

# RIGHT OF ESTABLISHMENT AND CORPORATE MOBILITY - AN OUTLINE OF ISSUES

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*The paper outlines the basic issues arising from the rules on the right of establishment in the European Union and discusses to what extent those rules enable companies to change their seat. The seat of the company is crucial for determining the substantive law which applies to the company. The substantive law may be either the law of the registered seat or the law of the real seat of the company. Conflict of laws rules in various countries are different as to the determination of the substantive law, depending on whether that law applies real seat or registered seat theory. Any company and its members are interested that the applicable substantive law is favourable to the company, its members and its business. The open question is, however, to what extent they are free to choose that law, by choosing the place of incorporation and/or by moving the seat of the company from one country to the other.*

*Key words: right of establishment, seat of company, transfer of seat, cross-border transfer of seat, lex societatis*

## I. INTRODUCTION

The incentive for this paper was given by the recent ECJ ruling in Case *Cartesio Oktató és Szolgáltató Bt* (hereinafter: *CARTESIO*)<sup>1</sup> that was widely commented in legal literature.<sup>2</sup> However, due to limits of this paper, the idea

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<sup>1</sup> C-210/06, *Cartesio Oktató és Szolgáltató Bt*, ECR 2008, I-9641.

<sup>2</sup> Bohrenkämper, J., *Corporate Mobility across European Borders: Still no Freedom of Emigration for Companies?*, *European Law Reporter*, 3/2009; de Sousa, A. F., *Compa-*

only to provide an outline of issues which gave rise to *CARTESIO*, *i.e.* the right to transfer company seat within the Community (*i.e.* the issue that falls within the scope of corporate mobility). In order to do so, we will focus foremost on the general corporate mobility within the conflict of laws context followed by a brief introduction of the two established but mutually divergent theories used by various jurisdiction (among other) for determination of applicable company law in corporate mobility cases. Thereafter, we will refer to corporate mobility within the context of Community law which unavoidably includes discussion on the intricate matter of the right to freedom of establishment. Finally, we will conclude this paper by referring to the work on the uniform Community level instrument that was to ensure adequate level of corporate mobility and thus company seat transfer within the Community.

## II. CONFLICT OF LAWS AND CORPORATE MOBILITY

It is common knowledge that purely domestic legal relations are governed primarily by the national provisions of the jurisdiction concerned.<sup>3</sup> However, in international situations this unanimous application of a national law of one jurisdiction becomes somewhat blurred. In such situations where there is more than one jurisdiction involved in regard to a certain legal situation (*i.e.* a situation with an international element), before resolving the dispute there is a need to determine which of the possible national law provisions would be applicable to the dispute concerned.<sup>4</sup> If all of the competing national laws are to be applicable simultaneously to the same legal situation, the conjunction of

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ny's Cross-border Transfer of Seat in the EU after *Cartesio*, Jean Monnet Working Paper 07/09 (<http://centers.law.nyu.edu/jeanmonnet/>, visited 10.9.2010.); Bouček, V., Pejić, L., *Presuda Cartesio i osobni statut trgovačkog društva - (dis)kontinuitet sudske prakse Europskog suda*, *Hrvatska pravna revija* 9 (2009) 10; Wisniewski, A., Opalski, A., *Companies' Freedom of Establishment after the ECJ Cartesio Judgment*, *European Business Organization Law Review* 10 (2009).

<sup>3</sup> Notwithstanding the right of the parties to determine applicable law to their contractual relationship which can be different from the law of their country, however even in such situations the parties could not bypass application of mandatory rules applicable in their country.

<sup>4</sup> *E.g.* an international sales contract involving a seller and a buyer from different jurisdictions or in the case of our interest a company intending to transfer its administrative seat from one jurisdiction to another.

these (generally) conflicting national laws would lead to contradictory results, legal uncertainty, ineffectiveness of legal protection and significant problems in regard to enforcement of court rulings. Therefore, for regulating such situations a whole new area of private law developed, *i.e.* private international law.<sup>5</sup> In order to determine which one of the competing national laws would be applicable to a certain legal situation private international law developed a legal term known as the connecting factor. Connecting factor represents a factual link that connects a certain person, entity or a legal relationship to a certain national legal order that is considered to be the closest to that person, entity or a legal relationship. In other words, connecting factor directs to the applicable law of a national legal order with whom a certain person, entity or a legal relationship has the closest connection. Connecting factors can be determined by international and national rules of law.<sup>6</sup>

Since the topic of our paper relates to corporate mobility within the context of Community law, a preliminary question arises: What does corporate mobility actually mean? Generally speaking, corporate mobility represents a freedom of a company to conduct its business activities in a jurisdiction other than the one of its original incorporation as well as company's right to choose a set of national company law rules that best suit its business needs.<sup>7</sup> For example, corporate mobility would include situations where a company incorporated under one jurisdiction operates in another or where a company transfers from one jurisdiction to another and thus subjects itself to the company law of that other jurisdiction.

Since international nature of corporate mobility concerns not one jurisdiction but two or more (*i.e.* company conducts its business activities in several jurisdictions), private international law plays an important role and thus represents an area of our immediate interest.<sup>8</sup> That is because such corporate mo-

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<sup>5</sup> The term private international law is a synonym to international private law and conflict of laws. The usage of these terms generally depends on the legal order (*e.g.* common law legal orders usually use the term conflict of laws). However, during this work we will interchangeably use both conflict of laws and private international law in order to relate to the same concept.

<sup>6</sup> Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents as example of international conflict of laws instrument and Switzerland's *Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG)* as an example of national conflict of laws rules.

<sup>7</sup> Wyckaert, M., Jenné F., Corporate Mobility, unpublished, p. 4 ([www.ssrn.com](http://www.ssrn.com), visited 10.9.2010.).

<sup>8</sup> De Sousa, A. F., *op. cit.* in fn. 2., p. 3.

bility situations might result in legal issues for companies that could require application of conflict of laws rule in order to determine applicable national company law provisions.<sup>9</sup> However, determination of such applicable company law (*i.e. lex societatis*) in international context might not be as easy since there is more than one national jurisdiction involved whose conflict of laws rules might not lead to application of the same *lex societatis*. This problem derives from application of diverging connecting factors by different jurisdictions which might eventually lead even to serious consequences for the company involved like the company's termination.<sup>10</sup>

### III. DETERMINATION OF *LEX SOCIETATIS*

In view of the above, private international law has seen two general but diverging theories being developed in regard to determination of *lex societatis*: (i) the registered seat theory and (ii) the real seat theory. Registered seat theory is usually native to common law legal order while the real seat theory is generally common to civil law legal orders.<sup>11</sup> However, note that many jurisdictions today adopt one of these theories with certain specific distinctions which eventually make such private international law regulation in every jurisdiction unique.<sup>12</sup> In other words, there are hardly two unique national legal orders in regard to the conflict of laws

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<sup>9</sup> Company laws are important because they provide a set of rules that regulate company's establishment, organization, every day operation and termination. In other words, to resolve a certain company issue it is the applicable company law that will first usually have to be determined and afterwards applied.

<sup>10</sup> Wisniewski, A., Opalski, A., *op. cit.* in fn. 2., p. 597; See also fn. 22 and the text following chapter 4 Consequences of determining *Lex Societatis*.

<sup>11</sup> Barbić, J., *Pravo društava*, Knjiga druga, Društva kapitala, Third Edition, Zagreb 2008, p. 378; de Sousa, A. E., *op. cit.* in fn. 2., p. 4, 6.

<sup>12</sup> For example Croatia acknowledges both the real seat and the registered seat as connecting factors. Specifically Croatian Company law in article 37 (4) provides that: "If the management board of a company is located at a place other than that place entered into the commercial register as the company's seat [*author's comment: the administrative seat*], or if the company performs its activities in a place other than place entered into the commercial register as the seat [*author's comment: the administrative seat*], the place entered in the commercial register shall be regarded as the seat [*author's comment: the registered seat*]...". (Official Gazette of the Republic of Croatia Nos. 111/93, 34/99, 121/99, 118/03, 107/07, 146/08 and 137/09).

rules on determination of *lex societatis*.<sup>13</sup> Furthermore, each of these two theories relates to a different connecting factor for determination of *lex societatis*.

Registered seat theory purports that the applicable company law is the law of the country under whose law the company is registered / incorporated.<sup>14</sup> Specifically, the connecting factor being the country of company's incorporation, *i.e.* where location of the company's registered seat is located.<sup>15</sup> Legal orders that adopt this theory regard companies that are incorporated under their law as companies that have their nationality.<sup>16</sup> Having nationality of a legal order grounded in the registered seat theory means that a company cannot transfer its registered seat to another jurisdiction without losing nationality of that legal order.<sup>17</sup> That is because such transfer would result in breaking the link with

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<sup>13</sup> De Sousa, A. F., *op. cit.* in fn. 2., p. 3, 9; Wisniewski, A., Opalski, A., *op. cit.* in fn. 2., p. 621 - 622.

<sup>14</sup> Barbić, J., *op. cit.* in fn. 11., p. 378; Valk, O., C-210/06 Cartesio Increasing corporate mobility through outbound establishment, *Utrecht Law Review* 6 (2010) 1, p. 154, 164; Mucciarelli, F. M., Company 'Emigration' and EC Freedom of Establishment: Daily Mail Revisited, *European Business Organization Law Review* 9 (2008), p. 283; Wyckaert, M., Jenné, E., *op. cit.* in fn. 7., p. 5; Registered seat theory is native to common law legal orders like UK, Ireland, USA and Netherlands.

<sup>15</sup> Registered seat (also referred to as registered office) is the address of the company registered with the company register in the jurisdiction of company's incorporation. In other words, registered seat represents an address which is registered with the government as the official address of a company, an association or any other legal entity (also known as the seat of incorporation). This is the address where all the communication from the company register will be related to. The registered seat does not need to coincide with the place where company conducts its business or has its management; Szudockzy, R., How does the European Court of Justice Treat Precedents in its Case Law? *Cartesio and Damseaux from a different Perspective: Part I*, *Intertax* 37 (2009) 6-7, p. 349-350; Valk, O., *op. cit.* in fn. 14., p. 152; de Sousa, A. F., *op. cit.* in fn. 2., fn. 1.

<sup>16</sup> It is important to note that human beings, *i.e.* individuals, are given rights upon birth, the same is recognized to legal entities like companies. However, unlike individuals who are recognized by the mere fact of being alive, the companies are recognized as legal entities and given certain right only under conditions set out by the law of the recognizing country of company's incorporation. Therefore, it can be inferred that the country of recognition decides whether and under what conditions to give life to a legal entity. Companies that are given life under the law of such recognizing country are considered as nationals of that country, *i.e.* they belong to that national legal order.

<sup>17</sup> De Sousa, A. F., *op. cit.* in fn. 2., p. 5; Wisniewski, A., Opalski, A., *op. cit.* in fn. 2., p. 618.

the legal order of the company's original incorporation, *i.e.* the national order which recognizes and thus "gives life" to that legal entity.<sup>18</sup> This means that a transfer of company's registered seat entails a change in the applicable company law since the connecting factor would refer to a jurisdiction other than the one under whose law it was incorporated before such transfer of registered seat. Consequently, a company could not exist anymore as a company established under the law of the country of its original incorporation because the link with that country's company law has been severed. On the other hand, registered seat theory also means that the seat of company's management (*i.e.* company's administrative seat)<sup>19</sup> could be transferred to another country without breaking the link with the country of incorporation.<sup>20</sup> Therefore, this theory's advantage is that it permits the company registered under the registered seat theory to freely decide where to locate its administrative seat. In other words, companies would remain incorporated under the law of their country of incorporation even though they conducted all of their business activities or relocated its management to another jurisdiction.<sup>21</sup> Furthermore, it is fairly easy to determine *lex societatis* by application of the registered seat theory since it should be simple to identify the jurisdiction of the company's incorporation.<sup>22</sup> However, the

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<sup>18</sup> Szudockzy, R., *op. cit.* in fn. 15., p. 350.

<sup>19</sup> Company's administrative seat represents the address of the company's operational headquarters, the seat of company's central administration (also known as the real seat, operational seat, company's headquarters or head office); Szydło, M., *Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of Advocate General in Cartesio Case*, *European Review of Private Law* 6 (2008), p. 974; Szudockzy, R., *op. cit.* in fn. 15., p. 350; de Sousa, A. F., *op. cit.* in fn. 2., fn. 2.

<sup>20</sup> Szudockzy, R., *op. cit.* in fn. 15., p. 350; Bohrenkämper, J., *op. cit.* in fn. 2, p. 86; de Sousa, A. F., *op. cit.* in fn. 2., p. 5.

<sup>21</sup> This theory was developed to facilitate needs of UK companies that undertook their business operations in other countries (generally UK overseas colonies) during the 18th century; de Sousa, A. F., *op. cit.* in fn. 2., p. 4.

<sup>22</sup> This might not seem an easy task in regard to the real seat theory since it is often hard to determine where company's administrative seat is actually located. Especially if we take into consideration that company management could organize its meetings in jurisdictions other than the jurisdiction of company's original incorporation under the administrative seat theory. In such situation, a valid question might arise as to whether the company's administrative seat (a link to *lex societatis* of a jurisdiction grounded in the real seat theory) is located in the jurisdiction of company's original incorporation grounded in the real seat theory or another jurisdiction where the management meetings were undertaken. For example, If that other jurisdiction is grounded in the real seat theory as

disadvantage of the registered seat theory is that it facilitates creation of the so called “letter box” companies.<sup>23</sup> Another disadvantage could as well be that the Member State of company incorporation might find it hard to maintain insight into company’s business operations, *e.g.* for the sake of tax purposes. Moreover, as a consequence there is a risk that a jurisdiction grounded in the registered seat theory could lose interest in companies that have only their registered seat located within its territory which could consequently even lead to deterioration of national control mechanism over such companies. Generally, the registered seat theory in its purest form does not take into consideration the interests of the jurisdiction where the company actually undertakes its business activities.<sup>24</sup> Therefore, the registered seat theory is often referred to as a formalistic theory unlike its counterpart, the real seat theory.

On the other hand, the real seat theory means that applicable company law would be the national law of the country where the company’s management is placed or from where the company is administered.<sup>25</sup> This theory gives emphasis to the jurisdiction where the company actually conducts its business activities regardless of the company’s place of incorporation.<sup>26</sup> Therefore, the connecting factor is the place from where the company is managed or where the company’s management is situated.<sup>27</sup> Analogously to the other theory, the

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well, that jurisdiction might claim that such company requires incorporation under its laws in order to be enabled to undertake business operations within its territory while the jurisdiction of company’s original incorporation might consider that such company is no longer considered a company registered under its laws since its management is not located anymore within its territory. The consequence in such situation might as well be company’s termination in the jurisdiction of company’s original incorporation.

<sup>23</sup> “Letter box” company is another expression used for pseudo foreign companies or off-shore companies. Such companies are considered the ones that are established in a jurisdiction with which they have minimal business contact. The motive behind incorporation of such companies is to facilitate tax evasion in the country where the company’s business operations are conducted or to subject a company to a more liberal company law; Wyckaert, M., Jenné, F., *op. cit.* in fn. 7., p. 6.

<sup>24</sup> Valk, O., *op. cit.* in fn. 14., p. 164.

<sup>25</sup> Real seat theory is native to civil law legal orders like Germany, France, Belgium, Spain, Greece; Mucciarelli, F. M., *op. cit.* in fn. 14., p. 283; de Sousa, A. F., *op. cit.* in fn. 2., p. 6; Wyckaert, M., Jenné, F., *op. cit.* in fn. 7., p. 4.

<sup>26</sup> Barbić, J., *op. cit.* in fn. 11., p. 378; Valk, O., *op. cit.* in fn. 14., p. 154, 161-162; Johnston, A., Regulatory competition in European company law after Cartesio, *European Law Review* 34 (2009) 3, p. 382.

<sup>27</sup> Szudockzy, R., *op. cit.* in fn. 15., p. 350.

transfer of company's administrative seat results in severance of the link with the jurisdiction of company's registration and as a consequence leads to the change of *lex societatis* and winding up of the company.<sup>28</sup> Therefore, as in the registered seat theory where the transfer of registered seat is prohibited, in the real seat theory the transfer of administrative seat is prohibited.<sup>29</sup> The transfer of registered seat from the jurisdiction grounded in the real seat theory should be permitted (at least in legal theory) since the real seat theory does not rely on registered seat as its connecting factor. However, this is also not possible since it would make the applicable company law unenforceable.<sup>30</sup> Furthermore, company laws usually demand registration of the company with the competent company register in the jurisdiction of company's incorporation. Company register provides third parties with information on the company's structure, leadership, share capital, business activities and etc. Therefore, Company register should primarily be located in the jurisdiction under whose law the company was originally incorporated.<sup>31</sup> In other words, companies incorporated under the real seat theory (as well as the registered seat theory)<sup>32</sup> are not permitted to transfer their registered seat from the jurisdiction of company's incorporation. Therefore, we can conclude that jurisdictions grounded in the real seat theory are generally even more restrictive than their counterparts, *i.e.* jurisdictions grounded in the registered seat theory. That is because they forbid both the transfer of the company's administrative seat as well as the transfer of the company's registered seat.<sup>33</sup> Notwithstanding, the advantage of the real

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<sup>28</sup> Bohrenkämper, J., *op. cit.* in fn. 2., p. 86; de Sousa, A. F., *op. cit.* in fn. 2., p. 7.

<sup>29</sup> Szudockzy, R., *op. cit.* in fn. 15., p. 350.

<sup>30</sup> Mucciarelli, F. M., *op. cit.* in fn. 14., p. 284; de Sousa, A. F., *op. cit.* in fn. 2., p. 6.

<sup>31</sup> Mucciarelli, F. M., *op. cit.* in fn. 14., p. 284-285; That is because company register also represent a form of control over companies incorporated under the law of a jurisdiction where the company is incorporated and where such register is located. Such register is then enabled to force companies registered with it to comply with mandatory law requirements of the respective company law or face deletion (*i.e.* which corresponds to company's termination) from the register. Notwithstanding that company's subsidiaries and branches in other jurisdictions are generally also registered with respective company registers in those other jurisdictions. However, in such situation non-compliance with mandatory rules of that other jurisdiction will not result in company's termination but only impossibility to undertake its business operations in that other jurisdiction.

<sup>32</sup> Since the registered seat represents the actual link with the jurisdiction ground in the registered seat theory.

<sup>33</sup> De Sousa, A. F., *op. cit.* in fn. 2., fn. 12.



seat theory is that it takes into consideration protection of company's minority shareholders, creditors and employees.<sup>34</sup> In addition, it also prevents regulatory competition between countries and establishment of "letter box" companies.<sup>35</sup> However, real seat theory is severely restrictive on corporate mobility since not only that it binds the company's management to a jurisdiction of company's original incorporation but prevents transfer of company's registered seat as well. In the modern decentralized global economy such approach might seem somewhat inflexible and overly burdensome to international business operators.

#### IV. CONSEQUENCES OF DETERMINING *LEX SOCIETATIS*

These two general theories manifestly contradict each other and consequently create significant issues within the sphere of private international law and corporate mobility.<sup>36</sup> For example, the obvious conflict between the two theories arises when a company incorporated in the registered seat theory jurisdiction establishes a subsidiary for a sole purpose of undertaking all of its business activities in another jurisdiction which is grounded in the real seat theory. According to the registered seat theory the *lex societatis* would be the law of its place of registration, while according to the real seat theory the *lex societatis* would be the law of the place where the company undertakes its business activities. Therefore, each of these legal orders would direct to its own set of substantive company law rules. That leads not only to application of conflicting company laws and diverging legal solutions but could also lead to repudiation of company's valid existence in the country that is grounded in the real seat theory.<sup>37</sup> Therefore, corporate mobility in general international context is an intricate process where one should carefully consider the interplay of competing national conflict of laws rules and the effect of applicable company laws. Furthermore, it should be pointed out that normally these two types of company

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<sup>34</sup> De Sousa, A. F., op. cit. in fn. 2., p. 8; Wisniewski, A., Opalski, A., op. cit. in fn. 2., p. 609 - 610.

<sup>35</sup> Valk, O., op. cit. in fn. 14., p. 162; Lombardo, S., Regulatory Competition in Company Law in the European Union after Cartesio, *European Business Organization Law Review* 10 (2009), p. 636; Wyckaert, M., Jenné, F., op. cit. in fn. 7., p. 6.

<sup>36</sup> That is because one allows for transfer of company's administrative seat (the registered seat theory) while the other prevents such transfer (the administrative seat theory).

<sup>37</sup> Bouček, V., Pejčić, L., op. cit. in fn. 2., p. 59.

seats coincide in one jurisdiction,<sup>38</sup> but due to rapid development of the global market that might change in the future. This conclusion is even supported by high interest of Community businessman for that form of corporate mobility between Member States.<sup>39</sup> This brings us to the practical question as to why would a company want to transfer only its registered seat or only its management to another jurisdiction, or why would it want to transfer both of them simultaneously to another jurisdiction? Generally, corporate mobility enables companies to improve their business operations on the world market in several ways that depend on the actual form of the company seat transfer. However, the form of seat transfer that the company will opt for will usually depend on the business goals that the company involved intends to accomplish.

## V. TRANSFER OF COMPANY SEAT

Transfer of company's registered seat alone involves a transfer of company's registered seat to another jurisdiction while the company's administrative seat remains in the jurisdiction of company's original incorporation. By transfer of its registered seat, a company ceases to be a company incorporated under the home Member State's law and becomes a company incorporated under the host Member State's law. Therefore, since every modern legal order has its own set of company law rules,<sup>40</sup> the main motive for such seat transfer is the intention to change the *lex societatis*.<sup>41</sup> That is because some of these company

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<sup>38</sup> That is especially true for small business enterprises.

<sup>39</sup> 79% of respondents (stakeholders from the Community and several third countries) opted for adoption of directive on transfer of registered seat within the Community. (Directorate General for Internal Market and Services, the consultation on future priorities for the Action Plan on Company Law and Enhancing Corporate Governance, Summary Report, p. 16 ([http://ec.europa.eu/internal\\_market/company/](http://ec.europa.eu/internal_market/company/)), visited 10.9.2010.).

<sup>40</sup> Vossestein, G., Transfer of the registered office The European Commission's decision not to submit a proposal for a Directive, *Utrecht Law Review* 4 (2008) 1, p. 54; Wymeersch, E., Is a directive on Corporate Mobility needed?, *European Business Organization Law Review* 8 (2007), p. 166.

<sup>41</sup> Rammeloo, S., The 14<sup>th</sup> EC Company Law Directive on the Cross-border Transfer of the Registered Office of Limited Liability Companies - Now or Never, *Maastricht Journal of European and Comparative Law* 15 (2009), p. 363 - 365; Wymeersch, E., op. cit. in fn. 40., p. 166. To the best of our knowledge, Italy is the only country that permits transfer of company's registered seat while being able to retain Italian *lex societatis*. (Rammeloo,

laws are more liberal while the other more restrictive in regulating everyday company operations. Such restrictive regulation is usually not without ground. For example, putting in place company control mechanisms can be to enable adequate protection of certain interest groups like company's shareholders, employees and / or creditors. On the other hand it can as well be to enable easier oversight of company business operations by state regulatory institutions. However, sometimes such extensive regulation might present overly burdensome requirements on the company. For example, company laws might be overly restrictive toward certain company operations like undertaking of certain business activities, establishment in other jurisdictions or company mergers or acquisitions. Consequently, being subject to such burdensome and restrictive regulation might result in company's decision to transfer its registered seat to another jurisdiction and thus replace such burdensome company rules with more liberal rules of the target jurisdiction. Therefore, the driving force behind the transfer of registered seat is intention to exchange one *lex societatis* for another, *i.e.* *lex societatis* that is more favorable to company's business intentions. However, such change of *lex societatis* will normally mean that a company will also have to adjust to the new *lex societatis*, meaning that such a transfer would usually entail company's reincorporation in the host jurisdiction.<sup>42</sup> And such reincorporation would have to be possible by both the company law of the home jurisdiction and the host jurisdiction. However, the change of *lex societatis* is not always the only reason for such seat transfer. For example, a company might also seek to minimize its tax liability in the jurisdiction of its original incorporation.<sup>43</sup>

Unlike the registered seat transfer, when company decides to transfer its administrative seat to another jurisdiction, usually its registered seat remains in the jurisdiction of its incorporation while its administration moves to another jurisdiction. The reasons behind such administrative seat transfer are mostly

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S., fn. 101). However, it is uncertain what would an Italian company accomplish by transferring only its registered seat to another jurisdiction and what would be the consequences of such transfer for the Italian company in the target jurisdiction.

<sup>42</sup> Wymeersch, E., op. cit. in fn. 40., p. 168.

<sup>43</sup> Jurisdictions can tax domestic companies based on company's worldwide income. Consequently, companies that conduct their business activities solely in other jurisdictions might want to transfer their registered seat to another jurisdiction and thus disable the ability of the home Member State to tax that company's worldwide income. Wymeersch, E., op. cit. in fn. 40., p. 166.

those of facilitating better mobility of company management and lowering associated company management costs. For example, in modern day global market economy increasing numbers of companies conduct their business activities in several jurisdictions. Under such circumstances, it could be imagined that a company undertakes a preponderant part of its business activities abroad as well. Undertaking such activities could require increasing levels of company management mobility.<sup>44</sup> Therefore, such companies might want to transfer their management to a jurisdiction where most of their business activities are undertaken. As a consequence, such transfer could lower transaction costs because company management could get familiar with the laws and the business environment of the target jurisdiction.<sup>45</sup> Usually there should be no problem concerning transfer of administrative seat of the company that is incorporated in the jurisdiction with the registered seat theory. That is because such jurisdiction permits transfer of administrative seat. At the same time, it also permits retention of company's nationality of the incorporation jurisdiction for as long as company's registered seat is located in that jurisdiction. However, that might not always be the case because there are occasions when even such jurisdictions can set out certain restriction in regard to transfer of company's administrative seat.<sup>46</sup> Unlike the registered seat theory, the real seat theory is unfriendly towards this type of transfer. That is only natural because real seat theory relies on the location of the company's administrative seat as a link that connects a company to a certain jurisdiction.

Finally, there is also a possibility of simultaneous transfer of both the company's registered seat and its administrative seat from the jurisdiction of company's original incorporation to another target jurisdiction. The reasons behind this transfer are those combined from the previous two situations. Consequently, where it is company's intention to transfer its business activities abroad along with its intention to take advantage of the target jurisdiction's more appropri-

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<sup>44</sup> Drury, R. R., *Migrating Companies*, *European Law Review* 24 (1999) 4, p. 354; de Sousa, A. F., *op. cit.* in fn. 2., p. 8.

<sup>45</sup> Rammeloo, S., *op. cit.* in fn. 41., p. 362-363.

<sup>46</sup> For example in Case 81/87, the *Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988], ECR p. 05483 (hereinafter: *DAILY MAIL*), UK as a Member State that is grounded in the registered seat theory denied company the right to transfer its administrative seat to another Member State due to tax evasion reasons.

ate *lex societatis*, transfer of both registered and administrative seat occurs.<sup>47</sup> Naturally, such dual seat transfer would usually require company's reincorporation in the jurisdiction where such transfer is to be effectuated. However, for reincorporation to be effective it must not only be allowed from the position of the jurisdiction of original incorporation but also from the position of the target jurisdiction.<sup>48</sup> Therefore, upon reincorporation such company would no longer be considered as a company established under the law of the jurisdiction of original incorporation but as a company established under the law of the target jurisdiction.<sup>49</sup> In other words, the target jurisdiction would become company's new jurisdiction of incorporation.

However, when we put corporate mobility within the context of European Union (hereinafter: EU) and thus Community law, the end result is significantly different because such corporate mobility falls within the ambit of Community law and not under diverse national conflict of laws rules. That is because Community level corporate mobility is covered by one of the fundamental freedoms of Community law, *i.e.* the freedom of establishment. Freedom of establishment, as one of Community given rights, imposes upon Member States a specific set of rules which regulate Member State's conduct in regard to corporate mobility between them.<sup>50</sup> In other words, these rules provide a specific set of Community level rules that supersede national company and conflict of laws rules in relation to corporate mobility. However, at the current stage of Community law development, freedom of establishment still does not resolve the major differences between the two conflict of laws theories mentioned above nor provides a solution that will ensure uniform rules on corporate mobility between Member State.

## VI. THE PRIMARY SOURCES OF CORPORATE MOBILITY WITHIN THE MEANING OF FREEDOM OF ESTABLISHMENT

Principally, primary sources of Community law include all the treaties establishing the European Communities and the European Union along with supplementing

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<sup>47</sup> Rammeloo, S., *op. cit.* in fn. 41., p. 365.

<sup>48</sup> Mucciarelli, F. M., *op. cit.* in fn. 14., p. 286

<sup>49</sup> Grundmann, S., *European company law: organization, finance and capital markets*, Antwerpen 2007, para. 837.

<sup>50</sup> For more on freedom of establishment see the following chapter.

annexes and protocols (hereinafter: Treaties).<sup>51</sup> Treaties provide a framework for organization and operation of the EU administered through Community institutions.<sup>52</sup> In other words, Treaties represent a legal basis for everyday life of the EU. In this light, certain Treaty provisions are capable of having direct effect in regard to individual's rights.<sup>53</sup> This means that individuals are capable of directly invoking such Community given rights contained within the Treaties either against Member States or against each other.<sup>54</sup> In addition, Member State's national courts are under obligation to recognize and enforce such directly effective Treaty provisions. Although some conditions exist that must be fulfilled in order for a Treaty provision to be considered directly effective,<sup>55</sup> certain freedom of establishment provisions are recognized as directly effective by ECJ case law.<sup>56</sup>

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<sup>51</sup> Treaty establishing the European Economic Community signed on 25 March 1957 (also known as the Rome Treaty), (<http://www.ena.lu/?lang=2&doc=16304>, visited 10.9.2010.), (hereinafter: EEC Treaty); Treaty on European Union signed on 7 February 1992 (also known as the Treaty of Maastricht), OJ 1992 C 191, (hereinafter: TEU); Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and related acts signed on 2 October 1997 (also known as the Amsterdam Treaty), OJ 1997 C 340 (hereinafter: TEC); Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts signed on 26 February 2001 (known as the Nice Treaty), OJ 2001 C 80; Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (known as the Lisbon Treaty), OJ 2007 C 306 (hereinafter: TFEU).

<sup>52</sup> However, Treaties cannot regulate every aspect of the vast and complex EU. Therefore, secondary sources of Community law like directives and ECJ case law facilitate effective practical application of Community law in everyday situations. For more on secondary sources of Community law see the chapter 7 "The Directive on Cross-border Transfer of Company Seat" and fn. 89.

<sup>53</sup> Čapeta, T., *Sudovi Europske unije: Nacionalni sudovi kao europski sudovi*, Zagreb 2002, p. 34.

<sup>54</sup> This is also the difference between horizontal direct effect and vertical direct effect. First enables individuals to invoke Community given rights against other individuals while the second enables individuals to invoke Community given rights against the Member States.

<sup>55</sup> Two general conditions need to be fulfilled: (i) that the provision is sufficiently clear and (ii) that it is unconditional. Regarding the (i) condition, provision is considered to be clear when on the basis of its text it can be ascertained who is the holder of the right, who is the obliged person and what would be the content of that right or obligation; Čapeta, T., *op. cit.* in fn. 53., p. 32.

<sup>56</sup> "It must be stated firstly that *Article 52 of the EEC Treaty embodies one of the fundamental principles of the Community and has been directly applicable in the Member States [emphasis added]* since the end of the transitional period." (Case C-270/83, *Commission v France*)

In TFEU the freedom of establishment rules remain substantially unchanged in relation equivalent provisions in the previous Treaties.

So, what freedom of establishment actually means? Although relevant Treaty provisions provide a general answer to this question, ECJ case law tried to provide a more practical definition by stating that freedom of establishment represents:

“...the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period [emphasis added]”<sup>57</sup>.

Not only that the above FACTORTAME II statement provides one viable interpretation of freedom of establishment but it is also considered that it provides subjective criterion required for application of freedom of establishment.<sup>58</sup> Specifically, in order for a company to be able to invoke freedom of establishment it should cumulatively: (i) pursue an actual business activity, (ii) pursue such business activity through a fixed establishment, (iii) such pursuit of actual business activity is to be taken in a Member State other than the Member State of company's original incorporation and (iv) it should intend to undertake its business activities in another Member State for an indefinite period of time.

Regarding the (i) requirement, *i.e.* pursuit of actual or genuine business activity, it is not required that a company already pursues such business activity in the host Member State<sup>59</sup> for it to be entitled the right to invoke freedom

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[1986], ECR 273 para. 13). To that effect see as well: Case C-270/83, *Commission v France* [1986], ECR 273, para. 26; Case C-11/77, *Patrick* [1977], ECR 1199, para. 13; Case C-2/74, *Reyners* [1974], ECR 631 paras. 10, 12, 25, 30; Case C-53/95, *Inasti* [1996], ECR I-703, para. 9; Case C-143/87, *Stanton* [1988], ECR 3877, para. 10; Notwithstanding, it is still questionable whether the same principle, as applied to individuals, can be applied to companies as well, for more on this issue see the section that relates to CARTESIO.

<sup>57</sup> Case C-221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others.* [1991], ECR I-03905, para. 20 (hereinafter: FACTORTAME II).

<sup>58</sup> Looijestijn-Clearie, A., *Centros Ltd: A Complete U-Turn in the Right of Establishment for Companies?*, *The International and Comparative Law Quarterly* 49 (2000) 3, p. 623.

<sup>59</sup> For the sake of defining, transfer of either the registered seat or administrative seat can be perceived both from the position of the home Member State (Member State from which the company transferring its seat also known as the Member State of origin) and from the position of the host Member State (Member State to which the company is transferring its seat also known as the target Member State). This differentiation be-

of establishment. If that would not be so, then the effectiveness of the right to invoke freedom of establishment would be diminished since a company would already have to be undertaking business activities in the host Member State for an unspecified amount of time. Therefore, it is enough for a company only to have an intention to pursue such business activity in the host Member State.<sup>60</sup> The (ii) and (iv) requirement only further elaborate on the manner in which such pursuit of business activity in the host Member State must be carried out. In other words, a company should undertake business activities through a fixed establishment and for an indefinite period of time. For example, an undertaking's preparatory business activities, information gathering on a certain market or use of warehouse solely for the purpose of goods delivery to customers would not comply with the set out "fixed establishment" requirement. Similarly, an undertaking's business activities in another Member State for a limited amount of time (*e.g.* for an execution of a specific business operation or pursuance of a time limited business objective) would not meet the (iv) requirement, *i.e.* pursuance of business activities for an indefinite period of time. The (iii) requirement, *i.e.* pursuit of business activity in a Member State other than the Member State of company's original incorporation, only serves to provide a Community element to the company's right to seek protection of freedom of establishment. In purely national situations, *i.e.* situations in which all facts are confined within a jurisdiction of a single Member State, freedom of establishment cannot be invoked.<sup>61</sup>

Such concept of freedom of establishment was even further refined in subsequent GEBHARD ruling where it was stated that:

*"The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom [emphasis added]..."*<sup>62</sup>.

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tween the home Member State and the host Member State is as well reflected in Community law. See as well the text following fn. 79.

<sup>60</sup> Case 53/81, *Levin v. Staatssecretaris van Justitie* [1982], ECR 1035, para. 21; Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995], ECR I-4165, para. 32 (hereinafter: GEBHARD).

<sup>61</sup> Case C-108/98, *RI.SAN.* [1999], ECR I-5219, para. 23; Case C-134/95, *USSL* [1997], ECR I-195, para. 19; *Joined Cases C-54/88 & others, Eleonora* [1990], ECR 3537, para. 11; *Ringe, W., No Freedom of Emigration for Companies?*, unpublished version, p. 21 (available at: [www.ssrn.com](http://www.ssrn.com), visited 10.9.2010.).

<sup>62</sup> GEBHARD, para. 25



Referring back to the Treaties, TFEU through Articles 49 to 55 provides provisions that relate to the freedom of establishment for both individuals and companies or firms validly formed within the EU. These provisions provide for more objective criteria and definition of freedom of establishment. Therefore, according to Article 49 (2) TFEU<sup>63</sup> freedom of establishment represents:

“... 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...”

This wording provides that individuals from one Member States have the right to pursue business activities in another Member State under same conditions as individuals of that other Member State conduct their business activities in the territory of that other Member State. Unlike the second paragraph, the first paragraph of Article 49 TFEU<sup>64</sup> is worded negatively. It provides that:

“...restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.”

Therefore, Article 49 (1) TFEU prohibits restrictions imposed by Members States upon nationals of another Member State in regard to exercise of freedom of establishment. In other words, a Member State cannot discriminate between its own nationals and nationals of the other Member State's. Therefore, according to freedom of establishment Member States must provide equal treatment to every individual, *i.e.* a citizen of the Community.

One cannot fail to notice that from the quoted Treaty provision it appears that freedom of establishment applies only to Member State individuals, *i.e.* natural persons. However, freedom of establishment chapter contains a provision which provides that this fundamental freedom shall also extend to legal entities as well, considering that certain additional requirements are complied with. Specifically, (i) that the legal entity has been validly formed in accordance

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<sup>63</sup> For future reference, this article corresponds to Article 43 (2) TEC and Article 52 (2) EEC.

<sup>64</sup> For future reference, this article corresponds to Article 43 (1) TEC and Article 52 (1) EEC.

with the law of a Member State and (ii) that it has registered office, central administration or principal place of business within EU. To that effect, exact wording of the relevant Article 54 (1) TFEU<sup>65</sup> provides the following:

“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 [emphasis added]* shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.”

We can see that, unlike ECJ case law established subjective requirements required for application of freedom of establishment, TFEU provides for purely objective requirements. The (ii) requirement of having registered office, central administration or principal place of business within the EU applies alternatively but acts cumulatively with the (i) requirement, *i.e.* that a company is validly established under the law of a home Member State. From the wording of Article 54 (1) TFEU it can also be perceived that freedom of establishment is applicable “in the same way” to companies (that meet the above mentioned conditions) as it is to Member State’s individuals. Consequently, it seems that the Treaties equally treat companies and individuals in regard to their right to invoke protection of freedom of establishment.<sup>66</sup> Admittedly, there are indeed apparent distinctions between the two (*e.g.* artificial nature of a legal entity as compared to physical nature of an individual). However, at least from the wording of Article 54 (1) TFEU it seems that no distinction should exist. Only distinction provided for is in regard to different conditions required for application of freedom of establishment to legal entities, *i.e.* companies.<sup>67</sup>

Article 49 (1) TFEU provides that this prohibition of restrictions applies both to “setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State” (second sentence) and to “establishment of nationals of a Member State in the territory of another Member State” (first sentence). It is important to note that these two sentences provide for two different rights of establishment. Specifically, the first sentence refers to right of primary establishment, *i.e.* freedom to set

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<sup>65</sup> For future reference, this article corresponds to Article 48 (1) TEC and Article 58 (1) EEC.

<sup>66</sup> Barnard, C., *The Substantive Law of the EU: The Four Freedoms*, Second Edition, New York 2007, p. 331.

<sup>67</sup> See the previous section of the text accompanying fn. 65.

up and manage a company in any Member State<sup>68</sup>, while the second sentence represents the right of secondary establishment, *i.e.* establishment of agencies, branches or subsidiaries within territory of any Member State.<sup>69</sup>

However, note that these two rights are not the same in regard to conditions required for their application. This assertion derives from the wording of Article 49 (1) TFEU which sets out more rigorous requirements for secondary establishment than for primary establishment. It provides that restrictions on secondary establishment are prohibited for “nationals of any Member State” and for those that are “established in ... any Member State”. Therefore, in order for an individual to be able to invoke the right of secondary establishment he must: (i) be a national of any Member State and (ii) already be established in any Member State. Individual’s Member State and the Member State of establishment mentioned in these two conditions need not be the same.

Unlike individuals whose right to invoke freedom of establishment is governed solely by Article 49 (1) TFEU, when considering a company’s right to invoke that freedom we have to look to Article 54 (1) TFEU as well. Now by combining these two articles we come to the following result. Instead of Member State’s nationality (the requirement (i) as set out above) different requirements apply to companies, *i.e.* the condition of valid formation of company under Member State law and the requirement of having one of three effective links with the Member State (either registered office, central administration or principal place of business).<sup>70</sup> However, (ii) requirement from Article 49 (1) TFEU still remains, *i.e.* the requirement of being established within any Member State. In other words, the requirement of “being established” is not the same as conditions set out by Article 54 (1) TFEU, *i.e.* company’s valid formation under Member State law and having a connection with a Member State.

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<sup>68</sup> The right of primary establishment also includes the right to transfer company’s seat to another Member State; DAILY MAIL, para. 12; de Sousa, A. F., *op. cit.* in fn. 2., p. 41 - 42; Cerioni, L., The cross-border mobility of companies within the European Community after the Cartesio ruling of the ECJ, unpublished, text following fn. 1 ([www.ssrn.com](http://www.ssrn.com), visited 10.9.2010.); Wyckaert, M., Jenné, F., *op. cit.* in fn. 7., p. 3.

<sup>69</sup> Bouček, V., Pejčić, L., *op. cit.* in fn. 2., p. 60; de Burca, G., Craig, P., *EU Law, Text, Cases, and Materials*, Second Edition, New York 1998, p. 756; Mucciarelli, F. M., *op. cit.* in fn. 14., p. 293; Barnard, C., *op. cit.* in fn. 66., p. 310, 332-333.

<sup>70</sup> Case C-212/97, Centros Ltd [1999], ECR I-1459 (hereinafter: CENTROS), para. 20; Case C-264/96, ICI [1998] ECR I-0000, para. 20 (hereinafter: ICI).

This requirement of being established within EU is complied with: "...when there is a *real and continuous link with the economy of a Member State* [*emphasis added*]".<sup>71</sup> In other words, it means genuine pursuit of business activity within any Member State.<sup>72</sup> There have been certain signals that suggest that secondary establishment actually demands genuine pursuit of company's business activity in company's home Member State.<sup>73</sup> The reasoning behind such assertion was to deny protection of Community law to non-EU companies that are primarily established within a certain Member State only as "letter box" companies with a sole purpose to then proliferate by secondary establishment to other Member States where company's actual and genuine economic pursuit would then be undertaken.<sup>74</sup> However, such assertions were later quelled by the ECJ case law in addition to the wording of the Treaty that clearly states "established in the territory of *any* Member State [*emphasis added*]".<sup>75</sup> Therefore, in order for a company to invoke the right of secondary establishment it is enough that it is established, *i.e.* that it pursues genuine business activity, within either a home Member State or the host Member State.

Unlike secondary establishment, primary establishment from the preceding sentence of the same paragraph requires only that an individual seeking establishment in another Member State is a national of any Member State, *i.e.* same as the above requirement (i) concerning secondary establishment.<sup>76</sup> That is due to possibility of multiple secondary establishments while there can be only one primary establishment.

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<sup>71</sup> Grundmann, S., *op. cit.* in fn. 49., paras. 216, 837.

<sup>72</sup> Barnard, C., *op. cit.* in fn. 66., p. 310; Looijestijn-Clearie, A., *op. cit.* in fn. 58., p. 626; Case C-386/04, *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*. [2006], ECR I-08203, para. 19; Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*. [2006], ECR I-07995, para. 54.

<sup>73</sup> General Programme for the abolition of restrictions on freedom of establishment adopted on 18 December 1961, OJ 36/62, OJ Sp Edn 1974, Second Series IX (hereinafter: General Programme); Looijestijn-Clearie, A., *op. cit.* in fn. 58., p. 627.

<sup>74</sup> Grundmann, S., *op. cit.* in fn. 49., para. 837.

<sup>75</sup> For the text of Article 49 (1) TFEU see previous text following fn. 62 - 63. Furthermore, ECJ case law suggests that a company complies with the requirement of being established if it is formed under the law of a Member State and has its registered seat within the Community; SEGERS, para. 16; CENTROS, para. 17; INSPIRE ART, paras. 86 - 97.

<sup>76</sup> Grundmann, S., *op. cit.* in fn. 49., para. 219.

Article 54 TFEU<sup>77</sup> provides an answer as to which types of legal entities are entitled to seek protection under freedom of establishment. That article provides that:

“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.”

Such broad definition of Article 54 (2) TFEU encompasses a wide array of private or public legal entities. However, from its scope are expressly excluded non-profit making legal entities. This would be in line with the general commercial focus of the Treaties and other Fundamental Freedoms (*e.g.* Freedom of Movement for Workers, Freedom to Provide Services).<sup>78</sup> However, this also means that Community law authorized Member States to determine which entities would be entitled to invoke protection of freedom of establishment.<sup>79</sup> Furthermore, when a certain company transfer is perceived from the position of the Member State of origin, that situation is called “company’s emigration” or an outbound situation. On the other hand, when a certain seat transfer is perceived from the position of the host Member State that situation is qualified as “company’s immigration” or an inbound situation.<sup>80</sup> Furthermore, if a certain Community recognized fundamental freedom (*e.g.* like the freedom of establishment or a freedom to provide services) is considered to provide protection from both the home Member State restriction (*i.e.* emigration) and the host Member State restriction (*i.e.* immigration) that freedom is considered a two-fold freedom. However, although it was clear for all other fundamental freedoms that they are two-fold, for freedom of establishment an issue arose as to its nature because it was not as clear whether that freedom is as well construed as a two-fold freedom or not.<sup>81</sup> Eventually it was established that

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<sup>77</sup> For future reference, this article corresponds to Article 48 (2) TEC and Article 58 (2) EEC.

<sup>78</sup> de Burca, G., Craig, P., *op. cit.* in fn. 69., p. 756.

<sup>79</sup> That would be by determining the form of their specific national entities, *i.e.* whether a certain entity is to be regarded as a legal entity (*e.g.* company) or not; Lombardo, S., *op. cit.* in fn. 35., p. 639.

<sup>80</sup> Szydło, M., *op. cit.* in fn. 19., p. 975; Valk, O., *op. cit.* in fn. 14., p. 152.

<sup>81</sup> The Treaty articles on freedom of establishment clearly cover the right of companies to pursue their business activities in the host Member State (*i.e.* immigration situations). According to the Article 49 TFEU and Article 54 TFEU companies are entitled to con-

duct their business activities in the host Member State and such right cannot regularly be restricted (CENTROS, para. 39; INSPIRE ART, paras. 104 - 105, ÜBERSEERING, para. 82). However, the question arises whether freedom of establishment entitles companies in their home Member State to leave that Member State notwithstanding the national restrictions imposed by their home Member State (*i.e.* emigration situations). In other words, does the freedom of establishment enable home Member States to restrict companies incorporated under its law to transfer their seat to another Member State? The issue referred to here is the one of the two-fold nature of the freedom of establishment. The answer should be affirmative. Free movement of goods, free movement of services and free movement of workers are all construed as two-fold freedoms. [Ringe, W., *op. cit.* in fn. 61., p. 23-28 (www.ssrn.com, visited 10.9.2010.)]. In its landmark GEBHARD ruling ECJ clearly stated that all fundamental freedoms should be similarly construed. (GEBHARD, para. 37; Bohrenkämper, J., *op. cit.* in fn. 2., p. 87; Ringe, W., *op. cit.* in fn. 61., p. 29-30). In other words, that would also mean that all fundamental freedoms should be two-fold, including freedom of establishment as well. However, DAILY MAIL seems to suggest the opposite by stating that if the restriction comes from the direction of the home Member State, the company cannot invoke freedom of establishment. (DAILY MAIL, para. 25). However, that same ruling initially clearly stated that: "Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 [*emphasis added*]. As the Commission rightly observed, the rights guaranteed by Articles 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State." (DAILY MAIL, para. 16). Therefore, DAILY MAIL *dictum* might not seem as straightforward as initially suggested. Furthermore, restriction of freedom of establishment in the emigration situation can have a more serious consequence for corporate mobility than the restriction in immigration situation. In immigration situation if a company is denied the right to enter a host Member State it can still seek to establish in the Member State other than the one initially intended that does not deny that company the right to establish in that Member State. However, in emigration situations where a home Member State prohibits company the right to exit her jurisdiction in order to establish in another Member State, a company is not only entitled to move its seat to the intended host Member State but as well as to any other Member State since its right to transfer abroad is completely negated by its Member State of incorporation. (Ringe, W., *op. cit.* in fn. 61., p. 18). Consequently, while companies are generally enabled to invoke protection of freedom of establishment in immigration situations [CENTROS, Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002], ECR I-09919 (hereinafter: ÜBERSEERING), and INSPIRE ART (altogether hereinafter: CENTROS *et al.*)] in regard to emigration situations [*e.g.* DAILY MAIL and CARTESIO], although

freedom of establishment is indeed a two-fold freedom, however with certain restrictions in regard to emigration situations.<sup>82</sup>

Furthermore, one might also wonder why Member States restrict corporate mobility in such emigration and immigration situations. There are several reasons. In emigration situations home Member State usually prohibits transfers to another Member States in order to protect its tax interests. By transfer of company's seat, depending on the national tax system, the host Member State might lose a tax payer.<sup>83</sup> Another viable reason would be the preservation of home Member State's control over the company incorporated under its law. In other words, change of *lex societatis* would in turn result in the loss of that Member State's ability to provide protection to certain interest groups (*e.g.* shareholders, employees or creditors) through control mechanism incorporated in its company law.<sup>84</sup>

On the other hand, why would a Member State set restrictions on companies entering its jurisdiction? That is due to fear of "unlimited corporate mobility".<sup>85</sup> This means that a company incorporated under the law of the home Member State could conduct its business activities in another Member State according to the rules provided by the company law under which it was incorporated in

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freedom of establishment covers these situation as well, it is an issue of what is required to trigger the application of freedom of establishment. Answer to this issue was one of the biggest contributions of CARTESIO (CARTESIO, paras. 108 - 110).

<sup>82</sup> The issue related is the one whether a home Member State can restrict companies incorporated under its law in invoking protection of freedom of establishment when they intend to transfer their company seat to another Member State. This is the issue that was resolved in CARTESIO where ECJ held that company's right to transfer its company seat is completely dependent upon the law of the home Member State (CARTESIO, para. 109). In other words, home Member State can freely decide whether to permit companies incorporated under its law to transfer their seat to another Member State or not.

<sup>83</sup> Ringe, W., op. cit. in fn. 61., p. 3. This was the situation in DAILY MAIL where the UK national tax law required consent of competent tax authorities in order for a company to transfer its administrative seat to another Member State. That was because according to the relevant UK tax law provision company's tax residence was determined by the location of its administrative seat. By transferring administrative seat outside UK, transferring company was no longer deemed to be resident of the UK for tax purposes (DAILY MAIL, paras. 2, 4).

<sup>84</sup> Ringe, W., op. cit. in fn. 61., p. 3.

<sup>85</sup> Ringe, W., op. cit. in fn. 61., p. 4.

the home Member State while disregarding conditions set out by the company law of the host Member State. Practically this means that companies could avoid application of mandatory company law provisions of the host Member State (*e.g.* minimum capital requirements for foreign subsidiaries).<sup>86</sup> This fear is generally attributed to the real seat theory which as a consequence requires application of the company law at the place of company's actual pursuit of business activities or location of corporate management regardless of the jurisdiction of company's incorporation. Thus, such jurisdictions mandate undertaking of business operations by foreign companies within their territory by conforming to the mandatory requirements imposed by their respective company laws (*e.g.* rules on minimal share capital).

To conclude, Articles 49 and 54 TFEU, in combination with the remaining provisions in the freedom of establishment chapter, provide ground rules on corporate mobility within the Community. Freedom of establishment means that a host Member State is not allowed to treat a company established in another Member State less favorably than a company incorporated under its own law (immigration situation). Furthermore, it should also mean that a home Member State cannot restrict its company from undertaking its business activities in another Member State (emigration situation).<sup>87</sup> The purpose of freedom of establishment is to ensure equal treatment of foreign individuals in the host Member State as well as to prohibit home Member State from preventing its own individuals from undertaking business activities in another Member State.<sup>88</sup>

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<sup>86</sup> Ringe, W., *op. cit.* in fn. 61., p. 4.

<sup>87</sup> ICI, para 21; C-471/04, Finanzamt Offenbach am Main-Land v Keller Holding GmbH [2006], ECR I-02107, para. 30; Case C-293/06, Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg [2008], ECR I-01129, para. 29 (hereinafter: DEUTSCHE SHELL); Deak, D., Outbound establishment revisited in *Cartesio*, EC Tax Review, 2008/6, p. 255 - 256.

<sup>88</sup> C-446/03, Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) [2005], ECR I-10837, para. 31; C-347/04, Rewe Zentralfinanz eG v Finanzamt Köln-Mitte [2007], ECR I-02647, para. 26; C-196/03, Arnaldo Lucaccioni v Commission of the European Communities [2004], ECR I-02683, para. 42; C-298/05, Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt [2007], ECR I-10451, para. 33; Deak, D., *op. cit.* in fn. 87., p. 256.



## VII. THE DIRECTIVE ON CROSS-BORDER TRANSFER OF COMPANY SEAT

Although mentioned freedom of establishment provisions provide some ground rules in regard to corporate mobility and thus transfer of company seat, Treaty rules certainly cannot cover every legal situation that might occur in practice. In such a situation, it is upon other Community institutions to fill the legal gap either by interpretation of the freedom of establishment provisions<sup>89</sup>

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<sup>89</sup> Since Treaties provide only for general rules in regard to application of Community law such generic provisions are open to diverse interpretations in every day application of Community law. However, this threat was recognized and consequently a Community level institution (i.e. ECJ) was established that was to facilitate uniform application of Community law and quell such danger of diverse interpretations of Community law. ECJ's primary task is that of authoritative interpretation of Community law. (Ćapeta, T., op. cit. in fn. 53., p. 183). Through such interpretative rulings ECJ ensures uniform and steady interpretation of Community law which consequently facilitates effective application of Community law (Ćapeta, T., op. cit. in fn. 53., p. 180, 186). If there would be no such institution, every Member State's national court could interpret Community law on its own which would result in legal uncertainty and would in turn seriously diminish the effectiveness of Community law and thus even the purpose of internal market. However, although individuals and companies are free to invoke Community given rights before their national courts, it must be stressed that it is solely upon the Member State's national court and not a Member State individual or a company to initiate proceedings before ECJ (in the form of preliminary ruling procedure) (de Burca, G., Craig, P., op. cit. in fn. 69., p. 407; Ćapeta, T., op. cit. in fn. 53., p. 183). Therefore, only a Member State national court may seek preliminary ruling from ECJ in order to clarify a certain Community law issue and thus provide a solution to the specific dispute that it was seized with. (Article 267 TFEU, corresponding to Article 234 TEC and Article 177 EEC). Once the preliminary ruling is given, ECJ's ruling is binding for the referring Member State whose national court must comply with the interpretation given by ECJ (de Burca, G., Craig, P., op. cit. in fn. 69., p. 407, 256; Babayev, R. R., *Legal Autonomy vs. Political Power: What is the Role of the European Court of Justice in the European Integration?*, unpublished, p. 2 ([www.ssrn.com](http://www.ssrn.com), visited 10.9.2010.); Ćapeta, T., op. cit. in fn. 53., p. 184). However, it must be noted that ECJ's ruling is not only binding for the referring national court but as well as all the other Member State's national courts that have been engaged with the similar Community law issue (de Burca, G., Craig, P., op. cit. in fn. 69., p. 408, 418; Babayev, R. R., op. cit. in fn. 89., p. 2). This rule of precedent was set out in ECJ's case law where it was stated that an interpretation of Community law already given on a similar case releases the competent national court of its duty to refer questions to ECJ regarding interpretation of Community law (as set out by Article 267

or by providing a legal instrument that would facilitate such situations. In the context of freedom of establishment an initiative to provide such a legal instrument that would facilitate cross-border seat transfer is an old one.

The first idea arose during the 1960's in the form a convention. The Member States of the European Economic Community recognized even back then the need for a unifying legal instrument that would enable cross-border corporate mobility. Convention was eventually signed on 29 February 1968 by then six Member States.<sup>90</sup> However, it eventually never came into force because one of the Member States failed to ratify it.<sup>91</sup> The belief was that harmonization through this convention would strengthen the economy of the involved Member States. It is even suggested that what Member States intended was to find a way to avoid regulatory competition between their respective national company laws.<sup>92</sup>

The idea was revived in 1997 when the first draft for the "Proposal for Fourteenth European Parliament and Council Directive on the Transfer of the

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(3) TFEU) (Joined cases 28 to 30/62, *Da Costa en Schaake NV* [1963], ECR 31; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982], ECR 3415, paras. 13 - 14, 16 (hereinafter: CILFIT); de Burca, G., Craig, P., op. cit. in fn. 69., p. 414 - 415). Such principle of precedent placed ECJ in a superior position against national courts of the Member States. Consequently, earlier ECJ rulings could be relied on by national courts faced with a similar issue already decided in previous ECJ case law. However, this does not deprive national courts faced with a similar Community law issue already decided by ECJ case law to refer that issue once again to ECJ for another preliminary ruling (CILFIT, para. 15.). Therefore, since its humble beginnings ECJ has positioned itself as a significant factor in Community law development and the process of Community integration (de Burca, G., Craig, P., op. cit. in fn. 69., p. 78 - 79, 409; Szudockzy, R., op. cit. in fn. 15., p. 347; Čapeta, T., op. cit. in fn. 53., p. 78.; Babayev, R. R., op. cit. in fn. 89., p. 3.). Through the preliminary ruling procedure ECJ has given one of its most seminal rulings and established many of today commonly used Community law principles like the principle of direct effect and supremacy of Community law. Consequently, it is impossible to disregard decades of Community law development that was primarily undertaken through ECJ's case law on freedom of establishment and corporate mobility within EU. However, due to limited scope of this work we are unable to relate to freedom of establishment case law.

<sup>90</sup> Convention on Mutual Recognition of Companies and Legal Persons of 29 February 1968, Bulletin of the European Communities, Supplement No. 2-1969, p. 7 - 16 ([http://aei.pitt.edu/5610/01/002314\\_1.pdf](http://aei.pitt.edu/5610/01/002314_1.pdf), visited 10.9.2010).

<sup>91</sup> Wymeersch, E., op. cit. in fn. 40., p. 162.

<sup>92</sup> Wymeersch, E., op. cit. in fn. 40., p. 162.

Registered Office or De Facto Head Office of a Company from One Member State to Another” was issued (hereinafter: 14<sup>th</sup> Company Law Directive).<sup>93</sup> The legal basis for such a proposal and the future directive can be found in the Treaties. Namely, Article 50 (1) TFEU<sup>94</sup> and Article 50 (2) g TFEU<sup>95</sup> enable Community institutions to issue a directive in order to attain freedom of establishment. Therefore, in 2003 Commission issued “Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward” (hereinafter: Commission’s Action Plan) which also included creation of a proposal for the 14<sup>th</sup> Company Law Directive.<sup>96</sup> The 14<sup>th</sup> Company Law Directive would facilitate transfer of company’s registered office to another host Member State where it would be registered as a company incorporated under the law of the host Member State.<sup>97</sup> In other words, such transfer of registered seat would also entail a change of *lex societatis*. That would mean that transferring companies would have to conform to the conditions laid down in the new *lex societatis*. This mechanism would facilitate preservation of the company’s legal personality and would thus not force a company to go through the process of liquidation.<sup>98</sup> After undergoing several

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<sup>93</sup> Proposal for Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or *De Facto* Head Office of a Company from One Member State to Another, 20 April 1997, XV/6002/97-EN REV.2.

<sup>94</sup> “In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.” For future reference, this article corresponds to Article 44 (1) TEC and Article 54 (3) EEC.

<sup>95</sup> “The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: ... (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union.” For future reference, this article corresponds to Article 44 (2) g TEC and Article 54 (2) g EEC.

<sup>96</sup> Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, COM(2003) 284 final, 21 May 2003.

<sup>97</sup> The draft proposal of the 14th Company Law Directive is unfortunately not available anymore at the Commission’s website.

<sup>98</sup> Vossestein, G., op. cit. in fn. 40., p. 54.

consultations which showed public support for the directive throughout 2003 to 2006<sup>99</sup> suddenly on 28 June 2007 Commission decided to put the 14<sup>th</sup> Company Law Directive on hold.<sup>100</sup> Shortly after being put on hold, the idea of the 14<sup>th</sup> Company Law Directive was abandoned on 3 October 2007.<sup>101</sup> The main reasons being “political feasibility”, “lack of an economic case” and “the forthcoming ECJ’s ruling”.<sup>102</sup>

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<sup>99</sup> Vossestein, G., op. cit. in fn. 40., p. 53; Company law: Commission consults on the cross-border transfer of companies’ registered offices of 26 February 2004, IP/04/270; Consultation on future priorities for the Action Plan on modernizing company law and enhancing corporate governance in the European Union of 20 December 2005 ([http://ec.europa.eu/internal\\_market/company/docs/consultation/consultation\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/consultation/consultation_en.pdf), visited 10.9.2010.).

<sup>100</sup> To that effect Commissioner for Internal Market Charlie McCreevy stated: “But there are also some unresolved issues concerning the cross-border transfer of a company’s seat and stakeholders seek more legal certainty in that respect. The Commission had envisaged submitting a proposal for a directive this year. However, our preparatory work has led me to the conclusion that we should not rush forward with legislation. If we are to propose legislation, we must be sure there is a reasonable chance of a result with added value for business. The economic case is not as obvious or as clear-cut as it may seem and Member States currently follow very different approaches to which they are strongly attached. Moreover, the Court of Justice will soon take a decision in a case that could provide us with new insights on the current legal situation in Europe. As you know, the Court has already in the past delivered fundamental judgments in the area of company mobility. I am therefore convinced that we should wait for the outcome of this case which is likely to bring more clarity into this complicated matter. We expect the judgment to be delivered in the autumn of this year.” (SPEECH/07/441 of 28 June 2007).

<sup>101</sup> “The Commission had also suggested that a further means of improving mobility might be a directive stipulating the conditions for transfer of registered office in the EU (the so-called “14th Company Law” directive). As I informed the European Parliament, in reply to the oral question tabled by Mr Gargani, the results of the economic analysis of the possible added value of a directive were inconclusive. Companies already have legal means to effectuate cross-border transfer. Several companies have already transferred their registered office, using the possibilities offered by the European Company Statute. Soon the Cross-border Merger directive, which will enter into force in December, will give all limited liability companies, including SMEs, the option to transfer registered office. They could do so by setting up a subsidiary in the Member State to which they want to move and then merging the existing company into this subsidiary. To my mind it is only if this framework is found wanting, that further legislative action in the shape of a 14th Company Law directive would be justified. Therefore, I have decided not to proceed with the 14th Company Law Directive.” (SPEECH/07/592 of 3 October 2007).

<sup>102</sup> Vossestein, G., op. cit. in fn. 40., p. 58.

The first reason, political feasibility, concerned the varied approach of Member States in regard to corporate mobility. This reason should not be deemed as valid as it represents a reality of Community and its varying Member States, a reality that should be dealt with, either through the means of directive as discussed here or through other means (convention, regulation, recommendation).<sup>103</sup> Therefore, reason of “political feasibility should not be an excuse for inactivity when such activity is required. The lack of economic case is based on the argument that companies already “have legal means to effectuate cross-border transfer” like the possibility offered by the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L 294 (hereinafter: SE Regulation) and the Directive 2005/56/CE of the Parliament and the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ [2005] L 310/1 (hereinafter: Cross-border Merger Directive). However, none of these alternatives provide for an effective means of corporate mobility within the Community.<sup>104</sup> Directive in this field

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<sup>103</sup> By means of convention based on Article 293 (3) TEC which provides that: “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: ... — the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,...”. Although this article was repealed from the TFEU text it does not stop Member States from regulating this matter through a convention. However, convention represents the most burdensome instrument since it has to be ratified by all the signees. The best example is the failed 1968 Convention on Mutual Recognition of Companies and Legal Persons. Furthermore, the regulation provides for an overly rigid legal structure that has to be followed by varying Member States and recommendation being of only advisory character to the Member States; Rammeloo, S., *op. cit.* in fn. 41., p. 372.

<sup>104</sup> Foremost these regulations are applicable and tailor made for specific Community entity (i.e. European Company) and not for Member State national company forms. Notwithstanding, in regard to SE Regulation a company would first have to transform into one of these Community entities. For example, transformation of limited company into European Company cannot take place before two years have elapsed since that limited company has had a subsidiary company established in another Member State. (Article 2 (4) SE Regulation, Article 37 SE Regulation). After transformation European Company can transfer its seat to the host Member State. However, regulation mandates that such transfer must include both the transfer of the registered seat and the administrative seat. (Article 7 SE). After transferring, transferred European Company can again transform into intended company legal form recognized by the law of the host Member State.

would lessen the costs associated with setting up of European Company for the transfer or that of facilitating a cross-border merger.<sup>105</sup> Moreover, it would surely provide for a more simplified procedure than the one required by the European Company and the Cross-border Merger Directive.<sup>106</sup> Consequently, Commission's argument of lack of economic case could hardly live up to the stated contrary arguments. Finally, the Commission's last argument of "the forthcoming ECJ's ruling" referred to CARTESIO. Notwithstanding, the directive is still needed. First of all, if corporate mobility would be resolved through a directive it would provide for a more unifying and comprehensive Community level instrument than the one that was to be facilitated through the ECJ's case

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(Article 66 SE). This lengthy three step process which includes two transformations and demands transfer of both the registered and the administrative seat does not provide for a practical solution which would ensure adequate level of corporate mobility between Member States. Furthermore, existing Community law permits for another possibility facilitated by the Cross-border Merger Directive. Specifically, this directive enables a cross-border vertical reverse merger. Cross-border vertical reverse merger is a merger through which a subsidiary company merges with its parent company, i.e. subsidiary company absorbs its parent company and the parent company ceases to exist (Bohrenkämper, J., *op. cit.* in fn. 2., p. 89.). This two step mechanism requires incorporation of a new company in the host Member State and undertaking of subsequent merger. Unlike the above mentioned possibility by the SE Regulation, this merger mechanism does not necessarily require a considerable amount of time. However, the length of this process would largely depend upon the overall efficiency and business friendly attitude of both the competent home Member State and host Member State courts. In addition, this means that each of the companies involved in the merger would have to comply with the provisions of its own *lex societatis* (e.g. decision making process) which might prove in some cases quite burdensome (Vossestein, G., *op. cit.* in fn. 40., p. 60; see as well Article 4 Cross-border Merger Directive which provides for some quite burdensome requirements that must be satisfied by the merging companies). Since the goal of Community as a one single market is to ensure a unified legal area where legal entities are not restricted in undertaking their business activities our position is that neither the proposed merger mechanism nor the SE mechanism could effectively accomplish this goal. In other words, Community entrepreneurs require a one step cross-border transfer of company seat mechanism that will allow them to transfer their business in the simplest manner possible from the legal jurisdiction of their initial home Member State to the legal jurisdiction of the new host Member State.

<sup>105</sup> Minutes of the sixth meeting of the Advisory group on Corporate Governance and Company Law held on 4 April 2007, p. 5 ([http://ec.europa.eu/internal\\_market/company/advisory/index\\_en.htm](http://ec.europa.eu/internal_market/company/advisory/index_en.htm), visited 10.9.2010.).

<sup>106</sup> Vossestein, G., *op. cit.* in fn. 40., p. 60.

law. That is because if corporate mobility is to be facilitated by the ECJ through its case law, it means that it is to be generally undertaken on a case to case basis.<sup>107</sup> On the other hand, it would as well provide for a more coherent and generally applicable instrument in all of the Member States, unlike the “case to case” approach facilitated by the ECJ.<sup>108</sup> Furthermore, at the current state of Community law there is a certain level of regulatory competition ongoing between the Member States. After INSPIRE ART it was clear that companies incorporated in Member State grounded in the registered seat theory (*e.g.* UK) could freely undertake their business activities or even transfer their administrative seat to another Member State grounded in the real seat theory without fear of being denied such activities by the host Member State.<sup>109</sup> This enabled UK to play the role of “...European Delaware, being the State offering the most attractive, in this case, the cheapest incorporation service while offering a well developed and very flexible legal regime.”<sup>110</sup> This resulted in situations

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<sup>107</sup> Wyckaert, M., Jenné, F., *op. cit.* in fn. 7., p. 29 - 30.

<sup>108</sup> For example, due to a Cross-border Merger Directive and ECJ's preceding ruling in SEVIC that concerned a Community cross-border merger situation. SEVIC already enabled companies to initiate cross-border mergers without the directive. However, such case law approach was afterwards replaced by a more coherent directive. This demonstrates that ECJ cannot provide for a required level of legal certainty unlike for example a directive in that field; Vossestein, G., *op. cit.* in fn. 40., p. 61; Lennarts, M., *Company mobility within the EU, fifty years on from a non-issue to a hot topic*, *Utrecht Law Review* 4 (2008) 1, p. 2; Wisniewski, A., Opalski, A., *op. cit.* in fn. 2., p. 620 - 621.

<sup>109</sup> In INSPIRE ART the court provided that: “That being so, as the Court confirmed in paragraph 27 of *Centros*, the fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.” (INSPIRE ART, para. 138). It continued by stating: “In addition, it is clear from settled case-law (*Segers*, paragraph 16, and *Centros*, paragraph 29) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.” (INSPIRE ART, para. 139; Lennarts, M., *op. cit.* in fn. 108., p. 2).

<sup>110</sup> Wymeersch, E., *op. cit.* in fn. 40., p. 164; After *CENTROS* a number of Ltd. companies in the UK increased from 4400 initially registered companies to 28,000 registered companies. These companies only represent a number of companies that do not conduct any

where businessmen (mostly small enterprises) established their companies in the UK and then transferred their business back to the Member State of their business interest (usually the Member State grounded in the real seat theory like Germany) thus avoiding burdensome company law of that Member State. As a consequence, both Member States grounded in the real seat theory and in the registered seat theory recognized the danger of losing investment and consequently initiated reforms of their respective company laws in order to make them more attractive to investors that are shopping for the most suitable Member State of incorporation.<sup>111</sup> The question poses itself, is such competition where company law standards are being tailored in order to attract investment good for the creditors, minority shareholders or the company employees? One thing is certain, a directive in this field would strike the best possible uniform balance between the interests of the investors on one side and the protection of company's creditors, minority shareholders and employees on the other. Moreover, not all Member States hold equal ground in regard to this ongoing regulatory competition. Member States grounded in the registered seat theory are actively participating in such regulatory competition while the real seat theory Member States are forced to passively monitor the number of compa-

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business activity within the UK but are solely incorporated for the purpose of conducting all of their business activities in another Member State (usually Germany and France); de Sousa, A. F., op. cit. in fn. 2., fn. 84; Johnston, A., op. cit. in fn. 26., p. 396.

<sup>111</sup> For example, France has reduced the minimum capital requirement to 1 EUR for its *Société à Responsabilité Limitée* (Private Limited Company) (Wymeersch, E., op. cit. in fn. 40., p. 164; de Sousa, A. F., op. cit. in fn. 2., fn. 85; Johnston, A., op. cit. in fn. 26., p. 397). Furthermore, in Germany two expert committees were formed in 2003 under the *Deutsche Rat für Internationales Privatrecht* that made a legislative proposal on cross-border seat transfer both from the European and the national position (Rammeloo, S., op. cit. in fn. 41., p. 373 - 374; Wisniewski, A., Opalski, A., op. cit. in fn. 2., p. 622). Eventually, in 2008 German authorities as well commenced procedure on adopting a law that would result in abandoning the real seat theory and adoption of the registered seat theory. In addition, Portugal has also reformed its law in order to facilitate transfer of company's seat (de Sousa, A. F., op. cit. in fn. 2., p. 10). In 2007 Hungary as well changed its legislation thus enabling companies to transfer their administrative seat to another Member State while remaining incorporated under Hungarian law (Cerioni, L., op. cit. in fn. 68., text following fn. 15; Deak, D., op. cit. in fn. 87., p. 251). Finally, the discussion on enabling companies to transfer their registered seat to another Member State (something that is currently not permitted under competent UK company laws) was also initiated in the UK (Johnston, A., op. cit. in fn. 26., p. 400).



nies that are leaving their jurisdiction or reform their respective national laws in order to facilitate a registered seat theory framework. Therefore, in order to provide equal opportunity to both the real seat Member States and the registered seat Member States a uniform regulation applicable within the Community is needed. Consequently, revival of Commission's work on the 14<sup>th</sup> Company Law Directive would be more than welcome.<sup>112</sup>

## VIII. CONCLUSION

The goal of this paper was only to provide an outline of the issue of corporate mobility within the Community. To that effect, we have provided a brief introduction to corporate mobility within the general context of conflict of laws, differences between the two diverging theories that relate to determination of *lex societatis* and ultimately to corporate mobility within the context of Community law. It can be concluded that there are still many practical corporate mobility issues both from the position of the general conflict of laws and more specifically from the Community law context. In final part of this paper we also relate to, in our view, unjustifiably abandoned work on the 14<sup>th</sup> Company Law Directive on the transfer of company's registered seat. Our assertion is that companies should be able to transfer both their registered seat as well as their administrative seat between Member States notwithstanding restrictions imposed either by the home Member States or the host Member State. In other words, freedom of establishment should be construed as a two-fold right and thus it should enable companies established within the Community to freely conduct their business operations (including the possibility to transfer their company seat) anywhere within the Community. Therefore, since Community law at the current stage of development (especially considering the relevant ECJ case law like CARTESIO) does not entitle companies with such rights, restoration of work on the abandoned 14<sup>th</sup> Company Law Directive is more than required. Currently, only such a uniform Community wide instrument

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<sup>112</sup> In that regard there have been certain incentives given by the European Parliament. Namely, on 10 March 2009 European Parliament adopted a resolution calling Commission to resume work on the 14th Company Law Directive. (European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI), P6\_TA-PROV(2009)0086 (not published)).

could ensure an adequate level of corporate mobility for Community companies and thus enable full realization of the right of establishment.

Sažetak

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## PRAVO POSLOVNOG NASTANA I KORPORATIVNA MOBILNOST - PREGLED KLJUČNIH PITANJA

*U radu se daju temeljne naznake otvorenih pitanja mobilnosti trgovačkih društava, kako s aspekta pravila međunarodnog privatnog prava, a tako i uvažavajući pravila prava EU. Za potonje je najvažnije pravo na ostvarivanje poslovnog nastana, kao dio primarnog prava EU. Mišljenje je autora da je za puno ostvarivanje prava poslovnog nastana prijeko potrebno da društva mogu ne samo obavljati svoju djelatnost gdje god žele, nego i promijenjati svoje sjedište, ako to odgovara potrebama njihovoga poslovanja, naravno pod uvjetom da to znači korištenje sloboda ustanovljenih pravom EU, a ne da znači zlouporabu tih sloboda. Ma kakav god stav da se zauzme o aktualnom stanju prava EU po tome pitanju, odnosno da li ono omogućava punu realizaciju prava poslovnog nastana ili ne, čini se da bi bilo vrlo korisno radi pravne sigurnosti da se donese poseban pravni instrument, koji bi uredio mogućnost promjene sjedišta društva iz jedne države članice u drugu. U tome bi smislu bilo potrebno nastaviti prekinuti rad na 14. direktivi prava društava o prijenosu registriranoga sjedišta.*

*Ključne riječi: pravo poslovnog nastana, sjedište tvrtke, prijenos sjedišta, prekogranični prijenos sjedišta, lex societatis*

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