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The Transfer of Seat of Companies within the European Single Market

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Abstract

The company law in Europe continues showing a difference of opinions in relation to the transfer of a company seat from one system to other, affecting the well functioning of the Single Market and the principle of freedom of establishment provided by the Treaty, no matter the way those organisations want to move, the Court of Justice being the only one offering, in time, clarifications and decisive solutions, many of them limiting the member states's action in restraining the freedom of establishment of companies.

As a consequence, the caselaw on transfer of seat of companies from one member state to another, rather timid at the beginning, but approaching a more bold attitude recently, become more favourable towards the acceptance of the freedom of establishment in most cases of transfer, the national company law, especially the provisions on conflict of law, facing a new challenge in the harmonisation of the provisions related to incorporation, functioning, merger/division/conversion or the creation of secondary establishments.

Moreover, the development of the market, leaning towards a speedy digitalisation, forces both the institutions and the members states to take measures to solve the problem of transfer of seat of companies in a more integrated market and one of the steps made in this way was the adoption of the Company Law Package, by which the European Union addressed two crucial issues: the use of digital tools by the companies and the cross-border conversions, mergers and divisions.

The article follows the main developments of the treaty provisions and caselaw in relation to freedom of establishment and transfer seat of companies, especially the pivotal decisions of the Court of Justice which made possible for the new attitude in the field and analyses the possible structural implications of the new provisions on cross-board conversions .

Keywords: *Private Law, European Union Law, European Company Law, Freedom of Establishment, Transfer of Seat, Incorporation, Real Seat, Mergers, Divisions, Conversions, Digital*

JEL Codes: K22, K23, K33

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a1. Internal market and freedom of establishment

The European Union legal order is characterised by autonomy, meaning that it constitutes a legal system which is different from the international legal order, although, formally, it belongs to it, and the national legal systems of Member States, being a supranational one, considered a common internal law.[2] The opinion that European Union Law, as a legal order based on treaties should belong to the international law was for a period very solid among the scholars[3], but as the Court stated being "a new legal order" many authors decided to lean towards the constitutionalism theory rather than internationalism[4], considering that European Union has passed to new level, unique among the international organisations[5].

The Court of Justice of European Union by explaining the special nature of the European legal system went to one of the first objectives provided by the founding treaties and in its decision from case Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited Case no. 270/80[6] when it expressed, in relation to the common market, that "the Treaty (…) seeks to create a single market reproducing as closely as possible the conditions of a domestic market", so the relations between the internal markets are seen as being of an internal legal order, common to all Member States and not belonging to international law.[7]

As the Court explained, among the first aspirations of the Member States of European Union has always been the creation of a unique Internal Market, without any internal barriers, enjoying the free movement of goods, persons, services and capital in a common tariff zone and functional competition between the merchants from different countries, for a long time the term "common market" being used as synonym for what now stands European Union.[8]

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[2] Lefter C., *Fundamente ale dreptului comunitar instituțional*, Economica Publishing House, 2003, p. 49

[3] Wyatt, D., *A new Legal Order or Old?*, European Law Review, 1982, p. 147

Berman, F., *Community Law and International Law. How Far Does Eithet Belong to Other?*, in Markesinis B.S., The Clifford Chance Lectures, Vol. 1, Oxford University Press, 1996, p. 241

[4] For a extended debate on the matter see:

Spiermann, O., *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order,* European Journal of International Law, Vol. 10, No. 4, 1999, p. 763-765 &

De Witte B., E.U. Law: *Is It International Law?* in Barnard C. & Peers S., *Introduction*, in Barnard C. & Peers S (eds.), *European Union Law,* Oxford University Press, 2014, p. 174-180

[5] Moravcsik, A., *The European Constitutional Settlement,* in Meunier S. And McNamara K. (eds.) *Making History: European Integration and Institutional Change at Fifty,* Oxford University Press, 2007, p. 23

[6] Polydor Limited and RSO Records Incorporated v Harlequin Record Shops Limited and Simons Records Limited, Judgment, Case 270/80, [1982] ECR 329, ILEC 067 (CJEU 1982), [1982] 1 CMLR 677, 9th February 1982, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]; European Court of Justice (Grand Chamber)

[7] Manolache O., Drept comunitar, Ediția a IV a, All Beck Publishing House, Bucharest, 2003, p 63

[8] When United Kingdom expressed itself before accession, it voted for becoming part of the "common market"

The development of the European Internal Market has a long history, from the first steps passing now more than 50 years and, still, we cannot conclude that certain areas are clearly defined, the role of the Court of Justice being crucial in interpreting and providing new principles, most of the enrichment process being based on the substitutes offered by the caselaw.

In regard to the definition of the Internal Market, an objective of paramount importance as I indicated in the above paragraphs, remains the same as in the firsts texts, in strict correlation with the freedoms, as defined in art. 26(2) Treaty on Functioning of European Union (TFEU), an area bereft of internal frontiers, where the four freedoms: of goods, persons, services and capital are guaranteed, a definition which is somehow circular in the idea that for the understanding of the market you need to discover the meaning of freedoms and vice versa.[9]

As to the main role attributed to the institutions and states for the fulfilment of the Single Market, there can be identified the action in the integration of the national ones into a single European market and that has to be fulfilled by removing all possible obstacles to trade between states, the rationale[10] for pursuing such a project being not purely economic, but also social and political, as for many, the market defines a form of ordoliberalism, but also supplies a greater degree of uniformity of structure and conditions.[11]

The nature of European market integration changed in time[12], as the paradigm from Rome Treaty, established in the Spaak report, to create a common market, replaced in late 70's by the single market paradigm, when the substantive law moved towards a more competitive model with the home country holding a greater role[13] and now we can witness the third one called Economic Union, where the market and the monetary union "complement each other"[14] with benefits of using a single currency in a well-functioning internal

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[9] Snell J., *The Internal Market and the philosophies of market integration,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 301

[10] The objective was explained by the Court in case 15/81 Gaston School (1982): "involves the elimination of all obstacles to intra-trade Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market"

[11] Chalmers D. , Davies G., Monti G., *European Union Law*, 2nd edition, Cambridge University Press, 2010, p. 675-676

[12] More on the integration of internal market in:

Craig. P., *The evolution of the Single Market,* in Barnard C. Scott J. (eds.), *The Law of the Single Market*, Hart Publishing, 2002, chapter 1

Gormley L.W., *The Internal Market: History and Evolution,* in Shuibhne N.N., (ed), *Regulating the Internal Market,* Cheltenham: Edward Elgar, 2006

[13] Mainly the Court of Justice, by its decision on "mutual recognition" from the Casis de Dijon Case, Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (1979) - C-120/78

[14] Snell J., *The Internal Market and the philosophies of market integration,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 313

market, but with questions raised on the reduced flexibility, seen in the last financial crisis.[15]

As we analyse the evolution of the European market, we can notice that the nature of market integration has changed in time and if, at the beginning, it was a market based on the freedoms and common tariff, with an assumed objective to be harmonised, later it switched to another, based on less harmonisation and more home country control and competition, and now it got to an integrated structure, pushing the market integration to a more centralised direction.

One of the reasons for this new approach is the increase of digitalisation which leads also to a faster and smoother cross-border process in the internal market, many goods, services persons and, definitively, capital moving a lot easier from one member state to the another and by that resetting the initial view on freedoms.

Whatever paradigm of the internal market we are analysing, there are two main conditions to be satisfied: to maintain a free movement and to confer power to European Union to harmonise in order to achieve the wanted market integration, but as I am going to show in the paper, there were many situations in which the free movement was affected by obstacles to trade or transfer represented by the lack of uniformity of national rules.

Moreover, we can notice, by overviewing the evolution of the harmonisation process, that from the corporate life view, the creation of a single financial market was an easier objective to be fulfilled in comparison to the still struggling process of company law harmonisation[16]. The integration of national markets was and still is one of the main objectives for the creation of a functional Single Market and the harmonisation company law was an integral part, but, in time, it remained the task of the Freedom of Establishment, an unquestionable cornerstone of the European Union with regards to free movement.

By establishing this principle in the treaty, the European legislator intended to enable EU citizens to become ongoing participants of the economic life of a Member State, different than their home state[17]. The Freedom of Establishment is regulated by Art 49 TFEU[18] which states that any measure restricting the citizens

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[15] For more overviews on :

Andenas M., Chiu I.H.Y, *Financial Stability and Legal Integration in Financial Regulation*, European Law Review, vol. 38, issue 3, 2013, p. 335-359

Moloney N., *EU Financial Market Regulation after the Global Financial Crisis: More Europe or More Risk?*, Common Market Law Review, vol. 47, issue 5, p. 1317-1383

[16] Davies P.L., Worthington S., *Principles of Modern Company Law*, 10th edition, Sweet&Maxwell, Thomson Reuters, 2016, p. 131

[17] Moens, G., Trone J., *Commercial Law of the European Union*, Spinger 2010, p. 74

[18] Article 49 TFEU: "*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.*

of a certain Member State in a different Member State is banned. In this way, the article promotes equal treatment and prohibits unjustified barriers.

The court of Justice intervened in clarification of art. 49 by judgement in *Gebhard* case[19] explaining that *"the concept of establishment within the meaning to the Treaty 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 therefor, so contributing to social and economic penetration within the (Union) in the sphere of activities as self-employed persons"*[20]

Art. 49 of TFEU covers two situations, first, called primary establishment, regards the right of individuals, natural or legal persons, to create and manage undertakings in other states and a second situation, qualified by the doctrine as secondary establishment, the ability of legal persons to create branches, subsidiaries and agencies in other Member States. The provision is clear, but it is not sufficient from the application point of view, so remained the job of the Court to clarify the extend and conditionality, so judgements in cases like *Cadbury's Schweppes*[21] or *Stauffer*[22] provided the conditions of having permanent present in host state and pursue and economic activity in order for freedom of establishment to be activated.[23]

Notably, one challenging issue regarding the freedom of establishment is the cross-border transfer of companies within the internal market, as a company may intend to transfer its seat to another Member State due to several reasons, including a change in the nature of the business, or in search of a less restrictive legislation concerning company law, or due to several socio-political factors.

As indicated already in the paper, there is a common assumption that, although an objective, the company law is not yet harmonised and the member states may often find themselves in the position to constrain such a transfer of seat by means of national law and only the Court of Justice was able to clarify the

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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.

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, subject to the provisions of the Chapter relating to capital."

[19] Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1995) C-55/94

[20] More on the explanation of freedom of establishment by Court judgement in Gerbhard case in Craig P. & de Burca G., *Eu Law. Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2015, p. 801-802

[21] Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue Case(2006) C-196/04

[22] Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschafte (2006), Case C-386/04

[23] Barnard C., Snell J., *Free movement of legal persons and the provisions of services,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 405

scope of the freedom of establishment and when needed, to eliminate barriers. One recent case was *Polbud*[24], where the Court took a broader approach when detailing the scope of the freedom of establishment[25], the case being the trigger for the adoption of new Directive which was enacted in November 2019 on cross-border mobility of companies, amending the Directive 2017/1132 relating to certain aspects of company law.

In relation to the secondary establishment, the caselaw is kind of explicit as what means a branch/subsidiaries/agencies, explained by case *Somafer*[26] and that the provision applies no matter the possibility to formally qualify as a branch or agency, the Court trying to ensure that the right is effective based on the condition of existence of permanent activity, as can be noticed form in case *205/84 Commission v. Germany* and *C-101/94 Commission v. Italy*.[27]

The treaty, for a better understanding to whom the Freedom of Establishment granted by art. 49 applies, provides in art. 54[28] that enjoys this right both companies/firms and natural persons, but the understanding of company may differ from one national system to another and by that it might be difficult to achieve an equal treatment between companies and nationals, as the second category exists due to birth, whilst the other has to be created by a specific national company law, the so called by "creatures of national law"[29]. Where that company may claim to exist as a legal person with rights and obligations, to be able to perform activities and conclude acts, all based on its national law, how should react a host jurisdiction, with different provisions on the company's existence and capacity? While the company is wanting to be acknowledged and protected based on the Freedom of Establishment.

The main issue to be addressed would be the very existence of the "visiting" company, whether the host state may recognise that person as a company on

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[24] Case C-106, Polbud - Wykonawstwo sp. z o.o., 2016

[25] Answering the questions, the CJEU made possible for *Polbud*, to legal transfer to Louxembourg, but, also, strengthened the mobility of companies within the European Single Market. First, the CJEU stated that the freedom of establishment applies to the transfer of the registered office of a company from one Member State to another even if no real business is intended to be conducted in the latter Member State. Secondly, the CJEU ruled out national legislation providing for the mandatory liquidation of a company if the company requests the removal from the initial commercial register in cases of outward migration

[26] Somafer SA v Saar-Ferngas AG (1978) Case 33/78

[27] Barnard C., Snell J., *Free movement of legal persons and the provisions of services,* in Barnard C. & Peers S., *European Union Law,* Oxford University Press, 2014, p. 406

[28] Article 54: *"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 shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.*

"Companies or firms" means 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."

[29] ECJ in Daily Mail case and Cartesio

account of its life in a different jurisdiction and the treaty provisions on Freedom of Establishment or look for a qualification of the respective person as a company based on the national provisions. A solution might be the application of private international law rules specific in that host state and by that identifying the circumstance in which it applies its own legal system or accept the foreign one, but this leads to a large range of possibilities[30], including the one of not recognising the company's existence, Freedom of Establishment being restricted due the lack of harmonisation of private international law or the substantive national company law.[31]

The states may address differently the issue of recognising foreign entities, mainly by identifying the connecting factors and apply different types of combined domestic and foreign law. Not only those companies are different in terms of forms or requirements, but each member state has also the power to choose between two contrasting factors when deciding when a company is regarded as a national one.[32]

In relation to another aspect which may raise questions, due to the complexity of possible national approaches, there is the view of the European legislator, in the second paragraph of art. 54, that a company or a firm is that undertaking formed under civil or commercial law, with the exception of the non-profit ones. The focus of the Treaty is placed on the economic activity of the legal person, and less on its legal form, companies existing with respect to the variable legislation which determines the company's incorporation and functioning[33] which, again, may lead us to different lists from each Member State.

Still, the same art. 54, offers us some extra information on company which may exercise the rights from Freedom of Establishment and we can notice that, in order for that undertaking to be declared established in a Member State, it is enough for it to be formed accordingly to the legislation of one Member State and to have its registered office, principal place of business of central administration within the European Union[34]. Thus, companies fulfilling national requirements receive the status of an EU company and can make use of the Freedom of Establishment.

We can express that, since the free movement of companies takes place, the next issue is to determine which law is applicable for the company in question

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[30] Wouters J, *Private International Law and Companies's Freedom of Establishment*, European Business Organization Law Review, Volume 2, Issue 1, 2001, p. 101

[31] Rammeloo S., *Corporations in Private International Law: an European Perspective*, Oxford University Press, 2001, p. 10-86

[32] Mucciarelli, F.M., Companies's Emigration and EC Freedom of Establishment, European Business Organization Law Review, Volume 9, Issue 1, 2001, p. 267

[33] See the reasoning of ECJ in Case 81/87,The Queen v Treasury and Commissioners of Inland Revenue, 1987

[34] See case Case 79/85, Segers v Bestuur van de Bedrijfsvereniging voor Bank, 1985

and which law will apply as the transferring process begins. As the nationality of the company is established, the company may be considered national or foreign, in which case, it has to be determined which law is to be applied. While deciding it, conflicts may arise between the law of the home or the host country, namely the Member State where the company has its seat and the one in which it will have it moved, especially if they have different approaches regarding conflict of laws for corporations[35], since each Member State may be advantaged if it regulated the company's activity.[36]

In relation to the different approaches regarding the "connecting factor", in order to determine the applicable *lex societatis,* there are two traditional approaches in Europe, on one hand some states (like United Kingdom or Denmark) adopted the incorporation theory, which indicates the place of incorporation as the connecting factor for determining the applicable law and, by that, any movement of the company abroad the relation with the state of origin is not interrupted and other states (like Germany of Hungary) which went with the "real seat" theory, considering the place where the activity is performed as being the connecting factor and, by that, any transfer of activity changes also the law applicable to the respective company.

2. Incorporation and Real Seat Doctrines

2.1 The incorporation theory

For the incorporation theory, according to which the validity, its internal rules and legal capacity are determined by the law of the state in which the company was incorporated, to transfer the "seat" of the respective company has no real legal meaning, in the idea that it remains subject to the jurisdiction in which it has the official headquarters.[37]

As a consequence, by choosing the place of incorporation of the company, if that state is one applying the incorporation theory, the founders decide the law which will govern their company[38]. In the world, there are many states who are open to the simple creation of companies without forcing them to have a strong relation and activities to the jurisdiction of incorporation, but this makes also room for for excessive use and may lead to the so-called "mailbox companies" or

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[35] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 3

[36] Chalmers, D. & Tomkins, A., *European Union Public Law, Text and Materials,* Cambridge University Press, 2007

[37] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 8

[38] Kozyris, J., *Corporate Wars and Choice of Law,* Duke Law Journal, 1985

"shell corporations", the ones which do not generally have commercial ties to the incorporation state, but are rather incorporated for tax advantages.[39]

This theory developed, first, during the eighteenth century, in England, with the scope to support the English companies operating in other foreign places, as a rebalancing in relation with the ones from the colonies[40]. This is one of its features, that in relation to its own companies, the state choosing this doctrine will apply its own company law no matter the connecting factors in foreign jurisdictions. On the other hand, that state, as a host one, will recognise the existence of foreign companies under the jurisdiction of formation.

According to the incorporation theory, when a company is formed in a state, it automatically gets legal personality, together with all its rights and obligations in different other states. Hence, if a company relocates, it will be recognised together with all the rights and liabilities in the state where it moved.

The advocates of this approach sustain that a major advantage is related to the legal certainty, since the company statute is confirmed in other states as well. Likewise, this doctrine is the one fostering the cross-border mobility,[41] the mergers being seen as an important tool to foster competition between jurisdictions, at least in the American states.

2.2 The real seat theory

Other states prefer to choose a different approach, the so-called "real seat" theory, which provides that the connecting factor between the company and its applicable law is the main place of activity[42], by that seeking to determine the legal system applicable to a company by finding the factual connections with a certain place, one where the decisions are taken and the main activities are carried out. As a rule, the real seat, also known as the head office, is to be considered the place of key control, more precisely where the central governance agreements are transposed into managerial decisions.

The real seat theory emerged during the nineteenth century in France and Germany with the view to retrain the French companies to emigrating in moderated states such as Belgium[43] and was mainly adopted by continental states[44].

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[39] Kristo, I. & Thirion, E.,. *An overview of shell companies in the European Union*, European Parliamentary Research Service, 2018

[40] Dammann, J., *Freedom of Choice in European Corporate Law,* The Yale Journal of International Law, Volume 29, 2004, p. 477

[41] Siems, M., *Convergence, Competition, Centros and Conflicts of Law:European Company Law in the 21st Century,* European Law Review, pp. 47-59, 2002

[42] Ebke W.F., *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, The International Lawyer no. 36, 2002, p. 1015

[43] Buxbaum M., Hopt K.J, *Legal Harmonization and the Business Enterprise. Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A.,* European University Institute - Series A, 2/4, DeGruyter, 1988, p. 174

This doctrine is focused on the idea that the state where the company undergoes its activities it is also the state where the most powerful effects occur, thus the company should abide by this respective legislation, perceived as the most appropriate one[45].

In the case of the real seat doctrine, if a company relocates to another Member State, the applicable law would be that of the country where it moves to. Worth mentioning the fact that the relocation formed according to the real seat theory would place costly burden on entrepreneurs due to incurred taxation.

The real seat doctrine accomplishes the European Company's Law aspirations since it accommodates and resolves the conflicts of interest, mainly between a company's shareholders, employees and suppliers or creditors, rather than expanding shareholder's revenues[46].

3. Treaty provisions and caselaw on Freedom of Establishment

The exceptions to the freedom of establishment can be regarded as similar to the ones practiced in free movement of goods or services and by that be considered legislative exceptions and case-law exceptions, also known as discriminatory or non-discriminatory measures.

In the Art. 51 TFEU[47] it is stated that the provisions related to the Freedom of Establishment are not to be applied in the cases where it is exercised official authority, clarified also by the Court in *Reyners* case[48] when it explained the lack of connection between the advocate profession and the authority of the state. The ECJ also clarified that private security undertakings activities do not make the subject of official authority[49] and neither do the activities of security systems companies[50].

Art.52 TFEU[51] is another treaty provision which provides an exception from the freedom of establishment, this one being in relation to public policy, security

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[44] Frost, C., *Transfer of Company's Seat-Unfolding Story in Europe,* Victoria University of Wellington, Volume 36, 2005, pp. 359-383.

[45] Ebke W.F., *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, The International Lawyer no. 36, 2002, p. 1015

[46] Kubler, F.,. *A Shifting Paradigm of European Company Law?*, Columbia Journal of European Law, Volume 11, 2005, p. 219

[47] Article 51TFEU:*"The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities"*

[48] Reynes v. Belgian State (1974) Case 2/74

[49] Commission v. Spain (1998) Case C-114/97

[50] Commission v. Belgium (2000) Case C-355/98

[51] Article 52 TFEU: *"1.The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

2.The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the above mentioned provisions"

and health matters, similar to the ones from free movement of goods. An example of a case when the state tried to justify its application was in Case C-3/88[52], but rejected by the Court of Justice.

The case-law exceptions, which can be considered as non-discriminatory, can be based on public interest cause and in order to justify activities on these grounds several conditions have to be fulfilled, conditions which were laid down by the ECJ in *Gebhard* case[53] and qualified by the doctrine as a formula, known as the Gebhard formula. This case is a leading one, frequently cited, on the conditions which Member States must satisfy when they "hinder or make less attractive" the exercise Freedom of Establishment.

Gebhard was a German authorised layer, holding a a residency in Italy, who decided, after a period of practice in a bigger law firm, to start its own office and practice, but without being part of the Italian Bar, which was breaching the Italian law on the association of attorneys in Bars, a provision which was addressed to all professionals, nationals or foreign. Answering the questions addressed in the reference by the Italian National Bar Council, the European Court of Justice enacted four conditions to be satisfied so as to base an action on the public interest cause:

"It follows, however, from 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:

they must be applied in a non-discriminatory manner;

they must be justified by imperative requirements in the general interest;

they must be suitable for securing the attainment of the objective which they pursue; and

they must not go beyond what is necessary in order to attain it " sending, also, at the end of the paragraph to another solution from a similar case[54]

In one of the pivotal European cases in freedom of establishment, *Centros*[55], a branch of a company which had the central office in the UK was denied registration by the government in the Netherlands, the motivation being the public and private creditor's protection as well as fraud prevention. Although stating that it could represent a reasonable argument, the Court discharged the justification, stating that the action was not proportional and was not appropriate to achieve the aim.

A case which came to sustain the solution in *Centros*, one from the famous triangle caselaw which changed an initial view in the field, is *Uberseering*[56], where

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[52] Commission of the European Communities v Italian Republic (1988) Case C-3/88

[53] Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1994) Case C-55/94

[54] Kraus v Land Baden-Wuerttemberg (1993) Case C-19/92, paragraph 32

[55] Centros Ltd v Erhervs-og Selskabsstyrelsen (1999) Case C-212/97

[56] Überseering BV v Nordic Construction Company Baumanagement GmbH (2002) Case C208/00

a company which transferred its seat in Germany did not receive legal capacity, action justified by minority shareholders and creditors as well as tax authorities' protection through a minimum capital requirement. One more time, the Court stated that this could represent a compelling argument, but rejected it, since the action went beyond the intended purpose. The Court held that it was an infringement of Freedom of Establishment, forcing German state to accept its existence, even though the company did not meet the requirement for incorporation under the respective national law[57]

Both the above cases are seen by the doctrine as some which were overturning the decision in *Daily Mail* case when the Court upheld the national restrictions imposed by the national British Treasury on the company which wanted to transfer its central administration in the Netherlands, thus escaping the tax provisions on unrealised capital gains, a greatly commented decision by which the Court allowed Members States to restrict freedom of establishment just on legal technicalities.

3.1. Transfer of seat of companies within the Single Market

The right of freedom of establishment differentiates between the primary and secondary establishment, the first one relating to the right of individuals/companies to create or to manage undertakings as stated in the Art. 54 of the Treaty. An individual or a company have the freedom to incorporate the company in a different Member State with the right to be equally treated by the respective state just as are the national companies from the host country with respect to the capital participation of the newly incorporated organisation.

The primary establishment also covers the right of companies to merge with companies from a different Member State or to transfer its seat to another Member State. Mergers with other companies from different Member States, as well as seat transfers, were essentially precluded in multiple Member States, since such transactions could lead to companies' dissolution or could have restrictive results [58]

In the present article, due to the complexity of the area, I decided to concentrate on the transfer of seat as main issue in relation to the Freedom of Establishment, the mergers being indicated in the text as other ways of primary establishment.

Companies who function in the European Single Market, in their intention to transfer from one Member State to another, enjoy the rights granted by the European legislation, exercised one of the cases of primary right of establishment,

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[57] Davies P.L., Worthington S., *Principles of Modern Company Law*, 10th edition, Sweet&Maxwell, Thomson Reuters, 2016, p. 140

[58] Grundmann, S., *European Company Law: Organization, Finance and Capital Markets*, Intersentia, 2007

specifically, the transfer their seat. In this case, the separation of different situations is decisive, since in conflict legislation, according to the connecting factors, the company's seat has distinctive understandings. In other words, a company may transfer its seat, also known as registered office, according to the place of registration, and it can also transfer its real seat, or head office, which is the place where the management and administrative offices are located[59].

The transfer of seat has raised many debates in time, following the complexity of issues the encountered in the European company law environment. One of these refers to the possibility of company to change the identity and its law applicable, which, subsequently, to the transfer, implies that the company will be subject to the law of the host country. Further, it will preserve its identity and will not be seed as going through the wind up process which ensures that its assets will not be lost. Secondly, the company may preserve its identity and not change the law applicable, in which case, it will not be regarded as winding up, but the law applicable will remain unchanged. Another outcome would be for the company to end its existence following the seat transfer and, as a consequence, all the assets will be liquidated and the current relations will have to terminate. Finally, the seat transfer decision may turn out to be unsuccessful, as the real seat or the registered seat will be regarded as belonging to the incorporation state, thus the law applicable will not be changed.[60]

A) The transfer of the real seat

The real seat or head office, which can be relocated freely across the Union, represents the main administrative place of the company, also corresponding to the place of the company management and control.

The real seat transfer may occur in 4 distinct situations:

a) Real seat relocation through emigration in case of the real seat doctrine

The transfer of the real seat of a company from a country applying the real seat theory could not be possible before the judgement in the *Cartesio*[61] case, the view being that the consequence would have been the company's dissolution or other applied restrictions. According to the real seat theory, in order to transfer, the company had to cease the activity and end being a subject of the respective jurisdiction, ultimately wind-up and, following the disappearance form the other legal system, be able to reincorporate in the host country. The main reason for aiming the end of the company was considered the protection of the company's

[59] Stampe, J., *The Need for a 14th Company Law Directive on the Transfer of Registered Office,* University of Lund, 2010

[60] Mucciarelli, F.,. *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited,* European Business Organization Law Review, Volume 9, 2008, pp. 267-303.

[61] CARTESIO Oktató és Szolgáltató bt. (2008) Case C-210/06

stakeholders. This situation implied a modification to the connecting factor, as it will result in changing the applicable law, more specifically, the company will be subject to the host country's jurisdiction. Without dissolution, the company might have been constrained to transfer the real seat or the transfer may not be treated as valid in the home country.

b) Real seat relocation through emigration in case of the incorporation doctrine

According to the incorporation theory, a company has the right to transfer its real seat without obstacles and without giving up its legal identity. With respect to the registered seat, it continues to represent the connecting factor selected by the applicable provisions. The majority of states applying this theory do not request the winding-up of the company, nor they demand the amending of the company's statute, when transferring the real seat, since it is not considered as a connecting factor. The focus is put on the registered seat and the company will remain under the governance of incorporation state, disregarding the place of the principal administration.

c) Real seat relocation through immigration in case of the real seat doctrine

This movement is to be regarded from the perspective of the host country, thus any transfer of the real seat from a country applying the real seat theory to another of the same kind implies the alteration in the legislation to be applied. Conflict legislation of the home Member State is not of relevance. When transferring the real seat under these conditions, the company needs to either move the registered office as well in the new Member State, or to re-incorporate under the law of the new Member State. As a consequence, the host Member State can reject the recognition of the company if it had not re-incorporated on its territory and had not undergone dissolution in the home Member State.

d) Real seat relocation through immigration in case of the incorporation doctrine

In this case, the host country will turn over to the incorporation Member State, meaning it will have to consider the law of the incorporation state. If this action is not agreed upon by the incorporation state, the applicable law will not suffer any changes, thus the applicable law will continue to be that of the incorporation state.

With respect to the transfer of the real seat through immigration, by virtue of the *Uberseering*[62] case, the Court decided that in the case of a corporation lawfully

[62] Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) (2002) Case C-208/00

established, with the registered office in a state , it is not justifiable by another state to decline the recognition of the corporation on its territory.

In the Uberseering case, a Dutch company contracted a German construction company, for works on one of its buildings, bought together with a piece of land. For reasons which are not immaterial here, the construction company asked in court for payment. Nonetheless, the performance was unsatisfactory for Uberseering, which proceeded with legal actions against NCC. The company's legal proceedings were dismissed on two occasions, on the grounds that Uberseering lacked the legal capacity in Germany. Since Germany supports the real seat theory, under its conflict legislation, the location of the head office establishes the company's legal capacity. Consequently, as Ubersering was under the jurisdiction of German legislation, and because it was regarded as being a foreign company, the legal capacity was recognised only if it reincorporated in Germany. The company appealed the two decisions, thereupon the German Supreme Court referred the case to the European Court of Justice as to the compatibility of the lower court's refusal to grant the company access to the trial, with rules on Freedom of Establishment. In its judgement, the ECJ declared that Uberseering had the right to exercise its right to freedom of establishment in Germany as a company which is incorporated in the Netherlands, under the Art 49 and 54 TFEU. The decision was based on the fact that Uberseering was lawfully incorporated in Netherlands, having the registered seat there. Forasmuch as a company exists by means of the national law which governs the company's incorporation and registration, Uberseering's existence connected to its condition of being a company incorporated according to the Dutch legislation.

In Uberseeing case, the Court stated that Germany's disapproval of the company's legal capacity represented an unjustified restriction with respect to the free movement of establishment[63]. The case addressed mainly the immigration case, but it touched also the emigration issue introducing some clarification to the hypothesis launched by Daily Mail case, recalling the former court's decision on the power of the state within its own jurisdiction and allow them to impose restrictions on emigrating companies.[64]

Considering the seat movement by means of emigration, through *Cartesio*[65] case, it was acknowledged that as a company is incorporated and established in a state, it has the right to move its seat to other state while converting into a company according to new host's legislation, provided that legislation permits the conversion.

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[63] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 7

[64] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 16-18

[65] Cartesio (2008) Case C-210/06

Cartesio Bt, a company setup in Hungary as a limited partnership in 2010, intended to move its real seat to Italy, with no change in the applicable law. The specialised Court, having to register the operation, declined the registration of the new Italian seat in the registry, claiming that such a transfer was not allowed according to the legislation in Hungary, since in order to transfer its seat, a company has to wind-up in Hungary, thereupon to re-incorporate in the host Member State. *Cartesio* made an appeal and the case was referred for a preliminary ruling to the European Court of Justice.[66]

The European Court of Justice maintained its approach as in a previous case, namely the *Daily Mail*[67] case, as the cases present striking similarities. One essential difference, nonetheless, is that in *Daily Mail*, a head office transfer was intended from the United Kingdom to Netherlands, both states supporting the incorporation theory. In contrast to *Cartesio* case, the connecting factor was not changed. The judgement in the *Daily Mail* case stated that provisions of the treaty represented the precluding legislation, therefore when transferring its seat to another Member State, a company may not remain governed by the incorporation's state legislation.[68]

The case was received with great interest by the scholars in the light of the fact that the Court was asked to provide its ruling on a case regarding the primary establishment, and secondly, the case was of interest due to the fact that as the Court's opinion on the *Cartesio* case was expected, the undertakings concerning the Fourteenth Directive regarding mergers had been interrupted

The importance of the *Cartesio* case, as already indicated in the text, lies in the judgement of the Court regarding the distinction between the seat transfer with or without a change in the legislation applicable.[69] Tackled in the *Sevic*[70] case, the Court confirms that companies have the right to cross-border conversions, right which shall not be restricted by the home Member State. The remaining question after *Cartesio* was related to which rules companies have to adhere to when pursuing a cross-border conversion. Nonetheless, as there are no settled procedural rules, when pursuing a cross-border conversion, companies may face different risks.

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[66] Korom, V. & Metzinger, P.,. *Freedom of Establishment for Companies: The European Court of Justice Confirms and Refines its Daily Mail Decision in the Cartesio Case C-210/06*. ECFR, Volume 1, 2009, pp. 125-160

[67] Daily Mail (1988) Case 81/87

[68] Wymeersch E, *The Transfer of the Company's Seat in European Company Law*, ECGI Working Paper Series in Law, 2003, p. 19

[69] Fabris D., *European Companies "Mutilated Freedom". From the Freedom of Establisment to the Right of Cross Border Conversion*, European Company Law, Vol. 16, Issue 3, 2019, p. 9

[70] SEVIC Systems AG C 411/03

B) The transfer of the registered office

The registered seat represents the statutory seat of a company, more precisely, the place where the offices of the companies are as per its official registration or its articles of association.

Just as in the case of the real seat, there are four situations in which the transfer of the registered seat may occur:

a) Registered office relocation through emigration in case of the real seat doctrine

Theoretically, such a transfer is not possible, except for the cases where the registered office is transferred simultaneously with the real seat. In those Member States supporting the real seat theory, the registered office as a connecting factor is not accepted, thus there is no reason for the transfer of the registered seat to be accepted as the central administration of the company remains in the home Member State. Practically, the companies are required to register in the country's public registry which establishes the jurisdiction that governs the company thus transferring the registration office of the company will also generate a change in the applicable legislation, henceforth the national legislation will not be applicable anymore[71].

b) Registered office relocation through emigration in case of the incorporation doctrine

In such conditions, the transfer of the registered office will change the connecting factor and it will imply that the company will no longer be subject to the home country's legislation. This situation can be avoided depending on the home country's legislation. As the applicable legislation is altered, in order for the company to maintain its legal status, it has to be able to transfer the registered office and to reincorporate in another country, without having to dissolute or liquidate according to the home country's legislation. Another requirement refers to the conflict legislation whereby a reference is made both to the home and the host country.

c) Registered office relocation through immigration in case of the real seat doctrine

In accordance with this theory, the connecting factor is represented by the real seat. In some cases, a company may be required to also move its real seat in the host Member State so as to be recognised as a foreign company or as a re-incorporated one.

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[71] Mucciarelli, F.,. *Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited,* European Business Organization Law Review, Volume 9, 2008

d) Registered office relocation through immigration in case of the incorporation doctrine

As a state supports the incorporation theory, whereby the connecting factor is indeed the registered office, it has the right to request that as the company transfers the registered office to also re-incorporate in the host country, which will alter the law applicable. Nonetheless, the company may not be subject of a change in the law applicable provided that the home country also supports the incorporation theory and the country where it intends to transfer the registered office makes use of the "Doctrine of Renvoi", according to which the Court of the country considers the legislation of another country too.

A decisive case which addressed the issue of transfer of the registered seat is the *Vale*[72] case, which is said to mirror the *Cartesio* case. A limited liability company, Vale Contruzioni Srl, incorporated in Italy intended to move its registered seat to Hungary and consequently, to stop its activities in Italy, the home state. In Italy, the company was erased from the registry, however, in Hungary the registration of the company, now Vale Epitesi Kft, was denied, on the grounds that according to the legislation, conversions are lawful only for the national companies. The Court referred the case to the European Court of Justice, asking whether an inbound conversion was a matter of the freedom of establishment[73].

In his statement, the Advocate-General expressed that inbound conversions represent a subject of the freedom of establishment[74] and that limitations to this freedom are accepted provided that these support the general interest and are non-discriminatory. Similar to the *Sevic* case, the Court's conclusion was that Hungarian legislation did not meet the *Gebhard* criteria thus precluding inbound conversions in spite of the fact that the general interest was not jeopardised. Also, the Court reconfirmed its judgements from the *Daily Mail* and *Cartesio* cases, that Member States have the right to define the connecting factor when it comes to a company's registration under its national law as well as the connecting factor when a company intends to preserve that status. As a consequence, the registered seat together with the real seat have to be in accordance with the host country's legislation.

Further analysis regarding the registered office transfer was taken up in the Polbud case[75], one of the latest cases in the field, which triggered the adoption of new Directives. The case resembles the *Vale* one, but it is different in two aspects. Firstly, as the company intended to transfer its seat to Luxemburg, it faced restrictions from Poland, the incorporation state, which required the company's

[72] VALE Építési (2012) C-378/10

[73] Krarup, M.,. *Vale: Determining the Need for Amended Regulation Regarding Free Movement of Companies within the EU,* European Business Law Review, 2013

[74] VALE Építési (2012) C-378/10 Opinion of the Advocate General (2011)

[75] Polbud (2017) Case C-106/16

liquidation, not from the host Member State and, further, Polbud had no intention to move its head office or transfer its economic activities from Poland to Luxemburg[76]

Opposing to the Advocate General's opinion[77] and the ones coming from the Member States, in its judgement, the Court confirmed that the transfer of the registered office was a right of the company. Over and above that, the Court ruled that the mandatory winding-up required for Polbud was not authorized and could not be based on the grounds of protecting the company's stakeholders. The Court also referred to the *Centros* case using an analogy, whereby if a company satisfies the test regarding the connecting factor of a host state, it may transfer its registered office, irrespective of the fact that the activities will take place in the home state[78].

From the outbound cross-border conversions perspective, issues are raised regarding the way in which the home state perceives it, since its rights to state conditions are not immune, but have to be in accordance with the freedom of establishment. With this in mind, the requirement to liquidate the company was considered a restriction. The home state losses the supervision over the company in case the company undergoes a conversion, which implies a switch in the applicable law, and it cannot impede the company's migration. On the other side of the spectrum, from the perspective of the host state, (the case of inbound conversions), the company is regarded as a foreign one, but it has the right to conversions if it meets the requirements of the host country's legislation, coupled with the conditions referring to the connecting factor. Further, as domestic conversions are available, so should a foreign company have the possibility to convert, thus ensuring equality in terms of treatment for national and foreign companies.

Since the company was allowed to transfer its registered seat in another state while maintaining its business activities in the home state, it can be settled that this case makes room for forum shopping. When moving the registered office, the company changes its nationality together with the legal identity, conforming to the new state and thus it can take advantage of more lenient legislation. The prerequisite for so doing is represented by the connecting factor to be the registered office or the incorporation place, as companies seek to move their registered office in the Member States with competitive regulations, whilst

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[76] Markovinovk, H. & Bilk, A., T*he transfer of a company seat to a different member state in the light of the recent "Polbud" decision,* Journal for International and European Law, Economics and Market Integrations, Vol. 5 Issue 2, 2018

[77] Polbud (2017) Case C-106/16 Opinion of the Advocate General Kokott (2017)

[78] Mucha, A., Case C-106/16, Polbud-Wykonawstwo: The Polish Supreme Court Requests the CJEU for a Preliminary Ruling on the Outbound Limited Company Seat Transfer. Instytut Allerhanda, 2017

undergoing their activities in the Member States most favourable. In its decision, the ECJ gave green line to letterbox companies' establishment, thus creating a so called "race to the bottom" across the Member States, considering the protection of stakeholders, while fostering tax evasion[79]. The *Polbud* case indeed settled the availability of cross-border conversions within the spectrum of the freedom of establishment on condition that the company fulfils the conditions of the host.

4. Is the Conversion of Companies the solution?

As from offering an alternative point of view, I consider that the field of mergers, conversions and divisions have developed immensely in the last period, mainly due to the growth of business and need for many of them to merge in order to adapt better to the requirements on the market. As I, already, indicated this paper didn't analyse the evolution of establishment by mergers, mainly due to its complexity which requires a separate study on its own, but I can indicate that for managers and, sometimes, even shareholders, mergers can be seen as an alternative to transfer of seat, with the only conditionality that there are more entities involved and they have common plans. Mergers and acquisitions can be regarded as a process of unification of two or more companies into a new company or exiting one, the difference between the two lying in the fact that the merger process leads to the disappearance of the entities which decided to combine forces and to the creation of a new company, whereas in the case of an acquisition, the bigger company continues its activity, but with an extra patrimony.[80]

Prior to the judgement of the European Court of Justice in the *Sevic*[81] case a veil of uncertainty existed around cross-border mergers, since it was presumed that these processes were possible only if and how they were provided in the national jurisdictions. In the Sevic case, a German public limited company, Sevic Systems AG, asked for the merger with its subsidiary, Security Vision SA, a Luxembourgese company. As a result of the acquisition, the assets of the subsidiary would have been transferred to SEVIC, and the company would no longer exist. Nonetheless, the German court denied the registration of the process because, in accordance with its national law, the merger was possible only between companies "established" in Germany. [82]

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[79] Soegaard, G., *Cross-border Transfer and Change of Lex Societatis After Polbud, C-106/16: Old Companies Do Not Die … They Simply Fade Away to Another Country. European Company Law Journal*, Volume 15, 2018

[80] Dumitru O.I., Seucan A., *Business Law. Lecture Notes*, ASE Publishing House, 2019, p. 213

[81] SEVIC Systems AG Case C-411/03, 2005

[82] Siems, M.,. *SEVIC: Beyond Cross-Border Mergers*. European Business Organization Law Review, Volume 8, 2007, pp. 307-316

The Court stated that the national provisions created a distinction between national and cross-border mergers and by that contravening to the Art. 49 and 54 of the TFEU[83]. The ECJ thus concluded that cross-border mergers represent actions deriving from the freedom of establishment, consequently their rejection would contravene to the Art 49 and 54 of TFEU. Although the judgement provided some clarifications, some questions remained unanswered. These concerned the way in which such a merger is to be incorporated; whether the requirements of the host or the home state are to be fulfilled; which legal persons can be part of a cross-border merger.[84].

The European legislator, following the caselaw in the field of mergers, decided to come with a new tools to enrich the the cross-border mobility within the Single Market and issued in 2005 a Directive on cross-border mergers of limited liability companies which was repealed in 2017 by complex and general Directive 2017/1132 relating to certain aspects of company law[85], providing the creation of a secure and protected corporate border of the Union as an inevitable prerequisite[86], trying to harmonise a very active field of mergers and acquisitions of companies which had either the registered office or the central administration within the European Union.

The new European approach towards a digital transformation of the Single Market, brought the European legislator in the circumstance to develop and propose to Member States a new instrument in the area of company law, one which has to take into consideration all the past experiences and interpretations in relation to freedom of establishment, next to digitalisation. As a result, on 25th April 2018, the European Commission proposed the so called "company law package" which aimed from the beginning to establish "simpler and less burdensome rules for companies" regarding incorporation and cross border transactions and consisted of two Directive proposals, one on the use of digital tools and procedures in company law by which Member States will need to allow a fully online procedure for the registration of new companies and of branches of other companies, that permits the incorporation without the physical presence of the members before any public authority, having as final objective the digitalisation of incorporation and registration process, with benefit effects, I consider, on the collaboration between Members Staes, individuals and companies, in the end, positively help to attain the so wanted harmonisation.

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[83] Stampe, J., *The Need for a 14th Company Law Directive on the Transfer of Registered Office,* University of Lund, 2010

[84] Storm, P., *Cross-border Mergers, the Rule of Reason and Employee Participation,* European Company Law, 2006

[85] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46–127

[86] Bartman, S., *10 Years Cross-Border Mergers Directive: Some Observation about EU Border Protection and Minority Exit Rights*. European Company Law Journal, Volume 6, 2017

As regarding the second Directive[87] , the one bringing a possible answer to all our questions and debates in the field of transfer of seat, the European Commission mentioned when it launched the proposal that, next to minor amendments in the field go cross-border mergers, the "real novelty is the introduction of common procedures for cross border divisions and conversions" and to prove the need and usefulness, the Commission mentioned at that time that this act comes as a result of different cross border conversions which had been expressly admitted by the Court of Justice of the European Union in cases like *Cartesio*, *Vale* or *Polbud*.

But, is the conversion provided in Directive 2019/2121 the solution for transfer of seat of companies? In the following paragraphs I am going to present the main provisions in this new field, corroborated with the current critics, remaining for the company law practice to answer the question in the near future.

Firstly, the Directive defines the operation of conversion as one in which a company, which without ending its existence, like it was so often required by Member States in the specific caselaw, converts its legal form registered in a home Member State into one of the host Member State while also transferring its seat and keeping its legal personality. One clear advantage of the new scheme relates to the fact that since the legal personality is retained, the company's assets and liabilities together with the acts already concluded will be transferred to the new company. As the statutory seat will be relocated to the host Member State, the status of the real seat will be determined according to the real seat doctrine or the incorporation doctrine respectively, adhered to by the Member States.

In the case which triggered the initialisation of conversions, *Polbud*, the Court indicated the need of cross boarder transfer of the registered seat with simultaneous transformation of the respective in a company of the destination state, but despite the opinion of the Court, the question of lack "genuine economic activity" as a condition creates debates[88] among the Member States, remaining to overview the way this objective will be implemented.

The Directive comes as a result of *Polbud* and other cases' judgements, but there is a critical view on the sphere of application, some specialists indicating that the Commission fulfilled partially its objective due to the limitation types of companies which can stand for conversion, the act listing mainly the limited liability ones and not partnerships[89].

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[87] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, PE/84/2019/REV/1

[88] Alexandrpoulou A., *European Legislative Proposals on Cross-Border Mobility of Companies and the use of Digital tools and process in Company Law*, Business and Company Law Review (Dikaio Epihireiseon kai Etairion, Δίκαιο Επιχειρήσεων και Εταιριών), 2019, v. 4, pp. 507-516

[89] Position Paper no. 31/2018 of the German Bar Association

The Directive provides a uniform procedure to facilitate these transactions while at the same time protecting the rights of minority shareholders, creditors and employees. The procedure, requires the issuance of an certificate which will be governed by the home state, while the ones subsequent to the certificate receipt will be governed by the host state. The pre-conversion certificate is to be issued by the host state in terms of its legality, but for that it has to be examined by an independent expert. It is debatable if this ex ante control by the expert and the authority is an efficient way of preventing the abusive use of these transactions.

A further concern is that this complex procedure may lead to arbitrary decisions, as judging *ex ante* the intentions of the company might be difficult. Some Member States would be tempted to pressure the national authorities to be strict, to prevent the flight of companies to other member states, which instead of increased freedom of establishment and company law harmonisation, we may notice even more national obstacles.

From the stake owners interest post of view, the Directive provides that shareholders may dispose of their shares in exchange for adequate compensation, in case they oppose the conversion, creditors with claims due before the draft terms are disclosed and appropriate solutions found for their interests to be protected and employee participation is also the subject of a scheme in which they can exercise influence on the management/supervisory board appointments. Still, the procedure also implies risks for stakeholders because it provides that the operations initiated may not be declared, the justification being hat the *ex ante* control should offer a total guarantee and therefore should not be challenged, but this can lead to a fraud and if the company has been able to hide its real intentions from the expert and the competent authority.

4. Conclusions

This paper intended to present the evolution of the caselaw in relation to the transfer of seat of companies within the European Single Market and the opinions launched by the doctrine afterwards, without generating a general perspective on the free movement of companies, but just concentrating on the struggle of different individuals and companies in exercising their rights conferred by the treaty through the provisions regarding Freedom of Establishment when they intended to transfer their seat from one Member State to another. These cases forced the Court to make interpretations and issue new principles, in a very sinuous process, exchanging positions from one situation to another, but offering us the chance to research and, ultimately to understand that

the intended process of company law harmonisation is still far away from conclusion and the job of the Court will still be the one to offer the best choice given the complexity of the issues offered by practice.

Nevertheless, as indicated in the previous section, the European legislator, reacting to the continuous pressure of company law harmonisation and as an effect of one of the most pivotal current cases, the *Polbud* case, decided to include in one of the Directives, part of the European Company Law Package, which brought amendments to the main Directive in the field company law, Directive 2017/1132, next to provisions regarding mergers and divisions, the new institution of "cross-boarder conversions" and by that trying to solve a long and tortuous period of Transfer of Seat of companies.

As I mentioned in the paper it seams that this act may reduce uncertainties and facilitate the transfer of seat of companies, but the Member States have to be very careful how they fulfil the directive's objectives, especially in the field of *ex ante* control of abusive operations by the competent authorities, which may bring costs and uncertainties while not ensuring the absence of fraud, and as final conclusion on this new form, we just have to wait for implementation and practice to see if this is the solution or we have to work on new proposals.

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