previous case law claiming it was full of contradictory signals. This was based on one hand that in the *Daily Mail* case national rules fell outside the scope of freedom of establishment, while on the other hand in *Centros*, *Überseering* and *Inspire Art* they fell inside. The Opinion held that the distinction generally drawn between primary and secondary establishment is wrong and has never been entirely convincing. The Opinion furthermore affirmed as a matter of principle that restrictions on both the inbound and outbound establishment are prohibited and that therefore the distinction drawn between home states and host states is also inappropriate. In particular, the distinction between situations in which a Member State prevents or dissuades companies that are constituted under its own company law from seeking establishment abroad, and situations in which the host Member State restricts the freedom of establishment, never fitted the Court's general analytical framework for Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC)[1061].

Thus the AG Opinion concluded that it is impossible to argue that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under

[1059] Opinion of AG Maduro in *Cartesio*, §23.
[1060] Opinion of AG Maduro in *Cartesio*, §25.
[1061] Opinion of AG Maduro in *Cartesio*, §28.

their domestic law, irrespective of the consequences for the freedom of establishment. Otherwise, Member States would have *carte blanche* to impose a 'death sentence' on a company constituted under their laws just because it had decided to exercise the freedom of establishment[1062]. According to the AG this cannot be right from the perspective of EU law and would also be inconsistent with the CJEU's more refined approach developed in its recent case law on the right of establishment of companies. Therefore the idea cannot be maintained that the incorporation and functioning of companies is determined exclusively by the varying national legislation of the Member States[1063].

As a consequence, the AG answered the fourth question by submitting that Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State[1064].

As mentioned above, the AG's conclusion was unanimously welcomed by legal commentators accros Europe. Because AG Maduro clearly recognized the evolution of the relevant law in the jurisprudance of the CJEU since its contraversial decision 20 years ago[1065]. The AG discovered a basic incompatibility between *Daily Mail* and the later judgments (*Centros*, *Überseering*, *Inspire Art* and *SEVIC Systems*) and urged the Court to finally break with *Daily Mail* and take from the Member States their uncontrolled 'power of life and death' over companies. As a consequence, and examined below, the CJEU took a somewhat different approach to the AG Maduro in its judgment in *Cartesio* and did not overrule the *Daily Mail* ruling.

D. The Judgment of the CJEU

The CJEU started by describing the situation and reformulating question four as: "whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a

---

1062 Opinion of AG Maduro in *Cartesio*, §31.

1063 Opinion of AG Maduro in *Cartesio*, §27.

1064 Opinion of AG Maduro in *Cartesio*, §36.

1065 **Wooldridge, Frank:** The Advocate General's Submissions in *Cartesio*: Further Doubts on the *Daily Mail* Case, Company Lawyer, Vol. 30, Issue 5, 2009, p. 146.

Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State *whilst retaining its status as a company governed by the law of the Member State of incorporation*"[1066].

In the context of the questions of the referring court that concerned the freedom of establishment of companies, the CJEU first and foremost recalled some important statements from its earlier jurisprudence.

First of all, the CJEU cited the *Daily Mail* case approvingly, reiterating the point that "companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning"[1067]. The CJEU next recognized that Member State legislation varied widely "in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real head office (*siege reel*) –that is to say, the central administration of the company– should be situated within their territory, and the removal of the central administration from that territory thus presupposes the winding–up of the company with all the consequences that the winding–up entails under the company law. The legislation of other States permits companies to transfer their central administration to a foreign country but some of them make that right subject to certain restrictions, and the legal consequences of such transfer vary from one Member State to another"[1068].

Then the Court invoked paragraph 21 of *Daily Mail* according to which the Treaty had taken account of the above–mentioned variety in national legislation. Within the context of Art. 54 TFEU (ex Art. 48 TEC), in defining the companies which enjoy the

---

[1066] Case C–210/06 *Cartesio,* §199, *emphasis* added. The questions referred to the CJEU reflected the circumstance that Hungarian legislation prevented Hungarian companies and partnerships from transferring their seat to another Member State, unconditionally, either with or without a change of the applicable *lex societatis*. But the Court assumed that Hungarian law refused only the cross border transfer of seat abroad with *no change* on the *lex societatis* of the company. In reality, however, Hungarian law disallowed *every possibility* of transfer of seat of Hungarian companies abroad. On this argument, see **Sousa,** p. 33–34.

[1067] Case C–210/06 *Cartesio,* §104, citing §19 of the *Daily Mail* case.

[1068] Case C–210/06 *Cartesio,* §105, citing §20 of the *Daily Mail* case.

right of establishment, the Treaty "placed on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company"[1069].

Next, the Court referred to paragraph 70 of the judgment in *Überseering* where the above–mentioned *dicta* were confirmed and where the Court also inferred that the question whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are both determined by the national law in accordance with which the company had been incorporated. Consequently, a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer of the company's actual centre of administration to a foreign country[1070].

The Court also pointed to paragraphs 21 to 23 of *Daily Mail* and to paragraph 69 of *Überseering* where the conclusion was reached that in defining, in Art. 54 TFEU (ex Art. 48 TEC), the companies which enjoyed the right of establishment, the Treaty regarded the differences in the legislation of the various Member States, "both as regards the required connecting factor for companies subject to that legislation and as regards the question whether –and, if so, how– the registered office (*siege statutaire*) or real head office (*siege reel*) of a company incorporated under the national law might be transferred from one Member State to another, as *problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions*"[1071].

It was, therefore, a question of national law whether and how a company is connected with a Member State, so as to benefit from freedom of establishment[1072]. It is obvious

[1069] Case C–210/06 *Cartesio,* §106, citing §21 of the *Daily Mail* case.

[1070] Case C–210/06 *Cartesio,* §107, citing §70 of the *Überseering* case.

[1071] Case C–210/06 *Cartesio,* §108, citing §69 of the *Überseering* and §21–§23 of the *Daily Mail* case. *Emphasis* added.

[1072] Case C–210/06 *Cartesio,* §108–109.

that the CJEU did not wish to show any preference for the real seat theory over the incorporation theory and vice–versa. As the Court ruled "in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 TEC applies to a company which seeks to rely on the fundamental freedom enshrined in that article –like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom– is a *preliminary matter* which, as Community law now stands, can *only be resolved by the applicable national law*"[1073].

A Member State could refuse to allow a company incorporated under domestic law and moving its seat to another Member State to remain governed by its laws. As the CJEU stated: "A Member State has the 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 right of establishment, and that required if the company is to be able subsequently to 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 breaking the connecting factor required under the national law of the Member State of incorporation"[1074].

The Court proceeded to make a distinction. *Cartesio* dealt with the situation where the seat of a company incorporated under the law of one Member State was transferred to another Member State with no change as regards the law which governs that company, i.e. transfer without reincorporation. This situation was, according to the CJEU, distinguishable from that where a company moved to another Member State and was converted into a form of company which was governed by the laws of that other Member State, i.e. transfer *with* reincorporation and a change of governing law. The latter situation could be covered by the EU law. If the host State allowed such migration under its laws but the home State made it dependent on the prior winding–up

[1073] Case C–210/06 *Cartesio,* §109. *Emphasis* added.

[1074] Case C–210/06 *Cartesio,* §110. *Emphasis* added.

or liquidation of the company, then this would be a *restriction* to the freedom of establishment[1075].

The CJEU rejected the Commission's argument that the absence of Community legislation in this area was remedied by rules governing the transfer of the company seat to another Member State as laid down in regulations such as the SE Regulation[1076]. These rules could not be applied *mutatis mutandis* to the cross–border transfer of the real seat of a company created under domestic law. This regulation enabled "the new legal entities which they establish to transfer their registered office and, accordingly, also their real seat (*siège réel*) –both of which must, in effect, be situated in the same Member State– to another Member State without it being compulsory to wind–up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer"[1077]. However, Cartesio merely wished to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, i.e. without a change of governing law. Therefore, Community legislation could not be applied *mutatis mutandis* on the facts of this case[1078].

The CJEU further observed that *Sevic* had not qualified the scope of *Daily Mail* and *Überseering*. *Sevic* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross–border merger. This situation was fundamentally different from the circumstances at issue in *Daily Mail*, but similar to *Centros*, *Überseering* and *Inspire Art*[1079].

As in *Daily Mail*, also in *Cartesio*, the CJEU did not rule in favour of corporate mobility. The Court, therefore, concluded that as EU law now stands, the provisions on the freedom of establishment were "to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State

[1075] Case C–210/06 *Cartesio,* §111–112.
[1076] For details of SE Regulation, see above Chapter Two, §4–I of the thesis.
[1077] Case C–210/06 *Cartesio,* §116–117.
[1078] Case C–210/06 *Cartesio,* §119–120.
[1079] Case C–210/06 *Cartesio,* §121–122.

may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation"[1080].

E. Commentary

1. Confirming *Daily Mail*: The Privileged Position of the State of Incorporation

As a starting point, the CJEU confirmed the *obiter dictum* declared in *Daily Mail*, according to which companies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning[1081]. In this context, the CJEU assumed that every Member State has not only the power to determine the connecting factor (i.e. registered office only or registered office together with real seat) that must be respected by the given company at the time of its formation for it to be regarded as incorporated under the law of that Member State, but also the power to determine the connecting factor required so that the company could maintain its status as a company incorporated under the law of that Member State. Therefore, companies, being creatures of national law, have to be set up in accordance with Member States' laws and they can also remain in existence in accordance with such laws[1082].

The CJEU held that the question whether a company formed in accordance with the law of a given Member State can transfer its seat to another Member State without losing its genuine legal personality is determined by the national law of the State of incorporation. In other words, the very existence of a company is inseparable from its status as a company incorporated under the law of a Member State. As in *Daily Mail*, also in *Cartesio*, the Court ruled in favour of the national authorities preventing a company from exit the jurisdiction of incorporation[1083]. Consequently, it must be

[1080] Case C–210/06 *Cartesio,* §124.

[1081] Case 81/87 *Daily Mail*, §19; Case C–210/06 *Cartesio,* §104.

[1082] **Wisniewski, Andrzej/Opalski, Adam:** Companies' Freedom of Establishment after the ECJ *Cartesio* Judgment, European Business Organization Law Review, Vol. 10, Issue 4, 2009, p. 604; **Korom/Metzinger,** p. 148; **Panayi,** *Corporate Mobility in PIL*, p. 166.

[1083] As mentioned above, AG Maduro opined that Arts. 43 and 48 TEC (now, Arts. 49 and 54 TFEU) preclude national rules which would make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State. But the Court took a somewhat concluded that the Member State of incorporation has a privileged (exclusive) position –even within the framework of the European law– with regard to companies formed under its own laws[1084].

Consequently, the final conclusion of the CJEU in *Cartesio* is fully understandable. As quoted above, in this conclusion the Court stated that Arts. 49 and 54 TFEU (ex Arts. 43 and 48 TEC) are to be interpreted "as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation"[1085]. This conclusion is justified in the light of the Court's line of argumentation to the extent that if the national legislation does not allow a company to transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of its incorporation, then the transfer of the company's real seat to another Member State is equivalent to that company not being regarded any longer by the first Member State as a company incorporated under the legislation of that State. After such a transfer the company ceases to be included in the subjective scope of protection of the freedom of establishment [within the meaning of Art. 54 TFEU (ex Art. 48 TEC)], and it no longer has any possibility to enjoy any of the rights conferred by the Treaty rules on freedom of establishment. As a result, the Member State concerned is free to issue such legal rules (i.e. rules not allowing the company to transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State

different approach to the AG in its judgment in *Cartesio*. See Opinion of AG Maduro on Case C–210/06 [2008] ECR I–09641; **Wooldridge,** *The AG's Submissions in Cartesio*, p. 145 *et seq*.

1084 **Szydlo,** *Case C–210/06 Cartesio*, p. 712; **Casoli,** p. 104; **Deak,** *Cartesio*, p. 498. In other words, Member States would, in effect, have the possibility of freely 'killing at the border' their companies as long as those companies intended to exercise the right of primary establishment by moving their head office abroad. See **Sousa,** p. 46.

1085 See Case C–210/06 *Cartesio,* §124. This ruling considerably increases complexity of the right to freedom of establishment. Whether a company and its owners and management may rely on freedom of establishment appears to be intrinsically linked to, and dependent upon, the structure not just of the conflict of laws rules adopted by the affected Member States, but also their substantial company laws. For detailed analysis of the transfer of real and/or registered seat in different scenarios see **Gerner–Beuerle/Schillig,** p. 313 *et seq*.

of its incorporation), and does not have to take account in that respect of the Treaty rules on freedom of establishment[1086].

2. *Obiter Dictum* Regarding Cross–Border Conversion

A very important issue that has been touched upon by the CJEU in *Cartesio* is the companies' right of cross–border conversion[1087]. Cross–border conversion[1088] is a process that consists in the change of the law applicable to a company. The Court stated that, in the case of conversion, the Member States' power to determine the connecting criterion on the basis of which a company's nationality should be determined "*cannot (…) justify the Member State of incorporation, by requiring the winding–up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so*." In particular, "*such a barrier to the actual conversion of such a company, without prior winding–up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited.*[1089]" As a result, the Cartesio allows for a particular modality through which a company can exit from the state of incorporation, i.e. conversion.

The Court assumed that when the company (formed in accordance with the law of a Member State) converts itself into a company governed by the law of another Member State (thus when this company pursues an activity contained within the objective scope of protection of the Treaty rules on free movement), then on the ground of the Treaty

[1086] **Szydlo,** *Case C–210/06 Cartesio*, p. 714.

[1087] **Morsdorf, Oliver:** The Legal Mobility of Companies within the European Union through Cross–Border Conversion, Common Market Law Review, Vol. 49, Issue 2, p. 629 *et seq*.

[1088] Through conversion the company that has been formed in accordance with the law of one State (the home state), and is governed by the law of that State, changes its personal statute (applicable law) and adapts to the requirements that are established for companies under the legislation of another State (the host state). For detailed information on this issue, see **Szydlo, Marek:** The Right of Companies to Cross–Border Conversion under the TFEU Rules on Freedom of Establishment, European Company and Financial Law Review, Vol. 7, Issue 3, 2010, p. 414 *et seq*.

[1089] Case C–210/06 *Cartesio,* §112–113, *emphasis* added.

rules on free movement it has the right to be free from the restriction that consists in the dissolution of that company by its home Member State[1090].

The Court's analysis is based on a distinction[1091] between a company wishing to move–out its real seat while continuing to be subject to the same *lex societatis,* and a company wishing to move–out its seat with a change of *lex societatis*. While the former situation which was met in *Daily Mail* and *Cartesio* does not entail an exercise of the freedom of establishment, the latter situation does constitute such an exercise. This must be saluted as a progress in the case–law of the Court vis–à–vis *Daily Mail* where that distinction had not been expressly made[1092].

In the first situation, the CJEU considers that the connecting factor adopted by the real seat Member State of incorporation of a company –which requires the coincidence between its real seat and the place of incorporation– is broken when the company moves its head office abroad. In this case a Member State remains free to prohibit such a transfer by requiring the company to wind–up. Such situation will remain outside the scope of the freedom of establishment because the company, according to national law, does not exist anymore in the Member State where it was incorporated in result of having transferred its seat abroad. In other words, the relationship between a company and its state of incorporation is outwith the scope of the Treaty provisions regarding the freedom of establishment. In this case, the CJEU found that the Member State of incorporation can still determine 'life and death' of a company[1093].

In the second situation, however, the CJEU considers that the Member State cannot prevent the company, by requiring its liquidation, to transfer its seat to another Member

1090 **Szydlo,** *Case C–210/06 Cartesio*, p. 721.

1091 The distinction is technically *obiter* because in *Cartesio,* the Hungarian company precisely wanted to transfer its seat without a change of governing law. See **Panayi,** *Corporate Mobility in PIL*, p. 166; See also **Wisniewski, Andrzej/Opalski, Adam:** Companies' Freedom of Establishment after the ECJ *Cartesio* Judgment, European Business Organization Law Review, Vol. 10, Issue 4, 2009, p. 617.

1092 **Sousa,** p. 47; **Roth,** *From Centros to Überseering*, p. 207; **Panayi,** *Corporate Mobility in PIL*, p. 167.

1093 **Borg–Barthet, Justin:** European Private International Law of Companies After *Cartesio,* International and Comparative Law Quarterly, Vol. 58, Issue 4, 2009, p. 1025; **Cerioni, Luca:** Cross–Border Mobility of Companies within the European Community after the *Cartesio* Ruling of the ECJ, Journal of Business Law, Year 2010, Issue 4, pp. 318–319.

State since the company '*is converted into a form of company which is governed by the law of the Member State to which it has moved*.' According to the Court, this last situation, differently from the first, will be covered by the Treaty provisions on the freedom of establishment. In the latter case, the Court found that a Member State may not restrict a company's emigration from its territory by requiring the winding up of the company[1094]. It can be concluded that a Member State's power to determine 'life and death' of a company incorporated under its legislation no longer exists where this company aims at changing the applicable national law[1095].

The distinction made by the CJEU between the two situations is appropriate from the point of view of the result achieved: Member States may legitimately counter their companies' intentions to transfer their head office abroad while continuing to be subject to the *lex societatis* of origin, but they cannot prevent their companies from transferring their head–office abroad with a change of *lex societatis*[1096].

According to the Court, as a result, it cannot prevent the company from converting itself into a company governed by the law of another Member State, to the extent that it is permitted under that law to do so. It could be concluded that, while the restrictive approach of *Daily Mail* was confirmed, the notion of the freedom of establishment was expanded beyond the home Member State perspective[1097]. Therefore, if Cartesio bt. had

---

1094 It can be concluded that in the *Cartesio* judgment the CJEU did not limit the scope of application to such an extent that the real seat doctrine can no longer be considered to exist. While leaving sufficient scope for the real seat doctrine to continue to exist, its effects have again been limited where they conflict with the treaty freedoms. Where a change in the applicable national law is foreseen with the transfer of the central place of administration companies may not be killed off at the border unless this can be justified. On this argument see **Valk, Oliver:** C–210/06 *Cartesio*– Increasing Corporate Mobility through Outbound Establishment, Utrecht Law Review, Vol. 6, Issue 1, 2010, p. 162–163.

1095 **Cerioni,** Cross–Border Mobility, p. 323.

1096 **Sousa,** p. 47–49; **Gerner–Beuerle/Schillig,** p. 312–313; **O'Shea, Tom:** *Cartesio*: Moving a Company's Seat Now Easier in the EU, Tax Notes International, Vol. 53, No 12, 2009, p. 1072. It has been argued that the logic of this distinction lies in the fact that, by electing to change its governing law in the process of emigrating, the company frees itself of its dependence on its governing law and the connecting factors prescribed therein. On this argument, see **Borg–Barthet,** *European PIL after Cartesio,* p. 1027.

1097 *Sevic* provided us with an expanded interpretation of the freedom of establishment from the host Member State viewpoint; but *Cartesio* provided a wider understanding of the freedom of establishment from the home Member State perspective. In *Sevic*, the CJEU ruled that inbound mergers cannot be prohibited by the host Member State, and in *Cartesio*, the Court stated that a home Member State cannot prevent a domestic company from converting itself into a company converted into an Italian S.a.s. *(società in accomandita simplice),* accompanied by a change in the applicable law from Hungarian to Italian, then Hungarian law could not have prevented the transfer of the seat[1098].

3. After *Cartesio*: A New Era of Corporate Mobillity?

In *Daily Mail*, also in *Cartesio*, the CJEU ruled in favour of the national authorities preventing a company from the exit jurisdiction of incorporation. As mentioned earlier, the Court, however, added a *caveat* to the *Daily Mail* judgment by stating that the home state cannot bar the emigration of a company in the case in which the company carries out a conversion, i.e. the company converts to one of the corporate vehicles offered by the host jurisdiction and ceases to be subject to the law of state of origin.

It is worth to note that the Court's judgment opened new perspectives for the cross–border seat transfer by introducing the fundamental distinction between on the one hand, the cross–border seat transfer of a company with no change as regards the law which governs that company, and, on the other, the transfer with an attendant change as regards the national law applicable. Therefore, by removing obstacles to corporate establishment, the legal scope for corporate mobility has increased after the *Cartesio* judgement[1099].

The CJEU says in *Cartesio* that the right of the companies to the international conversion derives –if the laws of the host state so permit– directly from the Treaty provisions on freedom of establishment. The Court seems to suggest that the international conversion is a legal possibility even without the intervention of the European legislator. This raises questions both with respect of the position of the

governed by the law of another Member State. This is a further step towards the more effective exercise of freedom of establishment. See **Papadopoulos**, *Regulatory Approaches,* p. 85–86; **O'Shea,** *Cartesio,* p. 1071.

1098 **Korom/Metzinger,** p. 154; **Bohrenkämper,** p. 86.

1099 **Valk,** p. 167.

Member State of incorporation and with that of the Member State of destination upon an international transformation[1100].

First, as regards the state of incorporation, the Court says that on the condition that the Member State of destination permits the conversion, the state of incorporation must not prevent the company from converting itself into a company form of the other state. This implies that the courts of the Member State of incorporation will have to verify whether the law of the Member State of destination allows for a cross–border conversion. If it does, the company may not be hindered in migrating by requiring its winding up or liquidation by law[1101].

Second, with respect to the Member State of destination of the conversion the CJEU leaves more room for state sovereignty. The *obiter dictum* was not concerned with the position of the destination state, but the formulation "to the extent that it is permitted under that law to do so" seems to suggest that the Member State of destination may have a certain freedom to decide whether or not it will accept companies formed under the law of another Member State to convert into a company form under its national law. In fact, the company's entitlement to the exercise of the European freedom of establishment in the form of the international transformation depends precisely on the choices made autonomously by the national legislators[1102].

But it should be noted that the last *dictum* does not mean that the CJEU is conferring an unrestricted freedom to the Member State of destination to refuse the conversion and inbound transfer of seat by companies from other Member States. The Court was not confronted in *Cartesio* with an inbound situation. It merely purported to allow Member State of origin to prevent their companies from becoming *stateless companies* as a result of their transfer of seat abroad. This may eventually occur, for instance, in situations where it is impossible to establish a correspondence between the form of the

---

1100 In other words, there are two main aspects of emigration of a company; its relationships with the home state and with the host state. The CJEU concentrated on the first aspect because it was the host state court that inquired how it should treat Cartesio's application for registration of its new seat in Italy. See **Wisniewski/Opalski,** p. 617.

1101 **Korom/Metzinger,** p. 155; **Szydlo,** *Cross–Border Conversion under the TFEU*, p. 428 *et seq.*

1102 **Korom/Metzinger,** p. 156; **Szydlo,** *Cross–Border Conversion under the TFEU*, p. 435 *et seq.*

company wishing to transfer its seat abroad with a change of *lex societatis* and the forms of companies known in the Member State of destination. In such cases it would be legitimate for the Member State of origin to disallow the transfer, provided that the Member State of destination rightfully refuses to accept the company's conversion and immigration[1103].

4. Directive to Advance Corporate Mobillity is Needed

In its case–law, with the *Centros/Überseering/Inspire Art* trilogy, the CJEU has decisively induced Member States to abandon the real seat theory[1104]. The *Cartesio* case also indicates that real seat Member States must now allow their companies, at least, to transfer their seat abroad with a change of *lex societatis,* without being wound up or liquidated, through cross–border conversion. Member States must, in light of the EU Treaty provisions on the right of establishment, give their companies no less than the possibility of transferring their seat abroad with a change of *lex societatis* through the conversion of the emigrating company in a form of company of the host Member State. If Member States do not allow for such a possibility they will be infringing the directly applicable EU Treaty provisions on the right of establishment.

This *obiter dictum* of the CJEU essentially restates the idea formulated in the abandoned 14th Company Law Directive. In other words, the Court's ruling in *Cartesio* constitutes a clear incentive for the Commission to put forward a proposal of 14th Company Law Directive on the cross–border transfer of seat permitting a transfer of head office with a change on the applicable law through the company's cross–border conversion into a form of company of the host Member State[1105]. In light of the

[1103] **Sousa,** p. 50.

[1104] It has been argued that this jurisprudence constitutes the victory of the Anglo–Saxon incorporation theory pursuant to which the founders of a Corporation freely choose the place of incorporation of a company and hence the *lex societatis*. The outcome of these decisions consequently brought about the definitive rejection of the real seat theory. On this argument See **Menjucq, Michel**: Towards the End of the Real Seat Theory in Europe?, in: Perspectives in Company Law and Financial Regulation–Essays in Honour of Eddy Wymeersch (Michel Tison *et al*. eds.), Cambridge University Press 2009, p. 124 *et seq*.; **Sester Peter/Cárdenas José Luis:** The Extra Communitarian Effects of *Centros*, *Überseering* and *Inspire Art* with regard to Fourth Generation Association Agreement, European Company and Financial Law Review, Vol. 2, Issue 3, 2005, p. 398 *et seq*.

[1105] It has been argued that: In light of *Cartesio* it is possible to argue that there is an urgent need for such a 14th Company Law Directive establishing an harmonized regime of companies' cross–border disparity of requirements imposed by Member States for both inbound and outbound cross–border transfers of seat, the creation of a harmonized regime governing the cross–border transfer of seat through a cross–border conversion appears as step that the EC legislator will now have to make[1106].

As mentioned in earlier sections, in *Daily Mail* and in *Cartesio* the CJEU expressly considered that the problem of the cross–border transfer of the registered office and/or of the real seat of a company had to be dealt with by community legislation or conventions[1107]. However, twenty five years after *Daily Mail* there are no any legal instrument at EU level directly addressing that problem. Not even a proposal of that Directive has been put forward by the Commission. The efforts of the Commission regarding the adoption of such a 14th Company Law Directive were put to an end in late 2007. The reasons for the Commission's current 'no–action' strategy regarding the adoption of a 14th Company Law Directive on the cross–border transfer of registered office are summarized in earlier sections. It should be noted that, by the Action Plan of 2012, the Commission decided on further investigation on the need for 14th Company Law Directive[1108].

Even before the *Cartesio* judgment, the Commission's position on the suspension of the legislative process of the 14th Company Law Directive was vulnerable and unreasonable when viewed in the context of the chequered history of the harmonization of company law and private law of companies[1109]. Because the Commission wanted to wait for new incentives from the CJEU, expected from the judgment in the *Cartesio* case. Whatever the expectations about the final ruling, it had been obvious beforehand

---

conversion. See **Vossestein,** *Cross–Border Transfer of Seat*, p. 123. The 14th Company Law Directive has been abandoned, yet the re–negotiation and adoption of a measure ensuring the international seat transfer is more topical than ever. See **Mucciarelli,** *Company Emigration,* p. 302; **Korom/Metzinger,** p. 160; **Rammeloo,** *The 14th Company Law Directive*, p. 370 *et seq*.

1106 **Szydlo,** *Cross–Border Conversion under the TFEU*, p. 442; **Sousa,** p. 52. In other words, the *Cartesio* judgment and its implications very clearly lead to the conclusion that a legislative effort at EU level is necessary for the further development of companies' freedom of establishment. See **Wisniewski/Opalski,** p. 620.

1107 Case 81/87 *Daily Mail*, §21–22; Case C–210/06 *Cartesio,* §108.

1108 See paragraph §6–I–F and §6–I–G of the thesis.

1109 **Wymeersch,** *Directive on Corporate Mobility,* p.161; **Vossestein,** *Transfer of the Registered Office,* p. 53; **Borg–Barthet,** *European PIL after Cartesio,* p. 1028.

that it could not replace harmonisation of national laws. A judgment in an individual case confirming the essential existence of a certain freedom cannot replace transparent substantive and procedural rules regarding the cross–border operation or remove obstacles resulting from different approaches to conflict of laws problems. For this reason, comprehensive legislation is required to compensate for the international contradictions resulting from convoluted case–law and piecemeal approach harmonization. Consequently, since the CJEU has declared that the possibility of cross–border conversion is open to national companies, the European legislator really has no other choice but to provide adequate regulating mechanisms[1110].

[1110] **Wisniewski/Opalski,** p. 621; **Biermeyer,** *Cartesio*, p. 255. **Borg–Barthet,** *European PIL after Cartesio,* p. 1028; **Cerioni,** *Cross–Border Mobility*, p. 325 *et seq.*; **Sousa,** p. 75.

CONCLUSIONS

Corporate mobility is an essential precondition for European companies to enjoy all the benefits and opportunities the integration of offers. It allows for the optimal allocation of the productive factors as well as for a high degree of entrepreneurial freedom. The TFEU grants the freedom of establishment and the right to freely move and operate within the European Union to both individuals and legal entities. Nevertheless, companies still have to face several legal and cultural barriers when deciding to move their offices and undertaking cross–border activities. The exit taxation system and the differences both in the criteria used to determine a company's nationality and in the languages and traditions in each of the Member States constitute serious constraints to the development of a European market for corporate charters.

The co–existence of the real seat and incorporation principles and the differing aims of national and European law, which meet so untidily in this area, are still problematic. Against this background, it is reasonable to say that regardless the level of demand, legislation is still needed. It is not acceptable that while there is full pan–European mobility at the time of the registration of the company, the scope for mobility is considerable reduced once registered.

While it must be acknowledged that the transfer of a company's registered office can already be carried out, the methods currently available for such transfers have important disadvantages that the transfer of a company's registered office under a specific directive would not have. Accordingly, the economic added value of such a directive would derive from the fact that such transfers could be carried out at a lower cost than is currently the case using the SE solution or the CBM Directive.

The CJEU case–law has greatly contributed to enhance the companies' right to move beyond the national borders. However, as far as a judge is not a legislator, its job is to interpret, and not to write, the law. This explains why the CJEU has admitted the right of a company to enter a jurisdiction other than the one of origin, while maintaining a more cautious approach in the case in which the emigration of a company is at stake. İn this latter situation, legal and political issues mix closely together and the European judge has preferred to declare the exit of a company from the state of incorporation, with the exception of the case in which a conversion occurs, as not covered by the Treaty's provisions on the freedom of establishment.

As a result, a company can victoriously invoke its right to freely establish within the EU against every host country challenging its entrance; on the other hand, home states are still granted the power to jeopardize companies' emigrations in all the cases in which a conversion does not occur. This could be explained considering the corporate charters' model and the need to put third parties on the right position to know the law applicable to the company without generating too many uncertainties.

In this respect, the approach used by the CJEU appears to promote corporate mobility while, at the same time, ensuring to the Member State a certain degree of control over those company incorporated in their jurisdiction. A comparison with the free movement of goods case–law could help in finding a *ratio* for the distinction operated between moving in and moving out cases. Considering the law of incorporation as a sort of 'brand' which gives indication of the law applying to a company, it could be reasonable to ask those firms relocating the head office in another state to change also the law which governs their internal affairs. This is because, each state should be free to decide the kind of policy it wants to adopt in the corporate law field and, consequently, the kind of connection their companies should maintain with the national territory.

Moreover, the impact of the CJEU case–law on national regulations of the Member States should be considered from another perspective. Given the possibility to migrate to other countries, more and more Member States are reforming their company regulations, in an effort to make them competitive and attract capitals. This way, while not directly affecting corporate mobility, it seems that the European line of judgments could prompt national legislators to revise the approach taken in this field. Because Europe is different from the U.S. under many aspects, more than a race to the bottom, the undergoing reforms seem to indicate a convergence trend which, in the long–term, could contribute to the building up of that system of mutual trust the Union aims to create.

Clearly, this could also impact on corporate mobility, leading to the creation of a flexible legal environment within which companies could move and operate. On the way to this final goal, one should take advantage of the diversity in Member States' company law regulations. Europe could be an extraordinary laboratory in which different traditions and cultures meet. In this context, entrepreneurs could test which is the set of legal rules that better meet their expectations, so as to incorporate in the country which offers the more suitable corporate governance package.

Companies wishing to move their registered office should be able to use a much more cost–effective procedure than the more expensive and circuitous routes of first having to become a SE or undertake a cross–border merger.

Consequently, the European Union needs the 14th Company Law Directive because it needs corporate mobility. This is a clearly given fundamental freedom, and a right that is increasingly required by businesses operating in a global economy. The principal problem arising from the current unclear situation is that, given the Commission's refusal to enforce this right, there is no comprehensive secondary legislation to guide the expectations of companies aspiring to cross–border mobility.

B I B L I O G R A P H Y

I. LITERATURE

Andenas, Mads: Free Movement of Companies, The Law Quarterly Review, Vol. 119, 2003, pp. 221–226.

Andenas, Mads/Wooldridge, Frank: European Comparative Company Law, Cambridge University Press, Cambridge 2009.

Andersen, Paul Krüger/Sorensen, Karsten Engsig: Free Movement of Companies from a Nordic Perspective, Maastricht Journal of European and Comparative Law, Vol. 6, Issue 1, 1999, pp. 47–73.

Angelette, Benjamin: The Revolution That Never Came and the Revolution Coming– de Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe, Virginia Law Review, Vol. 92, Issue 6, 2006, pp. 1189–1223.

Ansay, Tuğrul: Yabancı Şirketlerin Serbest Yerleşimi ve Tanınması, Public and Private International Law Bulletin, Year 23, No: 1–2, 2003, Dedication to Prof. Dr. Gülören Tekinalp, pp. 1–18.

Arat, Tuğrul: Ticaret Şirketlerinin Tâbiiyeti, Ankara 1970.

Armour, John Who Should Make Corporate Law? EU Legislation versus Regulatory Competition, Current Legal Problems, Vol. 58, 2005, pp. 369–513.

Aydoğan, Fatih: Federal Almanya'da Limited Şirketler Kanunu'nda (GmbHG) Yapılan Değişiklikler–Yenilikler (MoMiG), Banking and Commercial Law Review, September 2009, Vol. XXV, No. 3, p. 400 *et seq*.

Aygül, Musa: Milletlerarası Özel Hukukta Şirketlere Uygulanacak Hukukun Tespiti, Ankara 2007.

Bachner, Thomas: Freedom of Establishment for Companies: A Great Leap Forward, Cambridge Law Journal, Vol. 62, Issue 1, 2003, pp. 47–50.

Baelz, Kilian/Baldwin, Teresa: The End of the Real Seat Theory (*Sitztheorie*): the European Court of Justice Decision in Uberseering of 5 November 2002 and its Impact on German and European Company Law, German Law Journal, Vol. 3, Issue 12, 2002, available at: <http://www.germanlawjournal.com/index.php? pageID=11& artID=214>.

Ballarino, Tito: From *Centros* to *Überseering*: EC Right of Establishment and the Conflict of Laws, Yearbook of Private International Law, 2002, pp. 203–216.

Barnard, Catherine: The Substantive Law of the EU–The Four Freedoms, Oxford University Press, 2004.

Barnard, Catherine: Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware, European Law Review, Vol. 25, Issue 1, pp. 57–78. (*Some Lessons for the EU*)

Baums, Theodor: European Company Law Beyond the 2003 Action Plan, European Business Organization Law Review, Vol. 8, Issue 1, 2007, pp. 143–160.

Beale, Joseph H.: Jurisdiction of Courts over Foreigners, Harvard Law Review, Vol. 26, No. 4, 1912/13, pp. 283–301.

Bebchuck, Lucian Arye/Cohen, Alma: Firms' Decisions Where to Incorporate, Journal of Law and Economics, Vol. 46*,* No. 2, 2003, pp. 383–425.

Becht, Marco/Enriques, Luca/Korom, Veronika: *Centros* and the Cost of Branching, in: Perspectives in Company Law and Financial Regulation–Essays in Honour of Eddy Wymeersch (Michel Tison *et al*. eds.), Cambridge University Press 2009, pp. 91–99.

Becht, Marco/Mayer Colin/Wagner, Hannes F.: Corporate Mobility Comes to Europe: The Evidence, Conference on European Company Law, ERA, Trier, 2005.

Becht, Marco/Mayer Colin/Wagner, Hannes F.: Where do Firms Incorporate? Deregulation and the Cost of Entry, Journal of Corporate Finance, Vol. 14, 2008, p. 241 *et seq*.

Behrens, Peter: International Company Law in view of the *Centros* Decision of the ECJ, European Business Organization Law Review, Vol. 1, Issue 1, 2000, pp. 125–146. (*Centros Decision of the ECJ*)

Behrens, Peter: Reactions of Member State Courts to the *Centros* Ruling by the ECJ, European Business Organization Law Review, Vol. 2, Issue 1, 2001, pp. 159–174.

Behrens, Peter: *Centros* and the Proper Law of Companies, in: Capital Markets in the Age of the Euro: Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague 2002, pp. 503–527.

Behrens, Peter: Case Note–Judgment of 13 December 2005, *SEVIC* Systems AG, Common Market Law Review, Vol. 43, Issue 6, 2006, pp. 1669–1688. (*Case Note*)

Behrens, Peter: From "Real Seat" to "Legal Seat": Germany's Private International Company Law Revolution, in: Resolving International Conflicts–Liber Amicorum Tibor Várady, (Peter Hay *et al.* eds.), Central European University Press, Budapest 2009, pp. 45–66. (*From "Real Seat" to "Legal Seat"*)

Behrens, Peter: General Principles on Residence of Companies–A Comparative Analysis of Connecting Factors Used for Determination of the Proper Law of Companies, in: Residence of Companies under Tax Treaties and EC Law (Guglielmo Maisto eds.), Amsterdam 2009, pp. 3–29. (*Residence of Companies*)

Bellingwout, Jaap W.: Company Migration in Motion: The KPMG Report 1993, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995.

Benedettelli, Massimo V.: Conflicts of Jurisdiction and Conflicts of Law in Company Law Matters within the EU 'Market for Corporate Models': Brussels I and Rome I after Centros, European Business Law Review, Vol. 16, Issue 1, 2005, pp. 55–81.

Beveridge, Norwood P.: Internal Affairs Doctrine: The Proper Law of a Corporation, The Business Lawyer, Vol. 44, Issue 3, 1988/89, pp. 693–720.

Biermeyer, Thomas: Bringing Darkness into the Dark: European Corporate Cross–Border Mobility in Re Cartesio Case C–210/06 (16th December 2008), Maastricht Journal of European and Comparative Law, Vol. 16, Issue 2, 2009, pp. 251–255. (*Cartesio*)

Biermeyer, Thomas: Shaping the Space of Cross–Border Conversions in the EU. Between Right and Autonomy: *VALE* – Case C–378/10, *VALE Építési kft*, Judgment of the Court of Justice (Third Chamber) of 12 July 2012, Common Market Law Review, Vol. 50, Issue: 2, 2013, pp. 571–589. (*VALE*)

Biermeyer, Thomas/Holtrichter, Thore: Opinion of Advocate General Jääskinen in Case C–378/10 VALE, Delivered on 15 December 2011, Not Yet Reported. The Missing Puzzle in Judge–Made European Law on Corporate Migration?, Columbia Journal of European Law, Vol. 18, No. 1, 2011.

Birkmose, Hanne Sondergaard: A Market for Company Incorporations in the European Union?–Is *Überseering* the Beginning of the End?, Tulane Journal of International and Comparative Law, Vol. 13, Spring/2005, pp. 55–108.

Bisacre, Josephine: The Migration of Companies within the European Union and the Proposed Fourteenth Company Law Directive, International and Comparative Corporate Law Journal, Vol. 3, 2001, pp. 251–270.

Bohrenkämper, Jan: Corporate Mobility Across European Borders: Still No Freedom of Emigration for Companies? (Cartesio Oktató és Szolgáltató bt, ECJ (Grand Chamber) Judgment of 16 December 2008, C–210/06), European Law Reporter, No. 3, 2009, pp. 82–92.

Borg–Barthet, Justin: European Private International Law of Companies After **Cartesio,** International and Comparative Law Quarterly, Vol. 58, Issue 4, 2009, pp. 1020–1028. (*European PIL after Cartesio*)

Borg–Barthet, Justin: The Governing Law of Companies in EU Law, Hart Publishing, Oxford 2012.

Borg–Barthet, Justin: Free at Last? Choice of Corporate Law in the EU Following the Judgment in Vale, International & Comparative Law Quarterly, Vol. 62, No. 2, 2013, pp. 503–512 (*The VALE Judgment*)

Bouloukos, Marios: The European Company (SE) as a Vehicle for Corporate Mobility within the EU: A Breakthrough in European Corporate Law? European Business Law Review Vol. 18, Issue 3, 2007, pp. 535–557.

Bratton, William W./Mccahery, Joseph A./Vermeulen, Erik P.M.: How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis, American Journal of Comparative Law, Vol. 57, 2009, pp. 347–385.

Braun, Susanne: The European Private Company: A Supranational Company Form for Small and Medium–Sized Enterprises?, German Law Journal, Vol. 5, No. 11, 2004, pp. 1393–1408 .

Buxbaum, Richard M.: Back to the Future? From "Centros" to the "Überla–gerungstheorie" in Festschrift für Otto Sandrock zum 70 Geburtstag, (Klaus Peter Berger *et al*. Eds), Heidelberg 2000, pp. 149–163.

Cabral Pedro/Cunha Patricia: 'Presumed Innocent': Companies and the Exercise of the Right of Establishment under Community Law, European Law Review, Vol. 25, Issue 2, 2000, pp.157–164.

Cains, Walter: Case Note on *Cartesio* Decision by the European Court of Justice, Case C–210/06, Cartesio Oktató és Szolgáltató, European Review of Private Law, Vol. 18, Issue 3, 2010, pp. 569–578.

Casoli, Alessandra: European Corporate Mobility–Recent Developments in the ECJ Case Law on the Transfer of Companies' Offices, Saarbrücken 2011.

Cath, Inne G.F.: Freedom of Establishment of Companies: A New Step Towards Completion of the Internal Market, Yearbook of European Law, Vol. 6, Issue 1, 1986, pp. 245–261.

Cerioni, Luca: The Barriers to the International Mobility of Companies within the European Community: A Re–reading of the Case Law, Journal of Business Law, January 1999, pp. 59–79.

Cerioni, Luca: A Possible Turning–Point in the Development of EC Company Law: the Centros Case, International and Comparative Corporate Law Journal, No: 2/2000, pp. 165–195.

Cerioni, Luca: The "*Überseering*" Ruling: The Eve of a "Revolution" for the Possibilities of Companies' Migration Throughout the European Community?, Columbia Journal of European Law, Vol. 10, Issue 1, 2003, pp. 117–137. (*The Überseering Ruling*)

Cerioni, Luca: The European Company Statute (SE) and the Statute for a European Cooperative Society (SCE): A Comparison between the Two New Supranational Vehicles, European Legal Forum, Vol. 5, 2004, pp. 296–302.

Cerioni, Luca: EU Corporate Law and EU Company Tax Law, Edward Elgar Publishing, Cheltenham 2007. (*EU Corporate Law*)

Cerioni, Luca: Cross–Border Mobility of Companies within the European Community after the *Cartesio* Ruling of the ECJ, Journal of Business Law, Year 2010, Issue 4, pp. 311–337. (*Cross–Border Mobility*)

Cerioni, Luca: The "Place of Effective Management" as a Connecting Factor for Companies' Tax Residence within the EU vs. The Freedom of Establishment: The Need for a Rethinking?, German Law Journal, Vol. 13, No. 9, 2012, pp. 1095–1130.

Cerioni, Luca: The "Final Word" on the Free Movement of Companies in Europe Following the ECJ's VALE Ruling and a Further Exit Tax Case?, European Taxation, Vol. 53, Issue 7, 2013, pp. 329–340.

Cerioni, Luca: The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re–reading of the ECJ Case Law and the Quest for a Unitary Notion, available at: <http://bura.brunel.ac.uk/bitstream/2438/4141/3/Law.pdf> (published in European Business Law Review, Vol. 21, Issue 6, 2010, pp. 783–813) (*Abuse of Rights in EU Law*)

Craufurd, Smith–Rachael: The Establishment of Companies in European Community Law: Choice of Law or Abuse of Rights?, European Current Law, Vol. 11, 1999, pp. 11–15.

Da Costa, Carla Tavares/De Meester Bilreiro, Alexandra: The European Company Statute, Kluwer Law International, The Hague/London/New York, 2003.

Dammann, Jens C.: The Future of Codetermination after *Centros*: Will German Corporate Law More Closer to the U.S. Model?, Fordham Journal of Corporate and Financial Law, Vol. 8, Issue 2, 2003, pp. 607–686. (*The Future of Codetermination*)

Dammann, Jens C.: Freedom of Choice in European Corporate Law, Yale Journal of International Law, Vol. 29, No 2, 2004, pp. 477–544. (*Freedom of Choice*)

Dammann, Jens C.: A New Approach to Corporate Choice of Law, Vanderbilt Journal of Transnational Law, Vol. 38, No. 1, 2005, pp. 51–107. (*Corporate Choice of Law*)

Davies, Paul: The European Private Company (SPE): Uniformity, Flexibility, Competition and the Persistence of National Laws, ECGI Working Paper Series, Law Working Paper No. 154/2010, available at SSRN: <http://ssrn.com/abstract=1622293>.

De Kluiver, Harm–Jan: Inspiring a New European Company Law?–Observations on the ECJ's Decision in Inspire Art from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member States–, European Company and Financial Law Review, Vol. 1, Issue 1, 2004, pp. 121–134.

De Bruycker, Johan: EC Company Law–The European Company v. The European Economic Interest Grouping and the Harmonization of the National Company Laws, Georgia Journal of International and Comparative Law, Vol. 21, No. 2, 1991, pp. 191–216.

Deak, Daniel: Outbound Establishment Revisited in *Cartesio*, EC Tax Review, Vol. 17, Issue 6, 2008, pp. 250–258.

Deak, Daniel: *Cartesio*: A Step Forward in Interpreting the EC Freedom to Emigrate, Tax Notes International, Vol. 54, No. 6, 2009, pp. 493–499. (*Cartesio*)

Deakin, Simon: Regulatory Competition versus Harmonization in European Company Law, in Regulatory Competition and Economic Integration–Comparative Perspectives (Daniel Esty and Damien Geraldine eds.), Oxford University Press, 2001, pp. 190–217.

Deakin, Simon: Legal Diversity and Regulatory Competition: Which Model for Europe?, European Law Journal, Vol. 12, No. 4, 2006, pp. 440–454.

Dean, Janice: Corporate Mobility and Company Law Cultures in Europe, International Company and Commercial Law Review, Vol. 14, Issue 6, 2003, pp. 197–223.

Deininger, Rainer: Impact of the ECJ *Inspire Art* Decision, The European Legal Forum, 2004, p. 17–19.

DeMott, Deborah A.: Perspectives on Choice of Law for Corporate Internal Affairs, Law and Contemporary Problems, Vol. 48, No: 3, 1985, p. 161–198.

Drinhausen, Florian/Nohlen, Nicolas: The Limited Freedom of Establishment of an SE, European Company Law, Vol. 6, Issue 1, 2009, pp. 14–19.

Drucker, Thomas C.: Companies in Private International Law, International & Comparative Law Quarterly, Vol. 17, Issue 1, 1968, pp. 28–57.

Drury, Robert R.: The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”, Cambridge Law Journal, Vol. 57, Issue 1, 1998, pp. 165–194. (*Recognition of Foreign Corporations*)

Drury, Robert R.: Migrating Companies, European Law Review, Vol. 24, Issue 4, 1999, pp. 354–372. (*Migrating Companies*)

Drury, Robert R.: The “Delaware Syndrome”: European Fears and Reactions, Journal of Business Law, November 2005, pp. 709–744.

Drury, Robert: The European Private Company, European Business Organization Law Review, Vol. 9, Issue 1, 2008, pp. 125–136.

Dyrberg, Peter: Full Free Movement of Companies in the European Community at Last?, European Law Review, Vol. 28, Issue 4, 2003, pp. 528–537.

Ebenroth, Carsten Thomas: Gaining Access to Fortress Europe–Recognition of U.S. Corporations in Germany and the Revision of the Real Seat Rule, The International Lawyer, Vol. 24, 1990, pp. 459–485. (*Recognition of US Corporations*)

Ebert, Sabine: The Law Applicable to Groups of Companies Involving European Companies (*Societas Europaea*), Company Lawyer, Vol. 25, Issue 4, 2004, pp. 108–113.

Ebke, Werner F.: The "Real Seat" Doctrine in the Conflict of Corporate Laws, The International Lawyer Vol. 36, Issue 3, 2002, pp. 1015–1037 (*Real Seat Doctrine*).

Ebke, Werner F.: The European Conflict of Corporate Laws Revolution: *Überseering, Inspire Art* and Beyond, The International Lawyer, Vol. 38, No. 3, 2004, pp. 813–853. (*Conflict of Corporate Laws*)

Ebke, Werner F.: Centros–Some Realities and Some Mysteries, American Journal of Comparative Law, Vol. 48, 2000, pp. 623–660. (*Centros–Some Realities*)

Ebke, Werner F.: Conflicts of Corporate Laws and the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, in: Balancing of Interests: Liber Amicorum Peter Hay zum 70. Geburtstag, Frankfurt am Main 2005, pp. 119–140. (*Conflict of Corporate Laws*)

Ebke, Werner F.: Not–for–Profit Organisations, Conflicts of Laws and the Right of Establishment under the EC Treaty, in: Making Transnational Law Work in the Global Economy–Essays in Honour of Detlev Vagts (Pieter Bekker *et al*. eds.) Cambridge University Press, New York 2010, p. 298 *et seq*.

Edwards, Vanessa: EC Company Law, Oxford University Press, 1999. (*Company Law*)

Edwards, Vanessa: Secondary Establishment of Companies–The Case Law of the Court of Justice, Yearbook of European Law, Vol. 18, Issue 1, 1998, pp. 221–257.

Edwards, Vanessa: Case–Law of the European Court of Justice on Freedom of Establishment after *Centros,* European Business Organization Law Review, Vol. 1, Issue 1, 2000, pp. 147–155. (*Case–Law of the ECJ*)

Edwards, Vanessa/Farmer, Paul: The Concept of Abuse in the Freedom of Establishment of Companies: A Case of Double Standards? in: Continuity and Change in EU Law–Essays in Honour of Sir Francis Jacobs, Oxford University Press 2008, pp. 205–227.

Eicker, Klaus: German Federal Civil Court Requests Preliminary Ruling on the Compliance of the So–Called 'Seat Theory' with Arts. 52 and 58 (now Arts. 43 and 48) of the EC Treaty (Freedom of Establishment), International Tax Review, Vol. 28, Issue 6/7, 2000 pp. 259–260.

Eidenmüller, Horst/Engert, Andreas/Hornuf, Lars: Incorporating Under European Law: The *Societas Europaea* as a Vehicle for Legal Arbitrage, European Business Organization Law Review, Vol. 10, Issue 1, 2009, pp. 1–33. (*Incorporating Under European Law*)

Eidenmüller, Horst/Engert, Andreas/Hornuf, Lars: The Societas Europaea: Good News for European Firms, ECGI Working Paper Series, Law Working Paper No. 127/2009, Brussels 2009.

Elsmore, Matthew J./Sorensen, Karsten Engsig: Company Names and Company Mobility in the Internal Market: How to Balance the Interests of the Holders of Name Rights and the Freedom of Establishment? European Business Law Review, Vol. 20, Issue 6, 2009, pp. 851–887.

English, Richard D.: Company Law in European Single Market, Brigham Young University Law Review, Vol. 1990, Issue 4, pp. 1413–1541.

Enriques, Luca: Company Law Harmonization Reconsidered: What Role for the EC? ECGI Working Paper Series, Law Working paper No: 53/2005, Brussels 2005.

Enriques, Luca: EC Company Law Directives and Regulations: How Trivial Are They?, University of Pennsylvania Journal of International Law, Vol. 27, Issue 1, 2006, pp. 1–78.

Enriques, Luca: Silence is Golden: The European Company as a Catalyst for Company Law Arbitrage, Journal of Corporate Law Studies, Vol. 4, Issue 1, 2004, pp. 77–96.

Enriques, Luca: EC Company Law and the Fears of a European Delaware, European Business Law Review, Vol. 15, Issue 6, 2004, pp. 1259–1274 (*EC Company Law*)

Enriques, Luca/Gatti, Matteo: The Uneasy Case for Top–Down Corporate Law Harmonization in the European Union, University of Pennsylvania Journal of International Economic Law, Vol. 27, Issue 4, 2006, pp. 939–998.

Enriques, Luca/Macey, Jonathan: Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules, Cornell Law Review, Vol. 86, 2001, pp. 1165–1202.

Eroğlu, Muzaffer: Avrupa'da Şirketlerin Sınıraşan Hareketliliği Konusundaki Gelişmelerin Değerlendirilmesi ve Konunun Türk Hukukundaki Yeri, Maltepe University Journal of the Faculty of Law, Vol. 2008/2, pp. 179–206.

Escuin Ibanez, Irene: Law Applicable to the European Cooperative Society: Special Reference to the European Cooperative Established in Spain, European Company and Financial Law Review, Vol. 8, No. 1, 2011, pp. 30–46.

Feria, Rita De La: Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax, Common Market Law Review, Vol. 45, Issue 2, 2008, pp. 395–441.

Fici, Antonio: The European Cooperative Society Regulation, in: International Handbook of Cooperative Law, (Dante Cracogna *et al*. eds.), Springer–Verlag Berlin Heidelberg 2013, pp. 115–152.

Fleischer, Holger: Supranational Corporate Forms in the European Union: Prolegomena to a Theory on Supranational Forms of Association, Common Market Law Review, Vol. 47, Issue 6, 2010, pp. 1671–1717.

Foley, Henry E.: Incorporation, Multiple Incorporation, and the Conflict of Laws, Harvard Law Review, Vol. 42, No. 4, 1929, pp. 516–549.

Frost, Carsten: Transfer of Company's Seat–An Unfolding Story for the Europe, Victoria University of Wellington Law Review, Vol. 36, Issue 2, 2005, pp. 359–388.

Galle, Ruud C. J.: The Societas Cooperativa Europea (SCE) and National Cooperatives in Comparative Perspective, European Company Law, Vol. 3, No. 6, 2006, pp. 255–260.

Garcia–Riestra, Manuel: The Transfer of Seat of the European Company v Free Establishment of Case–Law, European Business Law Review, Vol. 15, Issue 6, 2004, pp. 1295–1323.

Gelder, Gabriel Van: The European Cross–Border Conversion from a Dutch Tax and Legal Perspective, EC Tax Review, Vol. 22, No. 4, 2013, pp. 202–208.

Gerner–Beurle, Carsten: Right of Establishment and Corporate Mobility: The Decision of the Court of Justice in *Vale*, available at SSRN: <http://ssrn.com/abstract=2249182>.

Gerner–Beuerle, Carsten/Schillig, Michael: The Mysteries of Freedom of Establishment after Cartesio, International & Comparative Law Quarterly, Vol. 59, No: 2, 2010, pp. 303–323.

Gesell, Harald/Riemer, Pieter: Outbound Cross–Border Mergers Protected by Freedom of Establishment–Annotation to the Decision of the Amsterdam District Court (*Kantongerecht*) 29 January 2007, EA 06–3338 166, European Company and Financial Law Review, Vol. 4, No: 2, 2007, pp. 308–316.

Giardina, Andrea: Italy: Law Reforming The Italian System of Private International Law, International Legal Materials Vol. 35, No. 3, 1996, pp. 760–782.

Gildea, Andrea J.: *Überseering*: A European Company Passport, Brooklyn Journal of International Law, Vol. 30, No: 1, 2004, pp. 257–292.

Gravir, Gaute Simen: Conflict of Laws Rules for Norwegian Companies after the *Centros* Judgment, European Business Law Review, Vol. 12, Issue 7/8, 2001, pp. 146–153

Grundmann, Stefan: European Company Law: Organization, Finance and Capital Markets, Intersentia, Antwerp–Oxford–New York, 2007.

Grundmann, Stefan: Regulatory Competition in European Company Law – Some Different Genius?, in Capital Markets in the Age of the Euro: Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague, 2002, pp. 561–595.

Guidotti, Rolandino: The European Private Company: The Current Situation, German Law Journal, Vol. 13, Issue 3, 2012, pp. 331–344.

Guillaume, Florence: The law Governing Companies in Swiss Private International Law, Yearbook of Private International Law, Vol. 6, 2004, pp. 251–289.

Hadari, Yitzhak: The Structure of the Private Multinational Enterprise, Michigan Law Review, Vol. 71, No: 4, 1973, pp. 729–806 (*The Structure of the MNE*)

Hadari, Yitzhak: Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises, Duke Law Journal, Vol. 1974, Issue 1 (March/1974), pp. 1–58. (*Choice of Law and Nationality*)

Hansen, Jesper Lau: A New Look at *Centros*–From a Danish Point of View, European Business Law Review, Vol. 13, Issue 1, 2002, pp. 85–95.

Hansen, Jesper Lau: The *Vale* Decision and the Court's Case Law on the Nationality of Companies, European Company and Financial Law Review, Vol. 10, Issue 1, 2013, pp. 1–17.

Hansen, Lone L.: Merger, Moving and Division Across National Borders–When Case Law Breaks through Barriers and Overtakes Directives, European Business Law Review, Vol. 18, Issue 1, 2007, pp. 181–204.

Hansen, Soren Friis: Free Movement of Companies: The 'Real Seat Doctrine' is Dead–Long Live the 'Incorporation State Doctrine', Scandinavian Studies in Law, Vol. 45, 2003, pp. 147–172. (*Free Movement of Companies*)

Hansen, Soren Friis: From C 212 to L 212–*Centros* Revisited, European Business Organization Law Review, Vol. 2, Issue 1, 2001, pp. 141–157.

Heine, Klaus: Regulatory Competition between Company Laws in the European Union: the *Überseering* Case, Intereconomics, March/April 2003, pp. 102–108.

Heine, Klaus/Wolfgang Kerber: European Corporate Laws, Regulatory Competition and Path Dependence, European Journal of Law and Economics, Vol. 13, No. 1, January 2002, pp. 47–71.

Hirt, Hans C.: Freedom of Establishment, International Company Law and the Comparison of European Company Law Systems after the ECJ's Decision in Inspire Art Ltd, European Business Law Review, Vol. 15, Issue 5, 2004, pp. 1189–1222.

Holst, Catherine: European Company Law after *Centros*: Is the EU on the Road to Delaware?, Columbia Journal of European Law, Vol. 8, Issue 2, 2002, pp. 323–341.

Hommelhoff, Peter: The European Private Company Before its Pending Legislative Birth, German Law Journal, Vol. 9, Issue 6, 2008, p. 799–818.

Hopt, Klaus J./Geens, Koen (Eds.): The European Company Law Action Plan Revisited – Reassessment of the 2003 Priorities of the European Commission, Leuven, 2010.

Ioakimidis, Apostolos: The Statute of the European Cooperative Society, Columbia Journal of European Law, Vol. 14, Winter 2007/2008, pp. 189–199.

Jankolovits, Laura: No Borders–No Boundaries–No Limits, An Analysis of Corporate Law in the European Union after the *Centros* Decision, Cardozo Journal of International and Comparative Law, Vol. 11, Issue 3, 2004, pp. 973–1006.

Johnson, Maureen: Roll on the 14th Directive, Case law Fails to Solve the Problems of Corporate Mobility within the EU–Again, Hertfordshire Law Journal, Vol. 2, No 2, 2004, pp. 9–18.

Johnson, Maureen: Does Europe Still Need a Fourteenth Company Law Directive?, Hertfordshire Law Journal, Vol. 3, No: 2, 2005, pp. 18–44 (*Fourteenth Company Law Directive*)

Johnston, Andrew: EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition, Journal of Corporate Law Studies, Vol. 6, No. 1, 2006, pp. 71–112.

Kaczorowska, Alina: European Union Law, 3rd Edition, Routledge 2013.

Kaldellis, Evangelos I.: Freedom of Establishment of Companies in the Post–*Centros* Ltd. Era: How Much of a Freedom in European Community Law, *Revue Hellénique de Droit International*, Vol. 55, Issue 2, 2002, pp. 411–440.

Kerr, P. Sterling: An Entity for Community Cooperation: The European Economic Interest Grouping, Bringham Young University Law Review, Vol. 1990, Issue 4, pp. 1743–1757.

Kersting, Christian: Corporate Choice of Law–A Comparison between the United States and European Systems and a Proposal for a European Directive, Brooklyn Journal of International Law, Vol. 28, Issue 1, 2002, pp. 1–74.

Kersting, Christian/Schindler, Philipp: The ECJ's *Inspire Art* Decision of 30 September 2003 and its Effects on Practice, German Law Journal, Vol. 4, Issue 12, 2003, pp. 1277–1291.

Khan, Aaron: Corporate Mobility under Article 49 TFEU: A Question of Means, not Ends, European Business Law Review, Vol. 22, Issue 6, 2011, pp. 847–870.

Kieninger, Eva–Maria: The Legal Framework of Regulatory Competition Based on Company Mobility: EU and U.S. Compared, German Law Journal, Vol. 6, Issue 4, 2005, pp. 741–770.

Kieninger, Eva–Maria: The Law Applicable to Corporations in the EC, *Rabels Zeitschrift für ausländisches und Internationales Privatrecht*, Vol. 73, No. 3, 2009, pp. 607–628.

Kirchner, Christian/Richard, W. Painter/Wulf, A. Kaal: Regulatory Competition in EU Corporate Law after *Inspire Art*: Unbundling Delaware's Product for Europe, European Company and Financial Law Review, Vol. 2, Issue 2, 2005, pp. 159–206.

Kornack, Daniel: The European Private Company–Entering the Scene or Lost in Discussion?, German Law Journal, Vol. 10, Issue 8, 2009, pp. 1321–1332.

Korom, Veronika/Metzinger, Peter: Freedom of Establishment for Companies: the European Court of Justice Confirms and Refines its *Daily Mail* Decision in the *Cartesio* Case C–210/06, European Company and Financial Law Review. Vol. 6, Issue 1, 2009, pp. 125–161.

Krarup, Mathias: *VALE*: Determining the Need for Amended Regulation Regarding Free Movement of Companies within the EU, European Business Law Review, Vol. 24, Issue 5, 2013, pp. 691–698.

Krüger, Hans Christian: The Council of Europe and Unification of Private Law, The American Journal of Comparative Law, Vol. 16, No. 1/2, Winter/Spring 1968, pp. 127–148.

Kubat Erk, Nadja: The Cross–Border Transfer of Seat in European Company Law: A Deliberation about the *Status Quo* and the Fate of the Real Seat Doctrine, European Business Law Review, Vol. 21, Issue 3, 2010, pp. 413–450.

Kubmaul, Heinz/Richter, Lutz/Ruiner, Christoph: Corporations on the Move, the ECJ off Track: Relocation of a Corporation's Effective Place of Management in the EU, European Company Law, Vol. 6, Issue 6, 2009, pp. 246–256.

Kuehrer, Norbert: Cross–Border Company Establishment between UK and Austria, European Business Law Review, Vol. 12, Issue 5/6, 2001, pp. 110–118.

Lang, John Temple: The Right of Establishment of Companies and Free Movement of Capital in the European Economic Community, University of Illinois Law Review, Vol. 1965, No: 4, 1965, pp. 684–705.

Lafontaine, Christoph: Company Mobility and Employee Rights: A Continental Approach to Reconcile Individual Protection with Corporate Politics while Addressing the Needs of the Common Market, *Zeitschrift für öffentliches Recht*= Austrian Journal of Public and International Law, Vol. 61, Issue 2, 2006, pp. 263–333.

Latty, Elvin R.: Pseudo–Foreign Corporations, The Yale Law Journal, Vol. 65, No. 2, 1955, pp. 137–173.

Lauterfeld, Marc: *Centros* and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo–Foreign Companies in German International Company and Insolvency law?, European Business Law Review, Vol. 12, Issue 3/4, 2001, pp. 79–88.

Lenaerts, Annekatrien: The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law, European Review of Private Law, Vol. 18, Issue 6, 2010, pp. 1121–1154.

Lennarts, Marie–Loisse: Company Mobility within the EU, Fifty Years on from a Non–Issue to a Hot Topic, Utrecht Law Review, Vol. 4, Issue 1, 2008, pp. 1–5.

Lenoir, Noëlle: The *Societas Europaea* (SE) in Europe A Promising Start and an Option with Good Prospects, Utrecht Law Review, Vol. 4, Issue 1, 2008, pp. 13–21.

Lombardo, Stefano: Conflict of Law Rules in Company Law after *Überseering*: An Economic and Comparative Analysis of the Allocation of Policy Competence in the European Union, European Business Organization Law Review, Vol. 4, Issue 2, 2003, pp. 301–336.

Lombardo, Stefano/Pasotti, Piero: The '*Societas Europaea*': a Network Economics Approach, ECGI Working Paper Series, WP 19/2004, Brussels 2004.

Looijestijn–Clearie, Anne: Centros Ltd–A Complete U–Turn in the Right of Establishment for Companies?, International and Comparative Law Quarterly, Vol. 49, Issue 3, 2000, pp. 621–642. (*Centros Ltd–A Complete U–Turn*)

Looijestijn–Clearie, Anne: Have the Dikes Collapsed? *Inspire Art* a Further Breakthrough in the Freedom of Establishment of Companies?, European Business Organization Law Review, Vol. 5, Issue 2, 2004, pp. 389–418. (*Have the Dikes Collapsed*)

Lorenzo, Sasso: *Societas Europaea*: Between Harmonization and Regulatory Competition, European Company Law, Vol. 4, Issue 4, 2007, pp. 159–167.

Lowry, John: Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company Law, Cambridge Law Journal, Vol. 63, No. 2, 2004, pp. 331–345.

Lyden–Horn, Alex: Cadbury Schweppes: A Critical Look at the Future and Futility of U.K. Controlled Foreign Company Legislation, Temple International and Comparative Law Journal, Vol. 22, Spring 2008, p. 191–211.

Makowicz, Bartosz/Saifee, Faisal: Societas Privata Europaea: The European Private Company, Company Lawyer, Vol. 30, Issue 8, 2009, pp. 227–232.

Martin, Didier/Poracchia, Didier: Company Mobility through Cross–Border Transfers of Registered Offices within the European Union: A New Challenge for French Law, *Journal du Droit International*, Year 2010, No. 2, pp. 347–397.

Mccahery, Joseph A.: Creditor Protection in a Cross–Border Context, European Business Organization Law Review, Vol. 7, Issue 1, 2006, pp. 455–459.

McCahery, Joseph A./Vermeulen, Erik P.M.: Does the European Company Prevent the 'Delaware Effect'?, European Law Journal, Vol. 11, No. 6, 2005, pp. 785–801. *(Delaware Effect*)

McCahery, Joseph A./Vermeulen, Erik P.M.: Understanding Corporate Mobility in the EU–Towards the Foundations of a European Internal Affairs Doctrine, A Working Paper Prepared for the 5th European Company Law and Corporate Governance Conference in Berlin on 27–28 June 2007, available at: <http://www.ecgi.org/presidency/presentations/2007_berlin_vermeulen_paper.pdf>.

Menjucq, Michel: Towards the End of the Real Seat Theory in Europe?, in: Perspectives in Company Law and Financial Regulation–Essays in Honour of Eddy Wymeersch (Michel Tison *et al*. eds.), Cambridge University Press 2009, pp. 124–131.

Merkt, Hanno: *Centros* and its Consequences for Member State Legislatures, International Company and Commercial Law Review, Vol. 3, 2001, pp.119–147.

Metzinger, Péter/Nemessányi, Zoltán: Freedom of Establishment for Companies in the European Union, Wolters Kluwer csoport, Budapest 2009.

Micheler, Eva: The Impact of the *Centros* Case on Europe's Company Laws, The Company Lawyer, Vol. 21, No. 6, 2000, pp. 179–182. (*The Centros Case*)

Micheler, Eva: Recognition of Companies Incorporated in Other EU Member States, International and Comparative Law Quarterly, Vol. 52, Issue 2, 2003, pp. 521–529. (*Recognition of Companies*)

Monteiro, Tiago Pereira: Report on the CECL Conference on Companies Crossing Borders within Europe, European Company Law, Vol. 5, Issue 2, 2008, pp. 145–153.

Moran, Stephen J.: Establishing Establishment: A Modern Chimera an Investigation into Securing the Right of Establishment for Companies within the Internal Market of the European Community, Irish Student Law Review, Vol. 15, 2007, pp. 147–174.

Mortimer, Tom: The Removal of Barriers to Corporate Mobility: An Analysis of Cases Pertinent to Articles 52 and 58, in 1996 Onwards: Lowering the Barriers Further (Andrew Caiger *et al*. eds.), Chichester 1996, pp. 135–136.

Morsdorf, Oliver: The Legal Mobility of Companies within the European Union through Cross–Border Conversion, Common Market Law Review, Vol. 49, Issue 2, pp. 629–670.

Mucciarelli, Federico M.: The Transfer of the Registered Office and Forum–Shopping in International Insolvency Cases: An Important Decision from Italy 'Case Note on the Decision 'B&C' of the Italian Corte Di Cassazione', European Company and Financial Law Review, Vol. 2, No. 4, 2005, pp. 512–533.

Mucciarelli, Federico M.: Company 'Emigration' and EC Freedom of Establishment: *Daily Mail* Revisited, European Business Organization Law Review, Vol. 9, Issue 2, 2008, pp. 267–303. (*Company Emigration*)

Mucciarelli, Federico M.: Seat's Transfer and State of Origin–Imposed Limits to Companies' Mobility, available at SSRN: <http://ssrn. com/abstract=982238>.

Muchlinski, Peter: Multinational Enterprises and the Law, Blackwell Publishers, Oxford 1999.

Munari, Francesco/Terrile, Paolo: The *Centros* Case and the Rise of an EC Market for Corporate Law, in: Capital Markets in the Age of the Euro–Cross–Border Transactions, Listed Companies and Regulation (Guido Ferrarini *et al*. eds.), Kluwer Law International, The Hague, 2002.

Murphy, Daniel T.: The European Economic Interest Group (EEIG): A New European Business Entity, Vanderbilt Journal of Transnational Law, Vol. 23, 1990–1991, p. 65–98.

Noussia, Kyriaki: European Private Company (‘Societas Privata Europaea’), Business Law International, Vol. 11, September 2010, pp. 277–296.

Nygh, Peter: The Refugee Corporation, University of Western Australian Law Review, Vol. 12, 1975/76, p. 467 *et seq*.

Omar, Paul J.: Centros Redux: Conflict at the Heart of European Company Law, International Company and Commercial Law Review, Vol. 13, 12, 2002, pp. 448–454.

Omar, Paul J.: *Centros*, *Uberseering* and Beyond: A European Recipe for Corporate Migration: Part 1, International Company and Commercial Law Review, Vol. 15, 2004, pp. 398–407 (*Corporate Migration–Part 1*)

Omar, Paul J.: *Centros*, *Uberseering* and Beyond: A European Recipe for Corporate Migration: Part 2, International Company and Commercial Law Review, Vol. 16, No. 1, 2005, pp. 18–27. (*Corporate Migration–Part 2*)

Omar, Paul J.: *Centros* Revisited: Assessing the Impact on Corporate Organization in Europe, International Company and Commercial Law Review, Vol. 11, Issue 12, 2000, pp. 407–415.

O’Shea, Tom: *Cartesio*: Moving a Company’s Seat Now Easier in the EU, Tax Notes International, Vol. 53, No 12, 2009, pp. 1071–1075. (*Cartesio*)

O’Shea, Tom: The UK’s CFC Rules and the Freedom of Establishment: Cadbury Schweppes plc and its IFSC Subsidiaries–Tax Avoidance or Tax Mitigation?, Vol. 16, No. 1, 2007, pp. 13–33. (*Cadbury Schweppes*)

Ottersbach, Christina: The Effects of *Inspire Art*: A Critical Comparison of the Formation of German and English Companies, Journal of International Trade Law & Policy, Vol. 4, No. 1/2, 2005, pp. 31–76.

Özel, Sibel: Avrupa Adalet Divanı'nın Inspire Art Kararı Üzerine Bir İnceleme, Prof. Dr. Tuğrul Ansay'a Armağan, Ankara 2006, pp. 459–476.

Özel, Sibel: Avrupa Birliğinde Şirketlerin Yerleşim Serbestisinin *Lex Societatis* İle Olan İlişkisi, Erdoğan Teziç'e Armağan, İstanbul 2007, pp. 905–914.

Panayi, Christiana H.J.I.: Corporate Mobility in the European Union and Exit Taxes, Bulletin for International Taxation, October/2009, pp. 459–473.

Panayi, Christiana H.J.I.: Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths, Yearbook of European Law (2009), Vol. 28, Issue 1, Oxford University Press 2010, pp. 123–176. (*Corporate Mobility in PIL*)

Papadopoulos, Thomas: Legal Perspectives on the Scope of the Tenth Company Law Directive on Cross–Border Mergers, European Current Law, No.10, 2008.

Papadopoulos, Thomas: EU Regulatory Approaches to Cross–Border Mergers: Exercising the Right of Establishment, European Law Review, Vol. 36, No. 1, 2011, pp. 71–97. (*Regulatory Approaches*)

Pellé, Philippe: Companies Crossing Borders within Europe, Utrecht Law Review, Vol. 4, Issue 1, 2008, pp. 6–12.

Peters, Carsten/Wullrich, Philipp: "Borderless Flexibility": The Societas Privata Europaea (SPE) from a German Company Law Perspective, Company Lawyer, Vol. 30, No. 7, 2009, pp. 214–219.

Petronella, Vittoria: The Cross–Border Transfer of the Seat after *Cartesio* and the Non–Portable Nationality of the Company, European Business Law Review, Vol. 21, Issue 2, 2010, pp. 245–265.

Petrović, Siniša/Jakšić, Tomislav: The ECJ Ruling in *Cartesio* and its Consequences on the Right to Establishment and Corporate Mobility in the European Union, European Journal of Law Reform, Vol. 12, Issue 3–4, 2010, pp. 230–296.

Pieper, J.: European Cross–Border Mergers after *SEVIC*, Company Lawyer, Vol. 30, 2009, pp. 169–173.

Pilger, Andreas: European Company Law after *Inspire Art*–From a German Perspective: Ltd. vs. GmbH, Berlin 2008.

Prentice, Dan D.: The Incorporation Theory–The United Kingdom, European Business Law Review, Vol. 14, Issue 6, 2003, pp. 631–641.

Rajak, Harry: Proposal for a Fourteenth European and Council Directive on the Transfer of the Registered Office or de facto Head Office of a Company from One Member State to Another With a Change in Applicable Law, European Business Law Review, Vol. 11, Issue 1, 2000, pp. 43–49.

Rammeloo, Stephan: Recognition of Foreign Companies in "Incorporation" Countries: A Dutch Perspective, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, pp. 47–73. (*A Dutch Perspective*)

Rammeloo, Stephan: Cross–Border Company Mobility and the Proposal for a 14th EC Company Law Directive: '*Daily Mail*' Surmounted, Maastricht Journal of European and Comparative Law, Vol. 6, Issue 2, 1999, pp. 105–110. (*Proposal for a 14th Company Law Directive*)

Rammeloo, Stephan: Corporations in Private International Law–A European Perspective, Oxford University Press, 2001. (*Corporations in PIL*)

Rammeloo, Stephan: Cross–Border Mobility of Corporations and the European Union: Two Future Landmark Cases?, Maastricht Journal of European and Comparative Law, Vol. 8, No. 2, 2001, pp. 117–120.

Rammeloo, Stephan: The Long and Winding Road towards Freedom of Establishment for Legal Persons in Europe, Maastricht Journal of European and Comparative Law, Vol. 10, No. 2, 2003, pp. 169–197.

Rammeloo, Stephan: At Long Last: Freedom of Establishment for Legal Persons in Europe Accomplished: ECJ Case C–167/01 Kamer van Koophandel en fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR not yet reported, Maastricht Journal of European and Comparative Law, Vol. 11, Issue 4, 2004, pp. 379–413.

Rammeloo, Stephan: The 14th Company Law Directive on the Cross–Border Transfer of the Registered Office of Limited Liability Companies: Now or Never?, Maastricht Journal of European and Comparative Law, Vol. 15, No. 3, 2008, pp. 359–394. (*The 14th Company Law Directive*)

Rammeloo, Stephan: Case C–378/10, *VALE Építési Kft.*, pending, lodged on July 28, 2010, Freedom of Establishment: Cross–Border Transfer of Company "Seat", Maastricht Journal of European and Comparative Law, Vol. 18, No. 3, 2011, pp. 353–358.

Rammeloo, Stephan: Case C–378/10 *VALE Építési Kft.*, Judgment of 12 July 2012, Not Yet Reported –Freedom of Establishment: Cross–Border Transfer of Company 'Seat'– The Last Piece of the Puzzle?, Maastricht Journal of European and Comparative Law, Vol. 19, No. 4, 2012, pp. 563–588. (*The VALE Judgment*)

Rawlings, Boynton M.: The French Company Law: Choice of Corporate Form Available to the Foreign Investor, The Business Lawyer, Vol. 30, 1974/75, p. 1251 *et seq*.

Reese, Willis/Kaufman, Edmund: The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit, Columbia Law Review, Vol. 58, No. 8, (Columbia University School of Law: 1858–1958), 1958, pp. 1118–1145.

Rehberg, Markus: *Inspire Art*–Freedom of Establishment for Companies in Europe Between "Abuse" and National Regulatory Concerns, The European Legal Forum, Year 4, Vol. 1/2004, pp. 1–8.

Reindl, Andreas: Companies in the European Community: Are The Conflict of Rules Ready for 1992?, Michigan Journal of International Law, Vol. 11, 1990, pp. 1270–1293.

Rickford, Jonathan: Current Developments in European Law on the Restructuring of Companies: An Introduction, European Business Law Review, Vol. 15, Issue 6, 2004, pp. 1225–1258. (*Restructuring of Companies*)

Rickford, Jonathan: The Proposed Tenth Company Law Directive on Cross–Border Mergers and its Impact in the UK, European Business Law Review, Vol. 16, Issue 6, 2005, pp. 1393–1414.

Ringe, Wolf–Georg: No Freedom of Emigration for Companies?, European Business Law Review, Vol. 16, Issue 3, pp. 621–642. (*No Freedom of Emigration*)

Ringe, Wolf–Georg: The European Company Statute in the Context of Freedom of Establishment, Journal of Corporate Law Studies, Vol. 7, No. 2, 2007, pp. 185–212. (*The European Company Statute*)

Ringe, Wolf–Georg: Sparking Regulatory Competition in European Company Law–The Impact of the Centros Line of Case–Law and its Concept of 'Abuse of Law', in: Prohibition of Abuse of Law–A New General Principle of EU Law (Ritea de la Feria and Stefan Vogenauer eds.), Hart Publishing 2010.

Romano, Roberta: The Genius of American Corporate Law, Washington D.C. 1993.

Robertson, Dominic E.: *Überseering*: Nailing the Coffin of Sitztheorie, The Company Lawyer, Vol. 24, Issue 6, 2003, pp.184–185.

Ronfeldt, Thomas/Werlauff, Erik: Merger as a Method of Establishment: on Cross–Border Mergers, Transfer of Domicile and Divisions, Directly Applicable under the EC Treaty's Freedom of Establishment, European Company Law, Vol. 3, Issue 3, 2006, pp. 125–129.

Rose, Paul: EU Company Law Convergence Possibilities after Centros, Transnational Law & Contemporary Problems, Vol. 11, Spring 2001, pp. 121–139.

Roth, Wulf–Henning: Recognition of Foreign Companies in *Siège Réel* Countries: A German Perspective, in: Current Issues of Cross–Border Establishment of Companies in the European Union (Jan Wouters and Hildegard Schneider eds.), Antwerpen 1995, pp. 29–46. (*Recognition of Foreign Companies*)

Roth, Wulf–Henning: Case C–212/97, Centros Ltd v. Erhvervs–og Selskabsstyrelsen, Judgment of 9 March 1999, Common Market Law Review, Vol. 37, Issue 1, 2000, pp. 147–155.

Roth, Wulf–Henning: From *Centros* to *Überseering*: Free Movement of Companies, Private International Law, and Community Law, International and Comparative Law Quarterly, Vol. 52, No.1, 2003, pp. 177–208. (*From Centros to Überseering*)

Rothe, Nicole: Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the *Überseering* Case, American University Law Review, Vol. 53, No. 5, 2004, pp. 1103–1141.

Roussos, Alexandros: Realising the Free Movement of Companies, European Business Law Review, Vol. 12, Issue 1/2, 2001, pp. 7–25.

Ryan, Patrick S.: Will There Ever Be a Delaware of Europe? Case C–167/01 Kamer van Koophandel en Fabrieken Voor Amsterdam v. Inspire Art Ltd. (E.C.J. September 23, 2003), Columbia Journal of European Law, Vol. 11, Winter 2004/2005, pp. 187–202.

Santa Maria, Alberto: European Economic Law, Kluwer International Law, Alphen aan den Rijn 2009.

Schindler, Clemens Philipp: Cross–Border Mergers in Europe –Company Law is Catching Up!– Commentary on the ECJ's Decision in *SEVIC* Systems AG, European Company and Financial Law Review, Vol. 3, Issue 1, 2006, pp. 109–119.

Schmidt, Jessica: SE and SCE: Two New European Company Forms–And More to Come!, Company Lawyer, Vol. 27, No. 4, 2006, pp. 99–109.

Schmitthoff, Clive M.: Daily Mail Loses in the European Court, Journal of Business Law, 1988, pp. 454–455.

Schön, Wolfgang: The Free Choice between the Right to Establish a Branch and to Set–up a Subsidiary–A Principle of European Business Law, European Business Organization Law Review, Vol. 2, Issue 2, 2001, pp. 339–364.

Schön, Wolfgang: The Mobility of Companies in Europe and the Organizational Freedom of Company Founders, European Company and Financial Review, Vol. 3, Issue 2, 2006, pp. 122–146. (*The Mobility of Companies*)

Segal, Bruce L.: The Internal Affairs Doctrine–Rights and Duties of Shareholders, Directors, and Officers of Foreign Corporations Doing Business in Michigan, The Michigan Business Law Journal, Vol. 27, Issue 1, Spring 2007, pp. 48–51.

Sester Peter/Cárdenas José Luis: The Extra Communitarian Effects of *Centros*, *Überseering* and *Inspire Art* with regard to Fourth Generation Association Agreement, European Company and Financial Law Review, Vol. 2, Issue 3, 2005, pp. 398–412.

Siclari, Domenico: A Renewed "Delaware Effect" for Company Regulation in EU? The Case of European Company (SE), The Columbia Journal of European Law, Vol. 17, Issue 1, 2011, pp. 1–4.

Siems, Mathias M.: Convergence, Competition, *Centros* and Conflicts of Law: European Company Law in the 21st Century, European Law Review, Vol. 27, Issue 1, 2002, pp. 47–59. (*EC Company Law in the 21st Century*)

Siems, Mathias M.: The European Directive on Cross–Border Mergers: An International Model?, Columbia Journal of European Law, Vol. 11, Issue 1, 2004–2005, pp. 167–185. (*Directive on CBMs*)

Siems, Mathias M.: SEVIC: Beyond Cross–Border Mergers, European Business Organization Law Review, Vol. 8, No. 2, 2007, pp. 307–316. (*Sevic*)

Siems, Mathias/Herzog, Leif/Rosenhager, Erik: The European Private Company: An Attractive New Legal Form of Doing Business?, Butterworths Journal of International Banking & Financial Law, Vol. 24, No. 5, 2009, pp. 247–250.

Sorensen, Karsten Engsig: Prospects for European Company Law after the Judgment of the European Court of Justice in *Centros* Ltd, Cambridge Yearbook of European Legal Studies, Vol. 2, 1999–2000, pp. 203–230.

Sorensen, Karsten Engsig: Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?, Common Market Law Review, Vol. 43, No. 2, 2006, pp. 423–459. (*Abuse of Rights*)

Sorensen, Karsten Engsig/Neville, Mette: Corporate Migration in the European Union–An Analysis if the Proposed 14th EC Company Law Directive on the

Transfer of the Registered Office of a Company from one Member State to Another with a Change of Applicable Law, Columbia Journal of European Law, Vol. 6, Issue 2, 2000, pp. 181–208.

Sousa, Antonio Frada de: Company's Cross–Border Transfer of Seat in the EU After *Cartesio*, NYU School of Law Jean Monnet Working Paper Series, Working Paper No: 07/09, New York 2009.

Stein, Eric: Conflict–of–Laws Rules by Treaty: Recognition of Companies in a Regional Market, Michigan Law Review, Vol. 68, No. 7, 1970, pp. 1327–1354. (*Recognition of Companies*)

Stein, Eric: Harmonization of European Company Laws, Michigan 1971. (*Harmonization of EC Laws*)

Stevens, Matt: International Affairs Doctrine: California versus Delaware in a Fight for the Right to Regulate Foreign Corporations, Boston College Law Review, Vol. 48, No. 4, 2007, pp. 1047–1087.

Stolowy, Nicole: Does the "Societas Europaea" or "European Company" Make a Significant Contribution to Construction of a European Company Law?, Journal of Business Law, Vol. 5, 2012, pp. 363–378.

Storm, Paul: Cross–Border Mergers, the Rule of Reason and Employee Participation, European Company Law, Vol. 3, Issue 3, 2006, p. 130 *et seq*.

Sturmfels, Kai F.: "Pseudo–Foreign Companies" in Germany–The *Centros*, *Überseering* and *Inspire Art* Decisions of the European Court of Justice, in: Key Aspects of German Business Law: A Practical Manual (Michael Wendler *et al.* eds.) Berlin/Heidelberg 2006, pp. 63–68.

Szabo, Daniel Gergely/Sorensen, Karsten Engsig: Cross–Border Conversion of Companies in the EU: The Impact of the VALE Judgement, Nordic & European Company Law Working Paper No. 10–33, January 2013, available at SSRN: <http://ssrn.com/abstract=2198364>.

Szydlo, Marek: Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the *Cartesio* Case, European Review of Private Law, Vol. 16, Issue 6, 2008, pp. 973–994.

Szydlo, Marek: Case C–210/06, *CARTESIO* Oktató és Szolgáltató bt, Judgment of the Grand Chamber of the Court of Justice of 16 December 2008, Common Market Law Review, Vol. 46, Issue 2, 2009, pp. 703–722. (*Case C–210/06 Cartesio*)

Szydlo, Marek: The Right of Companies to Cross–Border Conversion under the TFEU Rules on Freedom of Establishment, European Company and Financial Law Review, Vol. 7, Issue 3, 2010, pp. 414–443. (*Cross–Border Conversion under the TFEU*)

Şandru, Daniel Mihail: Freedom of Establishment of Companies in the European Union: Possible Effects of the Case *VALE*, C–378/10 Pending on the Case–Law of the Romanian Courts, International Journal of Academic Research in Accounting, Finance and Management Sciences, Vol. 2, No: 1, 2012, pp. 141–147.

Teichmann, Christoph: European Company Law–Common Principles of Competition Between Legislators?, in: European Private Law–Current Status and Perspectives (Reiner Schulze and Hans Schulte–Nolke eds.), Sellier European Law Publishers, Munich 2011, pp. 145–180.

Tekinalp, Gülören: Ortaklıkların Vatandaşlığı, İstanbul Üniversitesi Hukuk Fakültesinin Cumhuriyetin 50. Yıl Dönümü İçin Armağanı, Istanbul 1973, p. 549 *et seq*.

Tekinalp, Gülören: Yabancı Tüzel Kişilerin Tanınması, Halil Arslanlı'nın Anısına Armağan, Istanbul 1978, pp. 187–214.

Tekinalp, Gülören: Milletlerarası Özel Hukukta Ortaklıkların Merkezi Kriteri AT Hukuku ve MÖHUK, Public and Private International Law Bulletin, Year 19–20, No 1–2, 1999–2000, pp. 909–921.

Tekinalp, Gülören: Milletlerarası Özel Hukuk Bağlama Kuralları, 11th Ed., Istanbul 2011. (*Bağlama Kuralları*)

Tenore, Mario: Italy: Companies and Private International Law, in: Residence of Companies under Tax Treaties and EC Law (Guglielmo Maisto eds.), Amsterdam 2009, pp. 519–550.

Terra, Ben: The European Court of Justice and the Principle of Prohibiting Abusive Practices in VAT, New Zealand Journal of Taxation Law and Policy, Vol. 13, 2007, pp. 381–394.

Thoma, Ioanna: ECJ, 5 November 2002, Case C–208/00 Überseering BV v. NCC Nordic Construction Company Baumanagement GmbH–The *Überseering* Ruling: A Tale of Serendipity, European Review of Private Law, Vol. 11, Issue 4, 2003, pp. 545–554.

Timmermans, Christian: Harmonization in the Future of Company Law in Europe, in: Capital Markets and Company Law (Klaus J. Hopt and Eddy Wymeersch eds.), Oxford University Press 2003.

Timmermans, Christian: Impact of EU Law on International Company Law, European Review of Private Law, Vol. 18, Issue 3, 2010, pp. 549–567.

Timmermans, Christian: Recognition of Foreign Companies and Bodies Corporate: The Convention of 29 February 1968 on the Mutual Recognition of Companies and Firms: A Few Comments from the European Law Point of View, Netherlands International Law Review, Vol. 27, Issue 3, 1980, pp. 357–361.

Travers, Noel: The Right of Establishment of Companies which are Economically Inactive in their Member State of Registration, Commercial Law Practitioner, Vol. 6, 1999, pp. 159–166.

Trefil, Barbara: European Company Law: Comments and Meta–comments on *Centros*, German Law Journal, Vol. 2, Issue 11, 2001, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=117>.

Tridimas, Takis: Abuse of Right in EU Law: Some Reflections with Particular Reference to Financial Law, Queen Mary School of London, School of Law Legal Studies Research Paper No. 27/2009, available at SSRN: <http://ssrn.com/abstract=1438577>. (*Abuse of Right in EU Law*)

Tridimas, Takis: The General Principles of EU Law, 2nd Edition, Oxford University Press, 2006.

Tröger, Tobias H.: Choice of Jurisdiction in European Corporate Law–Perspectives of European Corporate Governance, European Business Organization Law Review, Vol. 6, Issue 1, 2005, pp. 3–64.

Tzouganatos, Dimitris: Private International Law as Means to Control the Multinational Enterprise, Vanderbilt Journal of Transnational Law, Vol. 19, No. 3, 1986, pp. 477–514.

Ugliano, Arianna: The New Cross–Border Merger Directive: Harmonisation of European Company Law and Free Movement, European Business Law Review, Vol. 18, Issue 3, 2007, pp. 585–617.

Vaccaro, Enrico: Transfer of Seat and Freedom of Establishment in European Company Law, European Business Law Review, Vol. 16, Issue 6, 2005, pp. 1348–1365.

Valk, Oliver: C–210/06 *Cartesio*–Increasing Corporate Mobility through Outbound Establishment, Utrecht Law Review, Vol. 6, Issue 1, 2010, pp. 151–167.

Van den Braak, Sandra: The European Private Company, Its Shareholders and Its Creditors, Utrecht Law Review, Vol. 6, Issue 1, 2010, pp. 1–21.

Van Eck, Gerco C./Roelofs, Erwin R.: SE Mobility: Taking a Short Cut? A Recommendation for Amendment of the SE Regulation, European Company Law, Vol. 6, Issue 3, 2009, pp. 105–109.

Van Eck, Gerco C./Roelofs, Erwin R.: *Vale*: Increasing Corporate Mobility from Outbound to Inbound Cross–Border Conversion?, European Company Law, Vol. 9, Issue 6, 2012, pp. 319–324.

Vanistendael, **Frans:** *Halifax* and *Cadbury Schweppes*: One Single European Theory of Abuse in Tax Law?, EC Tax Review, Vol. 15, Issue 4, 2006, p. 192 *et seq*.

Viandier, Alain: Free Movement and Mobility of Companies, European Business Law Review, Vol. 9, No. 9–10, 1998, pp. 301–306.

Vinter, Nikolaj/Werlauff, Erik: Tax Motives Are Legal Motives – The Borderline Between Use and Abuse of the Freedom of Establishment with Reference to the Cadbury Schweppes, European Taxation, Vol. 46, No. 8, 2006, pp. 383–386.

Vossestein, Gert–Jan: Companies' Freedom of Establishment after *SEVIC*, European Company Law, Vol. 3, Issue 4, 2006, pp. 177–182. (*Companies' Freedom of Establishment*)

Vossestein, Gert–Jan: Exit Restrictions on Freedom of Establishment after Marks & Spencer, European Business Organization Law Review, Vol. 7, Issue 4, 2006, pp. 863–878.

Vossestein, Gert–Jan: Transfer of the Registered Office–The European Commission's Decision Not to Submit a Proposal for a Directive, Utrecht Law Review Vol. 4, Issue 1, 2008, pp. 53–65. (*Transfer of the Registered Office*)

Vossestein, Gert–Jan: Cross–Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment–Some Considerations on the Court of Justice's *Cartesio* Judgment, European Company Law, Vol. 6, Issue 3, 2009, pp. 115–123. (*Cross–Border Transfer of Seat*)

Vossestein, Gert–Jan: Modernization of European Company Law and Corporate Governance: Some Considerations on its Legal Limits, Kluwer International Law, Alphen aan den Rijn 2010. (*Modernization of EU Company Law*)

Weber, Dennis: Tax Avoidance and the EC Treaty Freedoms: A Study of the Limitations under European Law to the Prevention of Tax Avoidance, Kluwer Law International, The Hague 2005.

Werlauff, Erik: Common European Company Law: Status 1998 (1): Equal Treatment of Companies, Domicile under Company Law and Related Concepts, European Business Law Review, Vol. 9, Issue 5/6, 1998, pp. 169–175. (*Common European Company Law*)

Werlauff, Erik: Using a Foreign Company for Domestic Activities, European Business Law Review, Vol. 10, Issue 7/8, 1999, pp. 306–313.

Werlauff, Erik: The Consequences of the *Centros* Decision: Ends and Means in the Protection of Public Interests, European Taxation, 2000, pp. 542–545.

Werlauff, Erik: The Main Seat Criterion in a New Disguise–An Acceptable Version of the Classic Main Seat Criterion?, European Business Law Review, Vol. 12, Issue 1/2, 2001, pp. 2–6. (*Main Seat Criterion*)

Werlauff, Erik: The SE Company–A New Common European Company from 8 October 2004, European Business Law Review, Vol. 14, No. 1, 2003, pp. 85–103.

Werlauff, Erik: SE–The Law of the European Company, Copenhagen 2003. (*The Law of the SE*)

Werlauff, Erik: Cross–Border Transfers of SE Companies, European Company Law, Vol, 1, Issue 3, 2004, pp. 121–125.

Werlauff, Erik: Relocating a Company within the EU, European Company Law, Vol. 5, Issue 3, 2008, pp. 136–139.

Werlauff, Erik: A 'Copenhagen Effect'? Denmark's Answer to Centros: A Far–Reaching Company Law Reform Aimed at Strengthening the 'Free Movement of Companies', European Company Law, Vol. 6, No. 4, 2009, pp. 160–168.

Werlauff, Erik: Pro Forma Registration of Companies: Why a Brass Plate in the Host Country Is Enough in Some Respects, but Not in Others, European Company Law, Vol. 7, Issue 1, 2010, pp. 25–30.

Wisniewski, Andrzej/Opalski, Adam: Companies' Freedom of Establishment after the ECJ *Cartesio* Judgment, European Business Organization Law Review, Vol. 10, Issue 4, 2009, pp. 595–625.

Wooldridge, Frank: *Überseering*: Freedom of Establishment of Companies Affirmed, European Business Law Review, Vol. 14, Issue 3, 2003, pp. 227–235.

Wooldridge, Frank: The Advocate General's Submissions in *Kamer van Koophandel*: Further Emphasis on the Right of Establishment, European Business Law Review, Vol. 14, Issue 5, 2003, pp. 497–505.

Wooldridge, Frank: The Advocate General's Submissions in *Cartesio*: Further Doubts on the *Daily Mail* Case, Company Lawyer, Vol. 30, Issue 5, 2009, p. 145 *et seq*.

Wouters, Jan: European Company Law: *Quo Vadis*?, Common Market Law Review, Vol. 37, Issue 2, 2000, pp. 257–300.

Wouters, Jan: Private International Law and Companies' Freedom of Establishment, European Business Organization Law Review, Vol. 2, Issue 1, 2001, pp. 101–139. (*Companies' Freedom of Establishment*)

Wyckaert, Marieke/Geens, Koen: Cross Border Merger and Minority Protection: An Open–Ended Harmonisation, Utrecht Law Review, Vol. 4, Issue 1, March 2008, pp. 40–52.

Wyckaert, Marieke/Jenné, Filip: Corporate Mobility, in: The European Company Law Action Plan Revisited–Reassessment of the 2003 Priorities of the European Commission (Koen Geens and Klaus J. Hopt eds.), Leuven, 2010, pp. 287–329.

Wymeersch, Eddy: The Transfer of the Company's Seat in European Company Law, Common Market Law Review, Vol. 40, Issue 3, 2003, pp. 661–695. (*Transfer of the Company's Seat*)

Wymeersch, Eddy: *Centros*: A Landmark Decision in European Company Law, Institute Working Paper Series, WP 1995–15, Gent 2001. (*Centros: A Landmark Decision*)

Wymeersch, Eddy: Company Law in the 21st Century, Financial Law Institute Working Paper Series, WP 1999–14, Gent 2001. (*Company Law in the 21st Century*)

Wymeersch, Eddy: Is a Directive on Corporate Mobility Needed?, European Business Organization Law Review, Vol. 8, Issue 1, 2007, pp. 161–169. (*Directive on Corporate Mobility*)

Wymeersch, Eddy: Cross–Border Transfer of the Seat of a Company–Recent EU Case Law and the SE Regulation, in: The European Company: Developing a Community Law of Corporations (Jonathan Rickford eds.), Intersentia, Antwerp–Oxford–New York 2003, pp. 83–94.

Wymeersch, Eddy: Company Law in Europe and European Company Law, available at SSRN: <http://ssrn.com/abstract=273876>.

Xanthaki, Helen: The Establishment of Foreign Companies in France, Company Lawyer, Vol. 17, No. 1, 1996, pp. 28–32.

Xanthaki, Helen: The Secondary Establishment of Companies within the EU: Challenge of Missed Opportunity?, European Business Law Review, Vol. 10, Issue 1, 1999, pp. 120–139.

Xanthaki, Helen: *Centros*: Is This Really the End for the Theory of *Siège Reel*, The Company Lawyer, Vol. 22, 2000, Issue 1, pp. 2–8.

Young, E. Hilton: The Nationality of a Juristic Person, Harvard Law Review, Vol. 22, No. 1, 1908, pp. 1–25.

Zimmer, Daniel: Case C–167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Common Market Law Review, Vol. 41, Issue 4, 2004, pp. 1127–1140. (*Inspire Art*)

Zimmer, Daniel: Legal Personality, in: VOC 1602–2002: 400 Years of Company Law (Ella Gepken *et al.* eds.), Kluwer Legal Publishers, Deventer 2005, pp. 265–280. (*Legal Personality*)

II. EU LEGISLATION

The Treaty on the European Union, (OJEU C 326/13 of 26.10.2012)

The Treaty on the Functioning of the European Union, (OJEU C 326/47 of 26.10.2012)

Protocol No (2) on the Application of the Principles of Subsidiarity and Proportionality, (OJEU C 326/206 of 26.10.2012)

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, (OJEU L 304/77 of 30.10.1978)

Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), (OJEU L 199/1 of 31.07.1985)

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), (OJEU L 294/1 of 10.11.2001)

Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), (OJEU L 207/1 of 18.08.2003)

Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, (OJEU L 222/11 of 14.08.1978)

Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3)(g) of the Treaty, Concerning the Division of Public Limited Liability Companies, (OJEU L 378/47 of 31.12.1982)

Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3)(g) of the Treaty on Consolidated Accounts, (OJEU L 193/1 of 18.07.1983)

Eleventh Council Directive 89/666/EEC of 21 December 1989 Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Company Governed by the Law of Another State, (OJEU L 395/36 of 30.12.1989)

Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares

Concerning Companies of Different Member States, (OJEU L 225/1 of 20.08.1990)

Council Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company with regard to the Involvement of Employees, (OJEU L 294/22 of 10.11.2001)

Council Directive 2003/72/EC of 22 July 2003 Supplementing the Statute for a European Cooperative Society with regard to the Involvement of Employees, (OJEU L 207/25 of 18.08.2003)

Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, (OJEU, L 142/12 of 30.04.2004)

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on Cross–Border Mergers of Limited Liability Companies, (OJEU L 310/1 of 25.11.2005)

Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, (OJEU L 258/11 of 01.10.2009); (before 21 October 2009, First Council Directive 68/151/EEC)

Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 Concerning Mergers of Public Limited Liability Companies, (OJEU L 110/1 of 29.04.2011); (before 1 July 2011, Third Council Directive 78/855/EEC)

Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, (OJEU L 315/79 of 14.11.2012); (before 4 December 2012, Second Council Directive 77/91/EEC)

III. OTHER EU DOCUMENTS

Commission Legislative and Work Programme 2007, Brussels 24.10.2006, [COM (2006) 629 final]

Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium–Sized Enterprises [notified under document number C (2003) 1422)] (2003/361/EC)

Commission Staff Working Document–Annex to the Communication from the Commission to the Council and the European Parliament–Common Actions for Growth and Employment: The Community Lisbon Programme {COM (2005) 330 final}, Brussels 20.07.2005, [SEC (2005) 981 final]

Commission Staff Working Document–Impact Assessment on the Directive on the Cross–Border Transfer of Registered Office, Brussels, 12.12.2007, [SEC (2007) 1707]

Committee on Legal Affairs of European Parliament's Draft Report with Recommendations to the Commission on Cross–Borders Transfers of Company Seats [2008/2196(INI)] of 17 October 2008

Communication from the Commission to the Council and the European Parliament–Modernising Company Law and Enhancing Corporate Governance in the European Union–A Plan to Move Forward, Brussels 21.05.2003, [COM (2003) 284 final]

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions–Action Plan: European Company Law and Corporate Governance–A Modern Legal Framework for more Engaged shareholders and Sustainable Companies (Text with EEA relevance), Strasbourg 12.12.2012, [COM (2012) 740 final]

Completing the Internal Market: White Paper from the Commission to the European Council [COM (85)310 final]

DG Internal Market and Services of the European Commission, Consultation and hearing on future priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, Brussels 3 May 2006

DG Internal Market and Services of the European Commission, Feedback Statement Summary of Responses to the Public Consultation on the Future of European Company Law, Brussels 17.07.2012

Draft Directive on the Transfer of the Official Registered Address of a Company from one Member State to Another without Dissolution (With Consequent Change of the Proper Law of the Company) (KPMG Study)

Draft Directive on the Transfer of the Siege Reel of a Company from one Member State to Another without Dissolution (While Remaining Subject to the Law of the State of Incorporation) (KPMG Study)

European Added Value Assessment (EAVA 03/12), Directive on the Cross–Border Transfer of a Company's Registered Office (14th Company Law Directive), Brussels 2003

European Parliament Resolution of 4 July 2006 on Recent Developments and Prospects in Relation to Company Law [P6_TA (2006) 0295]

European Parliament Resolution on the European Private Company and the Fourteenth Company Law Directive on the Transfer of the Company Seat [P6_TA (2007) 0491]

European Parliament Resolution of 10 March 2009 with Recommendations to the Commission on the Cross–Border Transfer of the Registered Office of a Company [P6_TA (2009) 0086]

European Parliament Legislative Resolution of 10 March 2009 on the Proposal for a Council Regulation on the Statute for a European Private Company [COM (2008) 0396 – C6–0283/2008 – 2008/0130 (CNS)]

European Parliament Resolution of 2 February 2012 with Recommendations to the Commission on a 14th Company Law Directive on the Cross–Border Transfer of Company Seats [P7_TA (2012) 0019]

European Parliament Resolution of 14 June 2012 on the Future of European Company Law [P7_TA (2012) 0259]

Final Report of the Group of Experts on European Systems of Worker Involvement (with Regard to the European Company Statute and Other Pending Proposals), Brussels 13.05.1997, (IP/97/396)

Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the De Facto Head Office of a Company from One Member State to Another (dated November 11, 1997 and numbered XV/D2/6002/97–EN REV1)

Proposal for a Council Regulation on the Statute for a European Private Company {SEC (2008) 2098} {SEC (2008) 2099}, Brussels 25.06.2008, [COM (2008) 0396 final]

Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, Brussels 4 November 2002

Report of the Reflection Group on the Future of EU Company Law, Brussels 5 April 2011

Report from the Commission to the European Parliament and The Council The Application of Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Brussels 17.11.2010, [COM (2010) 676 final]

Study on Transfer of the Head Office of a Company from one Member State to Another, carried out by KPMG European Business Centre, Brussels 1993

The General Programme for the Abolition of Restrictions on Freedom of Establishment of 18 December 1961, (OJEU, No. 2, 15.01.1962)

IV. CASE–LAW OF THE CJEU

Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585

Case 2/74 *Jean Reyners v. Belgian State* [1974] ECR 631

Case 33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299

Case 14/76 *A. De Bloos, SPRL v. Société en commandite par actions Bouyer* [1976] ECR 1497

Case 33/76 *Rewe–Zentralfinanz eG et Rewe–Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989

Case 11/77 *Richard Hugh Patrick v. Ministre des Affaires Culturelles* [1977] ECR 1199

Case 33/78 *Somafer SA v. Saar–Ferngas AG* [1978] ECR 2138

Case 115/78 *J. Knoors v. Staatssecretaris van Economische Zaken* [1979] ECR 399

Case 139/80 *Blanckaert & Willems PVBA v. Luise Trost* [1981] ECR 819

Case 107/83 *Ordre des avocats au Barreau de Paris v. Onno Klopp* [1984] ECR 2971

Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others* [1985] ECR 1

Case 270/83 *Commission of the European Communities v. French Republic* [1986] ECR 273

Case 205/84 *Commission v. Germany* [1986] ECR 3755

Case 79/85 *D. H. M. Segers v. Bestuur van de Bedrijfsvereniging voor Bank– en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375

Case 168/85 *Commission of the European Communities v. Italian Republic* [1986] ECR 2945

Case 39/86 *Sylvie Lair v. Universität Hannover* [1988] ECR 3163

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

Case 143/87 *Christopher Stanton and SA belge d'assurances "L'Étoile 1905" v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI).* [1988] ECR 3877

Case 377/87 *European Parliament v. Council of the European Communities* [1988] ECR 4017

Case C–61/89 *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I–3551

Case C–221/89 *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I–3905

Case C–246/89 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1991] ECR I–4585

Case C–340/89 *Irène Vlassopoulou v. Ministerium für Justiz, Bundes– und Europaangelegenheiten Baden–Württemberg* [1991] ECR I–2357

Case C–370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I–4265

Case C–19/92 *Dieter Kraus v. Land Baden–Württemberg* [1993] ECR I–1663

Case C–312/93 *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* [1995] ECR I–4599

Case C–441/93 *Panagis Pafitis and Others v. Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I–1363

Case C–55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I–4165

Case C–193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chrissant–hakopoulos* [1996] ECR I–929

Case C–53/95 *Inasti (Institut National d'Assurances Sociales pour Travailleurs Indépendants) v. Hans Kemmler* [1996] ECR I–703

Case C–57/95 *French Republic v. Commission of the European Communities* [1997] ECR I–1627

Case C–70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I–3395

Case C–134/95 *Unità Socio–Sanitaria Locale nº 47 di Biella (USSL) v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [1997] ECR I–195

Case C–261/95 *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I–4025

Case C–62/96 *Commission of the European Communities v. Hellenic Republic* [1997] ECR I–6725

Case C–367/96 *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I–2843

Joined Cases C–10/97 to C–22/97 *Ministero delle Finanze v. IN. CO. GE.'90 Srl and Others* [1998] ECR I–6307

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

Case C–373/97 *Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [2000] ECR I–1705

Case C–355/98 *Commission of the European Communities v. Kingdom of Belgium* [2000] ECR I–1221

Joined Cases C–397/98 and Case C–410/98 *Metallgesellschaft Ltd and Others (C–397/98), Hoechst AG and Hoechst UK Ltd (C–410/98) v. Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I–01727

Case C–54/99 *Eglise de scientologie* [2000] ECR I–1335

Case C–110/99 *Emsland–Stärke GmbH v. Hauptzollamt Hamburg–Jonas* [2000] ECR I–1569

Case C–453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others* [2001] I–06297

Case C–86/00 *HSB–Wohnbau GmbH* [2001] ECR I–5355

Case C–208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I–9919

Case C–463/00 *Commission of the European Communities v Kingdom of Spain* [2003] ECR I–4634

Case C–13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I–8679

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

Case C–255/02 *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise* [2006] ECR I–1609

Case C–299/02 *Commission of the European Communities v. Kingdom of the Netherlands* [2004] ECR I–9761

Case C–253/03 *CLT–UFA SA v. Finanzamt Köln–West* [2006] ECR I–1831

Case C–411/03 *SEVIC Systems AG v. Amtsgericht Neuwied* [2005] ECR I–10805

Case C–436/03 *European Parliament v. Council of the European Union* [2006] ECR I–03733

Case C–443/03 *Götz Leffler v. Berlin Chemie AG* [2005] ECR I–9637

Case C–196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006] ECR I–7995

Joined Cases C–222/05 to C–225/05 *van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I–4233

Case C–321/05 *Hans Markus Kofoed v. Skatteministeriet* [2007] ECR I–5795

Case C–438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I–10779

Case C–451/05 *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public* [2007] ECR I–8251

Case C–465/05 *Commission of the European Communities v. Italian Republic* [2007] ECR I–11091

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

Case C–414/06 *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn* [2008] ECR I–03601

Case C–445/06 *Danske Slagterier v. Bundesrepublik Deutschland* [2009] ECR I–2119

Case C–531/06 *Commission of the European Communities v. Italian Republic* [2009] ECR I–04103

Case C–161/07 *Commission of the European Communities v. Republic of Austria* [2008] ECR I–10671

Case C–169/07 *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung and Oberösterreichische Landesregierung* [2009] ECR I–01721

Joined Cases C–171/07 and C–172/07 *Apothekerkammer des Saarlandes and Others v. Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] ECR I–04171

Case C–326/07 *Commission of the European Communities v. Italian Republic* [2009] ECR I–02291

Case C–550/07P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* [2010] ECR I–08301

Case C–384/08 *Attanasio Group Srl v. Comune di Carbognano* [2010] ECR I–02055

Case C–115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein–Westfalen eV v. Bezirksregierung Arnsberg* [2011] ECR I–3701

Case C–371/10 *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/ kantoor Rotterdam* [2011] ECR I–12273

Case C–378/10 *Vale Építési Kft v. Hungary* [2012] ECR I–0000