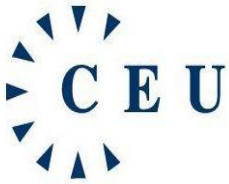

THE CROSS-BORDER TRANSFER OF A COMPANY'S REGISTERED OFFICE WITHIN THE EUROPEAN UNION

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ABSTRACT

This thesis focuses on the corporate mobility within the European Union. The aim of the research is to give a detailed and complete analysis on the possibility of the cross-border transfer of the registered office between the Member States of the Union.

By providing the comparative analysis of the conflicts of laws, the thesis indicates that the possibility of the transfer of the registered office does not stem from any conflicts of laws doctrines. Neither was the transfer until recently touched by the European Court of Justice (ECJ) The thesis provides an insight into the European Court of Justice's jurisprudence. Neither in its jurisprudence generally, could the answer for the possibility of the cross-border transfer of the registered office be found. Although the recent judgment of the ECJ shed some light on the problem, the transaction is still practically impossible.

The results of research demonstrate that there is a need for a directive that would give a way to company's unrestricted mobility.

Table of Contents

INTRODUCTION

The European Union is from its very beginning motivated to create an area where no internal frontiers exist and where free movement rights are guaranteed. Since the Union is already half century fighting against all internal barriers, one might assume that the free mobility is guaranteed. However, that is not absolutely true. The issue remains complicated mainly when it comes to the free movement of companies. This thesis identifies and analyzes the reasons that hinder the way to unrestricted corporate mobility. The main attention is given to the feasibility of the transfer of the registered office.

The first chapter provides general overview through relevant areas of law which might have the impact on the possibility of the seat migration. Significance here is mainly given to the conflicts of law rules. Since the seat transfer is cross-border transaction, the conflicts of laws rules are called upon to determine the applicable law of the "traveling" company. Taking into the consideration that both countries might have interest to regulate the internal relations of the company, the specific rules were designed to resolve the issue of conflicting jurisdiction. In this respect, the thesis concentrates on the impact of the two generally applicable principles. To demonstrate that the feasibility of the seat transfer does not run strictly along the borders of conflicts of laws theories, an short excursion through relevant provisions of substantive law is provided. Dealing with the seat migration within the European Union, one might not omit to mention the role of the European Union law. As has been mentioned above, the Treaty provisions on the freedom of establishment are of relevance here. .Although the right of establishment is proclaimed to be enjoyed to the same extent by the natural persons and companies, the

reality is different. Companies are still facing obstacles when trying to rely on the freedom of establishment provisions regarding the seat migration. European Court of Justice has in recent decades developed significant case-law, that mainly addressed the mobility of the head office. However, very recently, the court has for the first time addressed, althoug indirectly, the issue of the transfer of the registered office. The impact of the Cartesio judgment on the seat transfer possibility is detaily examined in the second chapter. The "conversion" option that has been introduced is tested from the angle of some Member States' substantive law. By the comparative analysis the thesis attempts to answer the question whether the possibility of the transfer of the registered officer has been answered by the Cartesio. Indication is given that further steps are required to achieve the free movement of companies in his fullest possible extent.

The third chapter describes the option of the transfer of the registered office under the EC secondary provisions. The thesis attempts to examine whether these options are attractive from the perspective of the company considering to re-register abroad. Finally, a deeper look should be taken at the development of the coordinative directive it this field. The directive, if once enacted, would allow what is now only hypothetically possible. The thesis makes some suggestion on what appears to be necessary to be addressed by the directive.

1. General framework of the corporate mobility

The European Union's non-border policy offers the company prospect to carry on the business anywhere within its territory. The start-up company when deciding where to locate its business benefits from the opportunity to choose among 27 corporate regimes. Needless to say, it tries to establish itself in one that would best fit its needs. However, during the life of the company its expectations might alter and thus the company might consider moving to another Member State, notwithstanding how right the initial choice was. The companies intending to transfer their registered office are motivated by the desire of benefiting of the "better" corporate regime, whereas the companies moving their head office abroad are usually inspired by various economic reasons; i.e the lower productions costs or more convenient tax regime.[1]

The chapter bellow examines various aspect of the law that have to be taken into consideration when deciding on the transfer the company's seat abroad. It is mainly the conflicts of laws and substantive law of countries affected by such a business activity, together with the provisions on the freedom of establishment.

1.1 Freedom of establishment

From the perspective of the European Union, the Treaty provisions on the freedom of establishment have the major impact on the possibility of the cross-border mobility.

[1] Stephan Rammeloo, *The 14th Company Law Directive on the cross-border transfer of the registered office of limited liability companies : now or never?* 14 Maastricht journal of European and comparative law 362 (2008).

European Union is from its very beginning motivated by the creation of the area with no internal borders (i.e. the internal market) where free movements are guaranteed. [2] The cornerstone of the establishment rights is enshrined in articles 49 and 54 of TFEU [ex. Articles 43 and 48 TEC].[3] These Articles guarantee natural person and companies the right to set up and manage undertakings in the territory of any Member State (primary establishment i.e. carrying on the business activity entirely within the host State) and on the other hand the right to set up of agencies, branches or subsidiaries in any Member State (secondary establishment, i.e. carrying on the business in one MS and having other offices in other MS).[4]

TFEU places the freedom of establishment enjoyed by the natural persons and by the companies on the same footing. However, whereas freedom of establishment of natural persons has been fully achieved, companies are still facing obstacles streaming mainly from discrepancies between the Member States' company laws [5] and the nature of the corporate entity.[6] .

Article 54 TFEU takes into account the artificial personality of company and points out that company or firm can rely on freedom of establishment as long as it is "*formed in accordance with the law of a Member State"* and have its *"registered office, central administration or principal place of business within the Union."* Even though the formulation of article 54 TFEU might seem easily comprehensible, it is worth mentioning

[2] Art. 26 of the Treaty on the Functioning of the European Union May 9, 2008, OJ C 115/47, (ex Art. 14 TEC);
[3] Art. 49 TFEU (ex Art. 43 TEC) and Art. 54 TFEU (ex Art. 48 TEC)
[4] JOSEPHINE STAINER, EU LAW 452 (OXFORD UNIVERSITY PRESS, OXFORD, 9th ed. 2006)
[5] Commission Staff Working Document, *Impact Assessment on the Directive on the cross-border transfer of registered office*, 7 SEC (2007) 1707
[6] CATHARINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 331 (OXFORD UNIVERSITY PRESS, OXFORD, 2nd ed. 2007)

several hints that need to be taken into the consideration when applying the treaty provision in practice, as is the case of the cross-border corporate mobility.

Firstly, the company formed in accordance with the law of a Member State has its legal personality only in line of requirement of that Member State's company law rules.[7] Therefore if an entrepreneur moves abroad, it might happen that it won't be considered as a legal person under company law rules of another Member State. This is especially true as regards firms.[8] Prior to the enactment of the Lisbon Treaty, the former Treaty establishing the European Community in its Art. 293 invited Member States to enter into the negotiations on mutual recognition of companies and the system for the retention of the legal personality in case of the seat transfer. Although the Article 293 did not survive the Lisbon Treaty amendments, during its existence it was not beneficial as regards corporate mobility since Members States could not come up with feasible Convention.[9]

Secondly, the enterprise when moving abroad might fail to meet the requirement of the law accordance which it was formed (MS following the real seat). Therefore it looses its legal personality and thus ceases to be the beneficiary of the freedom of establishment.[10]

Even though the European Court of Justice (ECJ) as a sole interpretator of the Treaties has broadened the scope of the freedom of establishment, it has not yet confirmed it to

[7] *Supra*, note 4, at. 463

[8] General partership in France (societé en nom collectif) is granted the legal personality (L210-6), in Germany the general partnership (offene Handelsgesselschaft)does aquire only the quasi legal personality-(para, 124 German Commercial Code), the general partnership as defined in section 1(A) of the Partnership Act does not have the legal personality at all.

[9] Jonathan Rickford, *Special issue section on the restructuring of companies in Europe,* 15 *European Business Law Review* 1236 (2004); he emphasizes that although they agreed on the Convention on Mutual Recognition of companies in 1968, the Netherlands refused to sign it. Their second attempt in the beginnings of 1980s was unsuccessful too, since it was blocked by the Denmark and UK.

[10] DAMIAN CHALMERS & ADAM TOMKINS, EUROPEAN UNION PUBLIC LAW : TEXT AND MATERIALS 735 (CAMBRIDGE UNIVERSITY PRESS, CAMBRIDGE 2007)

the same extension as it is given to the natural persons. The detail scrutiny of the relevant judgments on the freedom of establishment is considered in the next chapter.

1.2 The Conflicts of laws rules in European Company Law

The conflicts of laws ("known also as the private international law") is a specific area of law containing rules that are to be applied when foreign laws get into the conflict. Taking the cross-border seat transactions as an example it is obvious that it affects the original home country and the country to which the business is moved to. The company has created during its existence a commitment towards the former and is about to create the new one towards the latter. Thus both countries might have the interest to regulate the company's activity.[11] Admittedly, the question arises which law is to be applied. Or in another words, which company law requirement must the company now comply with when carrying on its business activity abroad.[12] For a legal certainty, the settlement of clashing jurisdiction cannot to be left for the discretion of the countries involved, but the precise rules have to be at disposal that would clearly indicate the solution.[13]

Conflicts of laws rules were designed to help to choose the law that will be the given preference and thus applicable for next company's activities. Since the function of the conflict of law rule is specific compared to the other legal norms, the structure differs too. The structure of this norm is briefly as follows: a) first part defines the class of the legal relationship to which the rule is applicable (e.g. company law) and b) second part, known

[11] *Supra*, note 9, at. 1232.
[12] *Supra*, note 4, at 463.
[13] Heinz Kußmaul, *Corporations on the move, the ECJ off track : relocation of a corporation's effective place of management in the EU*, 6 European company law 247 (2009).

as the connecting factor, determines which from the conflicting laws is to be applied for that legal relationship.

Within EU Member States apply two divergent connecting factors as regards determining the applicable law for companies; the principle of "incorporation" and principle "real seat" principle. Whereas under former, the governing law is law of the state where company is incorporated, the latter refers to the state of the company's place of the real seat.[14] Traditionally, the real seat principle overridden the incorporation theory when it was followed by majority of the founders of the European Union. At current state, the ratio of both 'competitive camps' is balanced. [15]

1.2.1 Real Seat doctrine

The "real seat" doctrine dates back to the nineteenth century, when it was developed in Germany and France to preempt its companies from re-incorporating in neighborhoods countries.[16] It is premised on the assumption that the law of the country where company in reality carries on all its business activities and thus country most affected by the company's operation should apply.[17]

The logic behind the "real seat" theory is based on the possibility to control the business activity where it is carrying on and thus ability to provide the adequate protection for the creditors, company shareholders, workers and other interested parties affected by the

[14] Frank Wooldridge, *The Advocate General's submissions in Cartesio: Further doubts on the Daily Mail case,* 30 Company Lawyer 145 (2009).
[15] *Supra,* note 5, at 9
[16] Carsten Frost, *Transfer of Company's Seat—an Unfolding Story in Europe*, 36 Victoria University Wellington Law Review 362 (2005).
[17] Werner F. Ebke, The "real seat" doctrine in the conflict of corporate laws, 36 The International Lawyer 1027 (2002).

company's operation.[18] However, seeing that increasing number of business transaction are currently taken via Internet conferences, it might be somehow difficult to determine where the managers took and implemented the decision and hence complicated to settle where "real seat" is located. [19]

Turning to the corporate mobility matter, the special problem is presented by the adherence to the "real seat "doctrine. At this point it suffices to emphasize that the "real seat" doctrine makes it complicated for the company's migration to occur since it requires the genuine link with the country of incorporation.[20] Put it more simply, the address of the central administration and place of incorporation has to coincide [21] and it makes the migration more difficult.

1.2.2 Incorporation doctrine

The "incorporation" theory has its roots in the eighteen century when it emerged in countries engaged in maritime activities, allowing companies to benefit from retaining its legal status regardless of where they conducted their overseas transactions.[22] Conceptually speaking, the incorporation theory uses as decisive connecting factor the

[18] Wolfgang Schon, The mobility of companies in Europe and the organizational freedom of company founders, 3 European Company and Financial Law Review 146 (2006)
[19] STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW 14 (OXFORD UNIVERSITY PRESS, OXFORD, 2001)
[20] Andrew Johnston and Phil Syrpis, Regulatory competition in European company law after "Cartesio", 34 European Law Review 381 (2009).
[21] Peter Behrens, *The impact of community law on the determination of the personal law of companies* 47 IN: RESOLVING INTERNATIONAL CONFLICTS : LIBER AMICORUM TIBOR VARADY (PETER HAY, LAJOS VEKAS, YEHUDA ELKANA, NENAD DIMITRIJEVIC ed., CENTRAL EUROPEAN UNIVERSITY PRESS. BUDAPEST ; NEW YORK, c 2009).
[22] António Frada de Sousa, *Company's cross border transfer of seat in the EU after Cartesio*, Jean Monnet Working paper 4 (2009).

place where the company came into the existence (i.e. where it was incorporated).[23] The Member States adhering to this principle do not require the linkage between the central administration and the place of incorporation and hence allow the companies to register under their law irrespective of location of their center of management. [24]

Whereas the real seat principle emphasizes the control of commercial transactions, the incorporation principle highlights the predictability and certainty of these transactions. The registered address, as an address defined in the article of associations, is easy and reliable to ascertain.[25]

The opponents of the incorporation principle argue by emergence of, what is in the United States called the, "Delaware effect" or "race to the bottom"[26]. It stands for a trend where countries diminish the company law requirement in order to attract the entrepreneurs to be established in their country. The companies are likely to register themselves in the countries with most favorable company law regime while carrying on all their activities in another States. [27] Since the incorporation principle does not require the linkage between the real seat and place of incorporation, it creates suitable environment for the "Delaware effect." The Delaware effect is not visible among the real

[23] *Id.*
[24] *Supra*, note 20, at Aj p. 381
[25] Mathias Siems, *Convergence, competition, "Centros" and conflicts of law : European company law in the 21st century* , 27 European Law Review 48 (2002); see further the Art. 2(1) of the First company law directive (Directive 68/151/EEC) that puts on the companies requirement to diclose in the publicly accessible register the instrument of instituition art. 2 (1) (Directive use general term to cover any documents equivalent to the insturment of instituion regardless their name under domestic law.eg article of associatios/statues. Besides the amendment to the directive (Directive 2003/58/EC) further laid the requirement to make the register electoronically accessible. 11th company law directive (Directive 89/666/EC) puts disclosure requirement on the brancehs of the foreign companies.]
[26] for the history of the concept the "Delaware effect" see Christiana H.J.I. Panayi, *Corporate mobility in the European Union and exit taxes*, 63 Bulletin for International Taxation (2009). footnote 9-10
[27] *Supra,* note 20, at 391

seat followers, since the "coincide" requirement excludes party autonomy to solely move its central administration abroad. [28]

The "Delaware effect"should be conceived as a double-edge sword. From the economic point of view it demonstrably brings considerable benefits[29] on the other hands it leads to the lowering of company's law requirement that are mainly aimed for the protection of the persons effected by the company's activity.

1.3 Seat transfers within the European Union

The discrepancy between decisive connecting factors, "real seat" principle and "incorporation," used for determing the governing law is being perceivable mainly when it comes to the issue of the seat transfer. As was shown above, the "real seat" requires the company to be incorporated in the country where the real seat is located, whereas the "incorporation" doctrine does not place on the companies any similar requirement. [30]

However, we must bear in mind that possibility of exercising such an transfer depends not only on the conflict of law rules but also on the substantive provisions of the both host and original MS.[31] Put it more precisely, when the company transfer its seat, conflicts of laws is called for the determination of applicable substantive company law, whereas it is left to substantive law to determine whether transfer of the seat is

[28] Wulf-Henning Roth, *From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law,* 52 The International and Comparative Law Quarterly 181(2003.)
[29] *Supra,* note 5, at 4.
[30] MAX ANDENAS & FRANK WOOLDRIDGE, EUROPEAN COMPARATIVE COMPANY LAW 35 (CAMBRIDGE UNIVERSITY PRESS, CAMBRIDGE 2009).
[31] Mucciarelli, Federico M. , *Companies' Emigration and EC Freedom of Establishment,* 20 (2007). Available at SSRN: http://ssrn.com/abstract=1078407.

permissible.[32] In this respect we should mainly consider on the one hand, whether the original jurisdiction requires dissolution of the emigrating company and on the other hand, whether host jurisdiction allows immigrating company to be registered without going through the process of incorporation once again.[33]

We will consider the companies mobility; firstly, the transfer of the real seat and secondly, the transfer of the registered office from the viewpoint of the conflicts of laws doctrines. Besides, a short overview on the substantive provisions of the selected Member States is given to prove that there are differences in treatment of the corporate mobility even within the same conflicts of laws theory.

1.3.1 The transfer of the head office

As was roughly outlined above, there are two approaches to the transfer of the head office steaming from the discrepancies of the conflicts of laws theories.

Therefore we will firstly consider the transfer of the real seat from the perspective of the countries adhering to the "real seat" doctrine. Secondly we will have a closer look on the real seat transfer from the viewpoint of the incorporation doctrine.

Under the "real seat" principle, the applicable law is one where the real seat is located. Therefore every change of the real seat will leads to the change of the applicable law. It is left to the substantive laws of the countries move away an move to decide how will penalize the company for breaking the connecting factor. The transaction is generally

[32] *Id.*
[33] *Supra,* note 21, at 61

considered either legally impossible or hindered by the several conditions.[34] Emigrating company is sanctioned by the dissolution, whereas immigrating by non-recognition.

Traditionally, the German approach towards the company's migration was conceived to be most severe.[35] It penalizes not only foreign companies moving its real seat in the territory of Germany; by not recognizing them but it also disallowed its companies wishing to relocate abroad. In this event, the German law ceased to apply and therefore the company would be dissolved and liquidated.[36] The application of this draconian sanction was, at least according to the academic writing, minimized by the renvoi doctrine. It means, that in case the German company move its real seat into country adhering to the incorporation doctrine, its private international law would call back (renvoi) for the application of the German law as the law of the place of incorporation and thus the liquidation would not be necessary.[37]

The French companies are allowed to transfer their operational headquarters provided that shareholders agreed upon it by the qualified majority and an international agreement with the state of arrival was in the force. However, no such an treaty ever came into force. Hence, the position of the French legal system is not clear cut. The widespread opinion, at least according to the academic writing, therefore, is that the transfer is allowed but requires unanimous consent of the shareholders.[38] As far as the immigration of the foreign company into the France is concerned, the French approach appears to be

[34] *Supra,* note 5, at.9
[35] Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law,* ECGI Working Paper N°10 10 (2003). Available at: http://ssrn.com/abstract=384802
[36] *Supra,* note 21, at. 60.
[37] Wulf-Henning Roth, From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law, 52 The International and Comparative Law Quarterly 185 (2003).
[38] *Supra,* note 35, at. 11

permissive since it allows the transfer of the foreign company head office provided that is accompanied by the transfer of the registered office.[39] Whether the company could benefit from such a formulation is questionable, since when moving its registered office abroad the domestic law would generally require the dissolution and thus it is not possible without the loose of the legal personality. However, in the light of the recent cases law of European Court of Justice, it appears that situation might have changed. The survey on the ECJ case law and its impact on the corporate mobility are further described in the second chapter.[40]

The transfer of the head office in the family of the incorporation countries is easier to ascertain, since it leaves the boarders wide open for such mobility. Incorporation doctrine originates from the principle that company is allowed to transfer its real seat without losing its legal identity, since the registered office as a decisive factor for determining the applicable law remains untouched. [41]

1.3.2 Transfer of the registered office

The company that has successfully moved its real seat might welcome the possibility to transfer the registered office as well and thus get rid of the obligations that still has in the state of incorporation.[42]

However, special problem is presented by the transfer of the registered office, which is generally perceived to be inadmissible.[43] The cross-border transfer of the registered

[39] *Supra,* note 31, at. 19-20
[40] *Supra,* note 35, at. 10-12: for further assessment for Italy, Spain, Portugal, Belgium, Luxemburg
[41] Andrea J. Gildea, *Uberseering: A European Company Passport,* 30 Brooklyn Journal of International Law 262 (2004).
[42] *Supra,* note 18, at. 139

office from the incorporation country would break the connecting factor and would lead to the change of the applicable law. [44]

For the reincorporation to be possible, substantive laws of both involves countries must permit it, otherwise the company would fist have to be dissolved in the country of origin (i.e. it would cease to exist) and such as "non-existence" entity would have to register in the place where it wish to locate its registered office.[45]

Theoretically, the transfer of registered office from "real seat" country should not be decisive since it is not a connecting factor. However practice is different and such a transfer is impossible unless accompanied with the transfer of head office (which will, as was shown above, generally lead to winding up of a company).[46]

The company's migration within European Union is hindered by several obstacles posed either by the conflicts of laws principles or by the substantive law provisions of the each Member States. Whereas there is at least generous approach towards the head office transfer from the family of incorporation countries, the transfer of the registered office is prevented by numerous legal or practical obstacles. However, all the Members States are bound by the European Union law which is migration oriented. Although there is no secondary legislation at this time, the ECJ through the interpretation of the treaty provision tries to pave the way to company's mobility. The next section examines in detail the ECJ jurisprudence and its assessment to the cross-border transfer of the seats.

[43] *Supra,* note 30, at. 30
[44] *Supra,* note 5, at. 9
[45] Marek Szydło, *Emigration of companies under the EC Treaty : some thoughts on the opinion of the Advocate General in the "Cartesio" case*, 16 European review of private law = Revue européenne de droit privé = Europäische Zeitschrift für Privatrecht 979 (2008)
[46] *Supra,* note 5, at. 9

2 The seat transfers under ECJ's jurisprudence

Thus far, we have examined the basic principles of the freedom of establishment and conflicts of laws rules. Now we turn our focus on their interrelation while taking into the account the principle of supremacy.[47] The supremacy principle dictates national law to be in strict compliance with European Union law. National courts, when applying the Treaties provisions might, find themselves uncertain on their meaning. To achieve their coherent interpretations within the EU territory, the ECJ is the only body authorized with this task. In last decades the ECJ when interpreting the provisions on the freedom of establishment, has delivered significant number of cases where it addressed the issue of the cross-border seat transfer.

2.1 Relevant ECJ's case-law

The most relevant cases related to the problem of the corporate mobility are: Daily Mail, Centros, Uberseering, Inspire Art and Cartesio. The following couple will try to higlight the gists of each of the cases.

2.1.1 Daily Mail

Daily Mail was one of the very first cases where the provisions on freedom of establishment regarding company's mobility were tested.[48] It needs to be pointed out at the outset, that Daily Mail was not meant to be a case on the cross-border seat transfer. Its

[47] ECJ *Costa v ENEL* (Case 6/64) [1964] ECR 585; ECJ *Internationale Handelsgesellschaft* [1970] ECR 1125; ECJ *Simmenthal* [1978]ECR 629.
[48] ECJ 81/87 *Daily Mail* [1998] ECR 5483.

factual context rather dealt with tax-relating problems. However, the ECJ rephrased the referred question, since, at that time, it didn't feel comfortable to tackle exit taxes issue.[49] Daily Mail, a British holding company, intended to sell part of its non-permanent assets and use proceeds thereof to buy its own shares. In order to evade paying significant taxes in the UK Daily Mail transferred its central management to the Netherlands. [50]

From the perspective of private international law it does not pose any problem neither for the United Kingdom, nor for the Netherlands since both adhere to the "incorporation" principle. [51]

However, for such a transaction to be possible the consent of the English tax authorities was required, if company wanted to maintain *"its legal personality and its status as a United Kingdom company."*[52] Apparently, the tax authorities seeing in the whole transaction nothing else but the act of evading the tax requirement refused its approval. It required Daily Mail to sell at least part of the assets before transferring its residence out of UK.[53] Daily Mail sought sanctuary in ECJ while relying on Art. 52 and 58 of the TEC [now Articles 49 and 54 TFEU] However, the court held, contrary to its expectations, that these articles:

(24) [...] 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.

The court based its reasoning on the presumption that companies, unlike natural persons, are creatures of the national law and hence they exist only by virtue of national legal

[49] *Supra*, note 22, at. 14.
[50] *Daily Mail* par. 6-9
[51] *Daily Mali* paras 3, 7
[52] *Ibid.* par. 18
[53] *Ibid.* par. 8

system.[54] Therefore, it is upon discretion of each Member State how it will treat its domestic companies. The court added that at the present state the transfer matter cannot be resolved by the rules concerning the freedom of establishment "*but must be dealt with by future legislation or conventions.*" [55]

2.1.2 Inbound establishment's case law

The scrutiny of the next category of cases, Centros-Überseering-Inspire Art, pays attention mainly to the development of company's possibility to transfer its head office to another Member State. Although, their main concern is on the transfer of the real seat, while the registered office remains untouched, they should provide an insight on how ECJ was successively encountering the seat migration matters. As was examined above, there are several reasons for companies to travel to another Member State. The attention will now be paid to the development of this possibility.

In the Centros case,[56] a Danish couple formed the company in the UK for the sole purpose of circumventing the Danish minimum capital requirement. Consequently, without doing any business in the UK, they tried to establish the branch of Centros in Denmark. Their attempt was put off by the Danish authorities that asked them first to fulfill the minimum capital requirement.[57] The Centros brought an action before the competent court. Since the local court was not *acte clair* whether the Danish capital requirement for the registration of a branch was within the frame of the freedom of

[54] *Ibid.* par. 19
[55] *Ibid.* par. 23
[56] ECJ Case C-212/97 *Centros* [1999] ECR I-1459.
[57] *Ibid.*, paras. 3-8.

establishment, it referred the issue to ECJ. The ECJ made it clear that Danish rules were incompatible with the freedom of establishment, even though Centros did not carry any business in the UK and its sole purpose of setting up a branch is to carry out all its business activity through this branch.[58]

Centros is a breakthrough judgment regarding to the immigration of companies within European Union. Despite the absence of legislation dealing with mutual recognition of companies, the Luxembourg court obliged Member States to recognize company established under the law of another Member State even if their own private international law rules, as was the case of Danish rules based on real seat theory, would dictate that company have to be incorporated under their own law.[59] Although factual context of Centros has been interpreted by the Court as dealing with the secondary establishment, given the fact that it carried out all business activities solely in Denmark, the Centros company sought in fact to transfer its real seat abroad.[60]

Subsequently, in 2002 the ECJ dealt with another significant case which undermined the basis of the "real seat" doctrine. In the Überseering case,[61] the Dutch company properly incorporated in Netherlands, was denied standing in the German court on the ground of the lack of legal capacity. The German court claimed that once all of the Überseering's shares have been acquired by the German citizens, the company has de facto transferred its real seat to Germany.[62] Überseering failed to comply with German law, since, at that time, Germany required the linkage of the head office with the place of incorporation.

[58] *Ibid.*, paras. 20-21.
[59] Justin Borg-Barthet, *European private international law of companies after Cartesio,* 58 International and Comparative Law Quarterly 1022 (2009).
[60] *Supra,* note 37 at. 179; and supra, note 21, at. 50
[61] ECJ Case C-208/00 *Überseering* [2002] ECR I-9919.
[62] *Ibid.*, p. 9.

Therefore Überseering lost its capacity and had no standing in the court. To meet the German requirement, the Überseering would have to be reincorporated in Germany.[63] The ECJ denied this argument and held that the requirement to reincorporate amounts to the outright negation of freedom of establishment.[64] In essence the court concluded that the application of the "real seat" theory to the foreign company incorporated in another MS that leads to the denying of its legal personality runs counter the Treaty provisions on the freedom of establishment.

The Inspire Art[65] went one step further and definitely forbade Member States to treat differently companies carrying on their business activities exclusively in its territory while being incorporated in another Member State (i.e. pseudo-foreign companies).[66] The Inspire Art, a UK company with a Dutch citizen as a sole shareholder, decided to set up a branch in the Netherlands. When registering in the commercial register it omitted to indicate that it is formally foreign company (pseudo-foreign company) within the meaning of the Dutch law on the ground that it was doing business exclusively in the Netherlands.[67] As a pseudo-foreign company, the Inspire Art would, inter alia, have to satisfy the minimum capital requirement.[68] The ECJ held that Dutch rules are incompatible with the freedom of establishment.[69]

It appears that in attempt to justify the outcome of Daily Mail, the Court[70] involved itself in differentiating between the inbound establishments; i.e. company seeking to enter into

[63] *Ibid.*, p. 4-5.
[64] *Ibid.*, p. 81.
[65] ECJ Case C-167/01 *Inspire Art* [2003] ECR I-10155.
[66] Werner F. Ebke, *The European conflict-of-corporate-laws revolution : "Überseering", "Inspire Art" and beyond*, 38 The International Lawyer 813 (2004).
[67] *Inspire Art*, paras. 35-36.
[68] *Ibid.*, par. 28.
[69] *Ibid.*, par. 105.
[70] *Überseering*, paras. 61-73 and *Inspire Art* par. 103.

the territory of one Member States and outbound establishment; i.e. company seeking to leave the territory of domestic Member State.[71] Whereas the former has been achieved, the latter may be is still hindered by application of national laws.

Even though, the Advocate General Maduro in his opinion to the Cartesio case,[72] which will be discussed in the following pages, criticizes the Court's previous reasoning based on the distinction between the inbound and outbound cases, the Court itself continues in line of this logic.

2.1.3 Cartesio

In the light of uncertainties around the companies' migration, the Cartesio had opportunity to give freedom to emigrating companies and destroy the difference in treatment of outbound and inbound establishment. Although it narrowed the ambit of the real seat theory, it didn't give way to companies' emigration. Companies are still desperately waiting on amber light traffic light, for the green signal to start flashing.

In the Cartesio case,[73] a Hungarian limited partnership, sought to transfer its head office to Italy while retaining its legal personality under Hungarian law. The court refused to register the change of the address into the commercial register on the ground that the existing Hungarian law did not permit such a transaction.[74] Had a change in the address took place within Hungary, the new address would be registered without any problem.[75] However, from the cross-border perspective the transfer of the head office was not

[71] *See* for the crytical survey of both conceptions: Wolf-Georg Ringe, *No Freedom of Emigration for Companies?* 16 European Business Law Review (2005). Available at SSRN:http://ssrn.com/abstract=1085544

[72] Opinion of Advocate General Maduro in *Cartesio* Case C-210/06, point 28.

[73] Case C-210/06 *Cartesio Oktató Szoláltató bt* [2008] ECR I-00000.

[74] *Ibid.*, paras. 1,24,102.

[75] Opinion of Advocate General Maduro in *Cartesio* Case C-210/06, point 22.

possible. Cartesio would first have to be liquidated in Hungary and only afterwards newly formed in Italy.[76] The question referred to the Luxemburg court was whether Art. 43 and 48 TEC [now Articles 49 and 54 TFEU] impede the MS to prevent its company from transferring its seat to another MS while remaining to be a subject of that law.[77] The court answered the question in negative. The ECJ confirmed the reasoning of Daily Mail and thus concluded that the question can, in the absence of European legislation, only be answered by the applicable domestic law.[78]

As a corollary, the Member States retained the right:

> (110)[...] to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that MS 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. [...]

In the context of the seat transfer it means that Member States were left the right to prevent to company to transfer its head office abroad when company intends to retain its legal status under that law. Thus Member States may continue to require the dissolution and liquidation of company prior the seat transfer.[79]

Despite the initial disappointment that the judgment seems to bring, we cannot conceive the Cartesio verdict as a step backwards. Reading the judgment till the end, we will find in its very last paragraphs a major achievement. There is where the court distinguished the above-mentioned situation (the transfer of the head office without the change of the applicable law) from the one where the company moves to another MS with the change of applicable law.[80] In this case, unlike in Cartesio where company wanted to remain

[76] *Cartesio,* par. 103.
[77] *Ibid.*, par. 99.
[78] *Ibid.*, par. 109.
[79] Eva-Maria Kieninger, *The Law Applicable to Corporations in the EC,* 73 Rabels Zeitschrift für ausländisches und internationales Recht 616 (2009).
[80] *Cartesio,* par. 111

subject of Hungarian law, the MS may not hinder the "*company from converting itself into a company governed by the law of other Member State*," provided that "*it is permitted under that law to do so*" Any requirement of prior winding up or liquidation of the company would equal to the restriction which is not justified under the freedom of establishment.[81] The ECJ, therefore, identifies this conversion option of migration to be covered by the freedom of establishment.[82] Had the Cartesio transferred its seat to the Italy by way of converting itself into an Italian S.a.s, then – if it would be permitted under Italian law- Hungary could not hinder such a transaction. [83]

2.1.4 Advocate General opinion in Cartesio

There are several opinions among scholars[84] that it would be more appropriate and coherent with the previous case law, if the ECJ had followed the opinion of the Advocate General.[85]

The Advocate General, Portuguese jurist Poiares Maduro, maintained a different position. He concluded that the Hungarian law that does not allow the cross-border transfer of the real seat infringes Articles 43 and 48 TEC [now Articles 49 and 54 TFEU]. He based his opinion on the Sevic's judgment reasoning: "*National rules that allow a company to*

[81] *Ibid.*, par. 112-113
[82] ADRIAAN F.M. DORRESTEIJN, EUROPEAN CORPORATE LAW 38 (KLUWER LAW INTERNATIONAL: ALPHEN/RIJN, 2nd ed. 2009)
[83] Jan Bohrenkämper**,** 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-218/06), 3 European Law Reporter 86 (2009).
[84] Among others : Justin Borg-Barthet (*Supra*, note 59).
[85] António Frada de Sousa, *Comapny's cross border transfer of seat in the EU after Cartesio*, Jean Monnet Working paper 49, 07/09.

transfer its operational headquarters only within the national territory clearly treat cross-border situations less favorably than purely national situations."[86]

By elaborating the earlier ECJ jurisprudence he was of the opinion that cases regarding the freedom of establishment do not represent the case-law and its underlying logic accurately.

By providing Überseering as an example it reached the conclusion that the effective exercise of freedom of establishment implies that neither theory can be applied in its fullest logical extension.[87]

Admittedly the Advocate General, like the ECJ did in Cartesio, refrained from favoring any connecting factor. Although, he also avoided burying the "real seat" principle, he based his opinion on somehow different logic. He emphasized that Member States do not any longer have absolute freedom to determine the 'life and death' of companies constituted under their domestic law, but he would allow Member States to prevent the company from transferring their operational headquarters when protection of the general public interest requires it.[88] However, he concluded that restrictions in Cartesio can't be justified on the basis of general public interest, since Hungarian law doesn't provided for any conditions, it rather outrightly prohibits any transfer of the real seat abroad. Therefore Maduro suggested, contrary what was concluded in the judgment, to declare Hungarian national rules incompatible with the freedom of establishment. [89]

[86] Opinion of Advocate General Tizzano in *SEVIC* case Case C-411/03, point 25.
[87] *Ibid.*, point 30.
[88] *Ibid.*, point 31, 33.
[89] *Ibid.*, point 35.

2.2 The Impact of ECJ jurisprudence on the seat transfers

2.2.1 Transfer of the head office

Impact of the ECJ jurisprudence on the transfer of the head office is quite significant especially when it comes to Member States adhering to the „real seat" doctrine. The ECJ's verdicts do not fundamentally affect the incorporation countries, which as a matter of a principle, allow their companies to relocate their real seat.

The ECJ through its interpretation broaden the scope of the freedom of establishment to situation of inbound transfer of the company's real seat. While moving in now is generally admissible unless prevented on the ground of general public interest, moving out remains unresolved.[90] Especially the Überseering case is of high importance here, since it forbids MS to apply the „real seat" doctrine to the companies moving the head office to its territory. The company must be recognized and cannot be forced to reincorporate in order to achieve this status.[91]

However, when it comes to the transfer of the „head office" abroad, the freedom of establishment provisions are not at disposal here. In Cartesio, the court reaffirmed the verdict in Daily Mail that companies are artificial creatures of national legal system[92] and thus move along with the assumption that the right to create the company is tantamount to the right to nullify it when the companies decides to leave that jurisdiction.[93]

[90] *Supra,* note 30, at. 13
[91] *Überseering,* par. 81.
[92] *Daily Mail,* par. 19 and *Cartesio* 109.
[93] *Supra,* note 37, at. 207

Although, Cartesio left the emigration of the company's head office outside the scope of the freedom of establishment, Member States are individually altering their legal system and adopting the incorporation principle. The reason behind is to allow their companies to transfer the head office abroad and thus enable them to enjoy the same competitive advantage that is already given to companies coming from the incorporation "camp."

2.2.2 The unprompted way to the "incorporation" principle

The following pages provide a brief insight on how the "real seat" Member States are inclined to switch to the "incorporation" principle.

Firstly, we should take a look at the Hungarian Law. Hungary, already during the preliminary ruling of Cartesio case changed its law on Commercial Register. From that time on, the Commercial Register differentiates between the registered office and real seat; and those don't have been within same place.[94] Practically, if factual context of Cartesio had been decided under the current Hungarian law, the outcome would have been different and the case would have never reached the ECJ stage. It remains of the interest to note, that position of the Hungarian legislation as regards the private international law was not clear-cut in the time of Cartesio. The Hungarian law on Commercial Register was not compatible with the principle of incorporation proclaimed by the Hungarian private international rules.[95] While rules of Hungarian private international law provided for an incorporation theory,[96] according to the law on the commercial register, a company would have been governed by the place of central

[94] Daniel Deák, *Outbound establishment revisited in Cartesio,* 17 EC Tax Review 251(2008).
[95] László Burián, *Personal law of companies and freedom of establishment,* 61 Revue hellénique de droit international 76 (2008).
[96] Art. 18 (2) Decree-Law no 13 of 1979 on private international rules

administration [97] By reference to this administrative rule, which on one hand was not part of PIL Act but which on the other limited the application of Hungarian Law on commercial companies, the Hungarian legal entities were prevented from transferring their real seat abroad.[98]

Secondly, Austrian Supreme Court held, reacting to the Centros decision, that real seat doctrine can no longer be applied since it violates the freedom of establishment guaranteed under the EC Treaty [now TFEU].[99] The verdict of the Austrian Supreme Court has been largely criticized among the Austrian academic writers.[100]

Thirdly, Belgium maintained less strict approach to the abolishment of the real seat doctrine. They still seem to be favoring this principle unless general rule of the Code on Private international law gives preference to the international treaty or Law of the European Union.[101]

Lastly, recent developments show, that even Germany, conceived to have of the strictest "real seat" regime, is about to shift to the "incorporation" principle. Indeed, Germany passed the new law in order to increase the flexibility and competitiveness of its domestic companies. Since November 1, 2008, it is therefore no longer necessary for German private and public companies to have their real seat in Germany.[102]

[97] Article 16 (1) of the Law No CXLV of 1997 on Commercial register, company advertising and legal procedure in commercial register matter

[98] DIRK VAN GERVEN, CROSS-BORDER MERGERS IN EUROPE 63-64 (CAMBRIDGE UNIVERSITY PRESS: CAMBRIDGE 2010) http://books.google.com/books?id=8mafhz3gyMoC&pg=PR10&dq=dirk+van+gerven+2010&hl=sk&cd=1#v=onepage&q=dirk%20van%20gerven%202010&f=false

[99] *Supra*, note 13, at. 255

[100] See for example Norbert Kuehrer, *Cross-border company establishment between the UK and Austria*, 12 European Business Law Review 116 (2001).

[101] *Supra*, note 79, at. 611

[102] Frank Wooldridge, *Recent reforms of the German GmBH*, 31Company Lawyer 62 (2010).

Besides, the German private international law keeps up with this trend. To put it more precisely, German Ministry of Justice formed the working group of experts whose task was to report on the reform of private international law of companies.[103] On the ground of their work, the draft bill on private international rules for companies was introduced, that will, inter alia, replace the "real seat" doctrine by the incorporation doctrine.[104]

2.2.3 Transfer of the registered office

As was explained in the first chapter, the feasibility of the transfer of the registered office does not stem from any private international law principle and was not until recently covered by the freedom of establishment.[105] It is of the interest to note that the ECJ had opportunity to visit the matter the few ago when administrative court of Heidelbeg referred to the ECJ the issue regarding the transfer of a registered office from Germany to Spain. However, the preliminary procedure was denied from the procedural reasons.[106] Basically, until Cartesio, it was impossible to transfer the registered office without prior winding-up of the company in the home State and subsequent reincorporation in the host state.[107] Those burdensome, time and cost consuming procedures made the transfer of the registered office far from being attractive to the companies' managers.[108] Here is where, Cartesio brought a breakthrough achievement. In his obiter, the court decided that the freedom of establishment enshrines the right to transfer the registered office and thus to

[103] *Supra*, note 21, at. 53-54
[104] *Supra*, note 21, at. 45
[105] *Supra*, note 79, at. 617
[106] *Supra*, note 31, at. 254
[107] *Supra*, note 9
[108] *Id.*

change the applicable law by way of converting the company into a form of company which is governed by the law of the host state.[109]

Therefore, Member States cannot any longer require the dissolution or liquidation of a company when it is moving its registered office abroad by the way of conversion.[110]

Even thought the company's registered office is now allowed to travel abroad, the success of whole operation is still contingent on the approach of the country of arrival, since the ECJ put the limit on the conversion mechanism by emphasizing – *to the extent that is permitted under that law to do so.* The country of arrival would need to provide for the possibility for immigrating company to be converted into the recognizable type of company and as such entered into the commercial register without being required to be newly incorporated.

However, it is unclear what the Court precisely meant under this formulation. Does the Court stand for the formal act of the conversion? If this is the case, the formal act of conversion of the foreign company into the domestic is only stipulated by legislation of Cyprus, Malta and Portugal.[111] On the other hand, some other Member States give the company the right to relocate the legal seat from or into their territory without mentioning the option of conversion. The registered office is theoretically free to cross the borders of

[109] *Cartesio*, par. 111.
[110] *Ibid.*, par. 112
[111] *Supra*, note 98, at. 63-64, see further António Frada de Sousa, Comapny's cross border transfer of seat in the EU after Cartesio, Jean Monnet Working paper 11-12, 07/09; and for Cyprus see further Cyprus: A New Option for Transfer-In Companies http://www.alycolaw.com/assets/mainmenu/35/editor/Articles_Transfer_Of_Registered_Office.pdf It states that Cyprus tries to attract investors by creating the competitive advantageous field for them. Among others, it introduced the legislation enabling existing companies submit themselves into the Cyprian corporate law.

Slovakia, as well as Czech Republic. However the transaction is conditioned upon the existence of an international treaty.[112]

Cartesio might be considered as a challenge, however, not the obligation for the MS to establish the rules allowing smooth one-step conversion for foreign companies. [113]

One might assume that the number of countries with the conversion mechanism will grow. Given that Cartesio judgment is very recent and since the legislative procedure is long-lasting process it requires some period till MS give the indication of the way they treat the Cartesio's challenge.[114]

2.2.4 Substantive law provisions of some Member States

In the section bellow, I will describe endeavour of some Member States to tackle the issue of the transfer of the registered office. The attention will be paid to the leading jurisdictions (Germany, the UK) and to the most recent (according to my research) legislation measure enacted by the Spanish government.

As far as the *German* jurisdicition is concerned, the transfer of the registered office, as well as the transfer of the central administration, into or outside the territory of Germany was generally inadmissible.[115] It may be demonstrated by the decision of Munich Oberlandesgerichthof, which denied the possibility of the German private limited company to transfer its registered office to Portugal.[116]

[112] Art. 26 *Slovak Commercial Code* 513/1991
[113] *Supra*, note 20, at. 389-403
[114] *Supra*, note 20, at. 399
[115] *Supra*, note 31, at. 21
[116] *Supra*, note 79, at. 617

Although, as it has been pointed out above, Germany is on the right track to abolish the real seat doctrine definitely. As far as the transfer of registered office is concerned, the Ministry draft bill, even though it allows such a transaction, is not precise enough.[117]

Article 10b of the Ministerial proposal defines only the situation which triggers the change of the applicable law; entry into the pubic register of another state. Taking into the consideration that the entry into the pubic register is tantamount to the transfer of the registered seat, the transfer of registered office will be, once the draft bill is enacted, possible. Any company wishing to re-register in Germany, as well as any domestic company abroad, will be allowed to do so without being liquidated and re-incorporated, provided that the target state allows it and preconditions of both states are fulfilled. Although, the draft bill omits to state which pre-conditions are needed to be met before such a transaction can occur.[118]

It remains of the interest to note that the expert's report did determine the preconditions that would have to be met by a company wishing to transfer its seat.

There is no provision in the *UK* Companies Act 2006 allowing an English company to transfer its registered office to another MS, not even to Scotland.[119] The most significant reasons why the UK is resistant to the transfer are tax losses and possible harmful effects on the rights of shareholders, creditors and employees.[120] If it occurs, the company won't be liquidated but the resolution to transfer will be held ineffective given the company will

[117] *Supra*, note 21, at. 61
[118] *Supra*, note 21, at. 61
[119] *Supra*, note 14, at. 145
[120] *Supra*, note 71, at. p. 3

be regarded as incorporated in the target state while still considered existent under original English law.[121]

In the light of Cartesio, it seems that UK will need to amend its law and allow the transfer of the registered office, at least to the extent, protected by Cartesio.

Under the UK law, neither a foreign company can convert itself into an English company

Although the UK government considered the option to regulate outbound and inbound transfer of the registered office of the companies, finally it decided not to address the issue and thus did not propose any measure in this respect. The reluctance of the UK government can be justified on the ground that it didn't want to „pre-judge the outcome of the EU negotiations", since it expected the European Commission proposal for a 14th company law directive on cross-border seat transfer in a foreseeable future. The directive would call for the implementation and the UK would have to harmonize its national law anyway according to it.[122]

However, as noted bellow, in the meanwhile the European Commission withdrew the work on the Fourteenth Directive from its agenda. The UK Government may be well advised to introduce conversion mechanism and thus create level playing field for the market of reincorporation, as it already does for the incorporation.[123]

The *Spanish* Government did not wait nor for the outcome of Cartesio, nor for the legislative initiative from the European Commission and it rather seized the opportunity to regulate the transfer of the registered office on its own. Therefore, Spain is according

[121] *Supra,* note 31, at. 16-21
[122] Company Law Reform (CM 6456, UK Goverment -The Department of Trade and Industry- White Paper, 2005 Availabe at http://www.berr.gov.uk/files/file13958.pdf, p. 48-49
[123] *Supra,* note 20, at. 399

to my knowledge, the country with the most recent legislation regulating expressly the transfer of the registered office abroad, as well as the transfer into the Spanish territory. The law on structural modification of commercial companies entered into force on July 4 2009.[124] With respect to the transfer of registered office of a foreign company into Spain, the SML regulates the immigration of companies incorporated both within and outside the EEA.[125] However, the non-EEA companies must meet the additional requirement as regards the minimum share capital.[126]

The relocation of registered office abroad may only be accomplished provided that the host MS enables the preservation of the legal status in case of such a transaction.[127] Comparing to Cartesio dictum on conversion which enables the transfer to the extant allowed by the host Member State, one might conclude that the SML is based on the same logic.

SML designs also procedural rules to maintain coherent procedure and to protect the interest of the involved parties. Preparation and approval of the transfer proposal by the company's directors, registration of transfer proposal by Commercial registry and approval by shareholders meeting , protection of creditors and the shareholders who voted against the transfer of registered office by giving them the right of withdrawal.[128] Furthermore, SML expressly excludes the companies under liquidation or insolvency proceeding to benefit from the right to transfer their registered offices.

[124] Carlos Franco, The Spanish law on structural modifications of corporations, The Spanish law on structural modifications of corporations, 24 Journal of International Banking Law and Regulation 529-530 (2009).
[125] Miguel Torres, Spain: Company law – Relocation of registered office, 24 International Company and Commercial Law Review N10 (2009)
[126] *Supra*, note 124, at. 530
[127] *Supra*, note 124, at. 530
[128] *Supra*, note 125, at. n9, 10

Spanish legislation is very liberal. It does not demand any documents proving the compliance with the requirement of company law of the place of origin.[129] The transfer must only conform to the Spanish provision of respective type of corporation, unless otherwise stated in international treaties.[130]

[129] *Supra*, note 125, at. N 11
[130] *Supra*, note 124, at. 530

3 The transfer of the registered office under the EU secondary legislation

The European Union may legislate only within the ambit of the principle of conferral, which is laid down in Article 5 (1) TEU [ex Article 5 (1) TEC]. It means that the Union may act only within the powers conferred upon up it by the Member States and thus can only be active only on the basis guaranteed in the Treaties. The basis for the legal measure necessary for the achievement of the freedom of establishment is Article 50 TFEU [ex Article 44 TEC], which empowers the Council and the European Parliament to enact directives. By enacting directives the Union attempts to harmonize company's law of its Member States. However, despite the strive of the market for a directive enabling the direct transfer of the registered office, the issue remains untouched by the secondary legislation. The long awaited 14th Company law Directive on the cross border transfer of companies' registered offices, if once enacted, could fulfill the businessmen desires. However, the Commission stopped its work on this project. The reasons for the Commissions non-actions as well as its suggestion to follow the procedures under SE Regulation[131] and 10th Company law directive[132] when wishing to move abroad are examined bellow. Having weighed the arguments of those currently available procedures and direct one which would be at disposal under the 14th Company Law Directive, the conclusion is reached that the legal measure is required.

[131] Council Regulation EC 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) OJ L 294

[132] Directive 2005/56/EC of the European Parliament and the Council of 26th October 2005 on cross-border mergers of limited liability companies OJ L 310

3.1 The indirect possibility of the cross-border migration

The current EU secondary legislation offers the prospect for the indirect transfer of the registered office by virtue of SE Regulation and Cross-border merger directive. These possibilities are described as indirect, since they do not provide for smooth a singe step transfer. On the contrary, company has to undergo either three steps procedure (the SE) or two steps (cross-border merger) one, when it wants to re-register.[133] Apparently, these procedures are far from being attractive to businessmen.[134]

The Cross-border merger Directive constitutes the possibility for limited liability companies (both private and public) to transfer their registered office by way of setting a subsidiary in the host Member State and consequently merging the existing company into this subsidiary (speech). As a corollary, by the way of merging of existing company into its subsidiary, the registered office is transferred and the continuity of the legal personality of the initial company is in principle preserved.[135]

However, the procedure is very costly and time-consuming given the fact that the company needs to establish a subsidiary and then to follow all the procedural formalities required when carrying on the cross-border merger. [136]

Another option is currently available under the SE-Regulation. In order to avail itself of the SE option, the subsequent procedure must be followed. Primarily, an existing company needs to be converted into the SE. Then as a SE, it can transfer its registered

[133] Gert-Jan Vossestein, *Cross-border transfer of seat and conversion of companies under the EC Treaty provisions of freedom of establishment : Some considerations on the Court of Justice's Cartesio judgment*, 6 European company law 60 (2009).
[134] *Supra*, note 5, *at. 5:*; 7 SE have transfered their registered office so far and 2 are planning to do so.
[135] Christiana Panayi, *Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths*, 28 Yearbook of European law 25 (2009), available at SSRN: http://ssrn.com/abstract=1437555
[136] *Supra, note* 5, at. 40 ;xamined all the procedural steps in detail.

office to intended Member State. Finally, it can transform back into a public limited company.[137] However, the attractiveness of this option is thwarted by several obstacles.

Firstly, the transfer of the SE's registered office must be accompanied by the simultaneous transfer of the de facto head office, since SE Regulation requires both seats to coincide in one MS.[138]

Secondly, the SE conversion option is only possible for a pubic limited company that has had a subsidiary company governed by the law of another Member State for minimum two years.

Article 37(3) constitutes additional obstacles discouraging managers from resolving to the SE transfer of registered office. It prohibits the transfer of the registered office simultaneously with the conversion. It means that, only when the process of the conversion of a public limited company is completed, the SE may transfer its registered office.[139] It is not likely that this long-lasting procedure would be attractive for the company. It would take minimum three months to accomplish this process: one month for the conversion[140] and two months for the transfer of the registered office.[141]

Besides, taking into consideration the minimum capital requirement (120.000 €[142]), broad structure and worker involvement[143], it is hard to imagine that company wishing merely to transfer its legal seat would face so many obstacles just to fulfill its goal. Taking into account that small and medium sized enterprises were considered to be primary

[137] Gert-Jan Vossestein, *Cross-border transfer of seat and conversion of companies under the EC Treaty provisions of freedom of establishment : Some considerations on the Court of Justice's Cartesio judgment*, 6 European company law 60 (2009).
[138] Art. 7 SE Regulation.
[139] Eck, Gerco C. Van, SE *mobility: taking a short cut? A recommendation for amendment of the SE regulation*, 6 European company law 108 (2009)
[140] Art. 37 (5) SE Regulation
[141] *Supra*, note 139, at. 108
[142] *Ibid.*, Art. 4 (2)
[143] *Ibid.*, Art.12

beneficiaries of the 14th Directive, the Commissioners' suggestion to wait until "*the framework is found wanting*" sounds even more astonishing in the light of these facts.[144] Apparently, already at the present state, one might conclude that the available options are unsatisfactory. [145]

3.2 The future scenario of the transfer of the registered office- the 14th Company Law Directive

The road to the achievement of the 14th Company Directive has been described among the academic scholars as the long and winding.[146] Truly, as this paper will show bellow, the indication is nothing but appropriate.

The round of the public consultation in 1997 and 2002 already emphasized the demand of the business world to be given the opportunity to relocate their companies by smooth and quick transaction into the country which they consider to have better corporate climate. In case that companies avail themselves of this transfer possibility, they should be able to do so without the fear of losing their legal personality.[147]

Initially, all the steps taken by the European Commission led to the achievement of this goal. The Commission stimulated by the report drew up by the High Level Group of

[144] *Supra,* note 1, at. 373

[145] General consultation round carried out in December 2005 confirmed that there is still pressing need (79.6% of the respondent) for a directive, available at: http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf

[146] Stephan Rammeloo, *The 14th Company Law Directive on the cross-border transfer of the registered office of limited liability companies : now or never?,* 14 Maastricht journal of European and comparative law 362 (2008).

[147] European Commission, The public consultation relates to the outline of the planned proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies; A need felt by the market, sub 1 availabe at: http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm

Company Experts[148] undertook, in its Action Plan[149], to present as the top priority in short-term period the proposal of the 14th Company Law Directive.

Quite surprisingly, Commissioner McCreevy's speech thwarted that way.[150] In October 2007 he announced before the European Parliament Legal Affair Committee there is no need for an action in this area. Having examined the economic consequences, he suggested that it would be more appropriate to wait for the clarification that might be brought by, at that time, pending case of Cartesio. Besides, he drew the attention to the seat transfers possibility by the means of the European Company Statute Regulation and the cross-border Merger Directive. As was shown above, these procedures are time-consuming and burdensome and the Directive would introduce more tempting offer for existing companies.

3.2.1 The safeguards of the 14th Directive

The future 14th Directive even though, if once enacted, would constitute a major step forward for businessmen wishing to relocate their company, it could pose a field for speculates who would initiate business transactions for no other purposes than to circumvent the companies obligations.[151] Groups in danger are especially minority shareholders, creditors and other 3rd parties involved for who the protection is required to

[148] Report of the High Level Group of Company Law Experts on a Modern Regulatory for Company Law in Europe, Brussels, 4th November 2002. Availabe at http://www.ecgi.org/publications/documents/report_en.pdf

[149] 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 Froward*, COM(2003) 284 final, 21.5.2003. p. 20 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0284:FIN:EN:PDF

[150] SPEECH/07/592 of 3 October 2007 (Speech by Commissioner McCreevy at the European Parliament's Legal Affairs Committee, Brussels) http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/592

[151] *Supra*, note 1, at. 391

be provided.[152] The departing Member State would have to furnish rules securing the proportionate protection for the minority shareholders and creditors.[153]

Secondly, as far as rights of shareholders are concerned, the Directive should secure that a Member State would oblige companies to disclose all the relevant documents in order to achieve the transparency of the whole procedure. Besides, the EP resolution suggests that managers should draw up a transfer proposal and a transfer report prior calling the shareholders' meeting to take the decision upon the transfer of the registered office. The report and the plan would have to state economic and legal impacts on the shareholders and employees.[154] Since the decision, if adopted, would fundamentally reorganize the companies' structure, each MS should, as minimum, require the majority needed for altering the memorandum and the article of association.[155]

Thirdly, the directive should call for mutual assistance between the MS engaged. Their coordination is mainly important for protecting company not to become "stateless". Therefore, Member States would be allowed to do the de-registration only after the submission of the evidence proving the entrance into the register in a new MS.[156] However, for the legal certainty the transfer should remain recorded in the register of home country.[157] Besides, the Directive should safeguard the tax neutrality of the transfer procedure.[158] Fear of the tax looses is one of the reasons why the states remain hostile to companies emigration. Hence the most jurisdictions traditionally levied considerable exit

[152] European Parliament resolution of 10th March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company, (2008/2196(INI)
[153] S*upra*, note 5, at. 47-49 (2007).
[154] EP resolution p. 6
[155] EP recommendation p. 3
[156] EP recommendation 4
[157] European Commission, The public consultation relates to the outline of the planned proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies;Coordination Directive, sub. 6.
[158] *Ibid.*, sub. 9.

taxes on a emigrating company.[159] Exit taxes are charges imposed on unrealized capital gains on the asset of a person leaving the jurisdiction[160] The ECJ had the opportunity to address the question of exit taxes in *Lasteyrie du Saillan*t. The Court held that they constitute an unjustified restriction on the freedom of establishment, since exit taxes hinder the ability of individuals to move their business into the territory of another MS.

Furthermore, the directive should safeguard the employee participation. The directive shall envisage that these rights should be governed by new Member States, unless they are more firmly enshrined in the home MS. If this is the case, scope of employees' participation should be maintained or negotiated.[161] It appears that home MS would demand to allow for bargaining for variation of its rights, however, it is necessary to state where the limits for these negations are. [162]As mentioned above, the SE Regulation provides the solution: in case the settlement is not reached through mandatory negations, the default rules on workers' co-determination would apply.[163] Opponents argue that the involving of the employment regime into the Directive would make it less attractive. On the other hand, leaving the co-determination outside the scope of Directive might cause that Member States with strong worker regime would not support its adoption. In this respect, German advanced workers' co-determination system needs to be mentioned. It requires the large enterprise with more than 2,000 employees to have workers representative on their supervisory board. [164] It is one of the reasons why German government has steadily blocked the adoption of SE.

[159] *Supra*, note 35, at. 6
[160] *Supra*, note 26, at. 469
[161] European Commission, The public consultation relates to the outline of the planned proposal for a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies; A coordinative directive http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm
[162] *Supra*, note 9, at. 162
[163] *Supra*, note 5, at. 50
[164] *Supra*, note 21, at. 58

However, as we might see, they finally overcame the difficulties. This reconciliation may serve as the basis for workers' co-determination in respect of the 14th Directive. [165]

Lastly, the Directive shall secure that Member State would not allow the transfer of the registered office of a company under the insolvency or liquidation process to transfer its registered office.[166] Similar rule might be found in Spanish or Italian laws. Also Spanish companies which are subject to insolvency or liquidation proceeding are not permitted to transfer their registered office.[167] Italian law is even stricter, by stating that the transfer of the companies' registered office one year before the commencement of the insolvency proceeding is not possible.[168]

The EU law has already stepped it and since 2000 is regulating the cross-border insolvency regime (EC Regulation on Insolvency Proceedings 1346/2000). It is based on the concept of the debtor's centre of main interest (COMI). The reputable presumption is that COMI is where the registered office is located. However, especially to avoid abuse in the event of the migration of the real seat, it might be rebutted when company has closer ties with another legal system.[169]

[165] *Supra*, note 21, at. 22
[166] EP resolution recommendation 6
[167] *Supra*, note 125, at. N9
[168] Susan Moore, *COMI Migration: The Future*, 22 Insolvency Intelligence 27 (2009); for the Insolvency procedure see further SRMJ 1:
[169] *Supra*, note 1, at. 391

3.2.2 Transfer of registered office with versus without simultaneous transfer of the head office?

The matter that needs to be clearly resolved by the 14th Directive is whether the transfer of the registered office would require to be accompanied by the transfer of the real seat. The Impact Assessment tested both possible attitudes that future directive may adopt; under limited approach the relocation of the registered office with simultaneous transfer of the real seat and under extensive approach the transfer of the transfer of the registered office alone.[170]

The "limited approach", does not intend to interfere with the Member States' conflicts of laws rules and hence leaves it for the MS of arrival conflicts of law rules to determine the solution.[171]

Accordingly, MS adhering to a real seat doctrine would be allowed to demand companies to transfer the registered office together with the real seat. Differently, companies moving to the country applying the incorporation principle would be permitted to relocate their registered office alone, without the need move of their real seat.[172] It needs to be reminded that also under the SE Regulation leas towards this approach and require company's registered office and head office to be located within the Community in the same Member State.[173]

Secondly, the "extensive approach", if followed by the Directive, would give companies full freedom to transfer their registered office by expressly prohibiting any requirement

[170] *Supra,* note 5, at. 42
[171] *Supra,* note 9, at. 1256
[172] *Supra,* note 37, at. 192
[173] Art. 7 SE Regulation. Furthermore, the MS may even required the seats to be located in the same place

for the transaction to be accompanied with the relocation of the head office. Companies would be allowed to choose the any MS which best fits their corporate climate. [174]

The European Parliament resolution leans towards the extensive approach, by stating that rule requiring the coincidence of the head office and registered office in one MS "would run counter to the case-law of the ECJ relating to the freedom of establishment and would therefore infringe the EC law"[175]

[174] *Supra,* note 5, at. 45
[175] EP Resolution point G.

Conclusion

This thesis tried to answer the question whether the transfer of the company's registered office within the European Union is possible.

The First chapter attempted by the comparative analysis of divergent connecting factor answer the question from the perspective of the conflicts of law rules. Unlike, the transfer of the head office which doesn't basically cause any problem for countries adhering to the incorporation principle, the possibility of the transfer of the company's registered office is a problem for both, the "incorporation" doctrine as well as for the "real seat" doctrine. The second chapter provided an excursion through the ECJ jurisprudence. The ECJ in several cases tested the compatibility of domestic provisions with the freedom of establishment. The court is broadening the ambit of the its context by preventing the Member States to apply the rules that cause the free mobility provision impossible. Whereas the freedom of immigration has been fully achieved, emigration scenario is left in the hands of the domestic legislator. The different treatment appears to stem from the nature of the corporate entity. Cartesio confirmed the Daily Mail judgment that the companies are creatures of national law and must first comply with the domestic law requirement before relying on the freedom of establishment. However, the court shaped this argument to the significant extent. From the time of Cartesio, the company may decide not to be the creature of domestic law and can transfer its real seat by way of converting itself into the company governed by the foreign law. It means that the companies may cease to be creatures of the foreign law, however only to the extent it this law accept them. The ECJ by encompassing the conversion option within the scope of the

freedom of establishment, addressed the issue of the transfer of the registered office. The feasibility of the transaction is still contingent upon the acceptance of the Member State of arrival. However, it might be assumed that countries will introduce the conversion mechanisms for the companies wishing to relocate in their territory.

Even though the measures are enacted by all of the Member States, the thesis by providing safeguards that needs to be protected, concludes that the Directive that would harmonize the procedural steps in every Member State would enhance the corporate mobility and thus be beneficial for the internal market.

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