



FACULTY OF LAW  
University of Lund

Miriam Laksman

The Race to the Bottom – A  
Study of the Consequences of  
ECJ Case Law and the Freedom  
of Establishment

Master thesis  
30 credits

Supervisor  
Michael Bogdan

EC Law, Competition Law

Autumn 2008

# Contents

<b>FOREWORD</b> .....	<b>1</b>
<b>SUMMARY</b> .....	<b>2</b>
<b>SAMMANFATTNING</b> .....	<b>4</b>
<b>ABBREVIATIONS</b> .....	<b>6</b>
<b>1 INTRODUCTION</b> .....	<b>7</b>
1.1 Purpose and Method .....	7
1.2 Delimitations and Disposition.....	8
<b>2 BACKGROUND</b> .....	<b>9</b>
2.1 The EC Treaty and the Freedom of Establishment .....	9
2.2 Primary and Secondary Establishment .....	10
2.3 The Incorporation Theory and The Real Seat Theory .....	10
2.3.1 <i>The Incorporation Theory</i> .....	11
2.3.2 <i>The Real Seat Theory</i> .....	11
2.3.3 <i>Possible Outcomes of a Transfer of an Establishment from one Member State to Another</i> .....	11
2.3.3.1 Incorporation Theory versus Incorporation Theory .....	11
2.3.3.2 Real Seat Theory versus Real Seat Theory .....	12
2.3.3.3 Incorporation Theory versus Real Seat Theory.....	12
2.3.3.4 Real Seat Theory versus Incorporation Theory.....	12
<b>3 ECJ CASE LAW</b> .....	<b>14</b>
3.1 C-81/87 <i>Daily Mail</i> .....	14
3.2 C-212/97 <i>Centros</i> .....	16
3.3 C-208/00 <i>Überseering</i> .....	17
3.4 C-167/01 <i>Inspire Art</i> .....	18
3.5 C-210/06 <i>Cartesio</i> (Case pending).....	19
3.5.1 <i>Possible Outcome in Case C-210/06 Cartesio</i> .....	20
3.6 “Immigration” and “Emigration” Cases.....	21
3.7 Concluding Remarks on the Discussed ECJ Case Law.....	22
<b>4 RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT</b> <b>23</b>	
4.1 Art 46 .....	23
4.2 Fraud and Abuse .....	23
4.3 The Gebhard-test – the Rule of Reason.....	24
<b>5 WILL THERE BE A RACE TO THE BOTTOM?</b> .....	<b>25</b>
5.1 The Delaware-effect .....	25
5.1.1 <i>The Delaware-effect – a Background</i> .....	25
5.1.2 <i>Forum Shopping</i> .....	26

5.1.3	<i>Regulatory Competition</i> .....	26
5.1.4	<i>Consequences of Forum Shopping and Regulatory Competition</i> .....	27
5.1.4.1	Race to the Bottom .....	27
5.1.4.2	Race to the Top .....	27
5.2	Is the Future of the EU Comparable to the Present Situation in the USA? .....	28
5.2.1	<i>Differences Between the USA and the EU</i> .....	28
5.2.1.1	Incorporation and Re-incorporation .....	28
5.2.1.2	Other Factors of Significance in Connection with Re-incorporation .....	29
5.2.1.2.1	Incentives for Member States to Compete.....	30
5.2.1.2.2	Different Objectives of Company Law.....	31
5.3	Concluding Remarks on the Race to the Bottom .....	32
<b>6</b>	<b>HAVE THE JUDGEMENTS IN <i>CENTROS</i>, <i>ÜBERSEERING</i> AND <i>INSPIRE ART</i> LED TO REGULATORY COMPETITION WITHIN THE EU? .....</b>	<b>34</b>
<b>7</b>	<b>HARMONISATION OF COMPANY LAW WITHIN THE EU .....</b>	<b>36</b>
7.1	The 10 <sup>th</sup> Company Law Directive.....	36
7.2	The European Economic Interest Grouping .....	36
7.3	Societas Europaea – The European Company.....	37
7.4	The 14 <sup>th</sup> Company Law Directive.....	38
7.5	Concluding Remarks on the Harmonisation of Company Law .....	39
<b>8</b>	<b>ANALYSIS AND CONCLUSION .....</b>	<b>41</b>
8.1	Analysis.....	41
8.2	Conclusion .....	44
	<b>APPENDIX.....</b>	<b>48</b>
	<b>BIBLIOGRAPHY .....</b>	<b>51</b>

# Foreword

After I had completed and handed in this thesis the judgement in the case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-000 was delivered. I had predicted the judgement in the case to be different and since great parts of the thesis, foremost the analysis and conclusion depended on the predicted outcome of the case I decided to add an appendix where the judgement is discussed.

However, I am of the opinion that re-incorporation will become possible within a foreseeable future and therefore, as part of the main focus of the thesis is what consequences might follow from making re-incorporation possible, this thesis is still of relevance.

# Summary

Nationals of Member States, including companies and firms that are formed in accordance with the laws of a Member State, are granted the right to freedom of establishment through Art 43 and 48 in the EC Treaty. However, as the legal situation appears today, this freedom of establishment is restricted.

In accordance with the freedom of establishment, natural persons are entitled to incorporate companies in any Member State and legal persons can, almost without restrictions, set up secondary establishments, that is branches, agencies or subsidiaries in any Member State. The Member State of arrival cannot lawfully, with a few exceptions, none of which yet has been applied, hinder or place limitations on such an establishment. So far, nothing in the ECJ case law or in legal writing indicates what situations and measurements would qualify as exceptions and it is uncertain if there will ever be a case where the protective interests, such as for example public policy, will be considered as more important than the fundamental right to freedom of establishment. This means that on the one hand freedom of establishment is highly protected. However, would a company wish to move its registered seat, i.e. its registered office, central administration or principal place of business, problems occur. It has been ruled by the ECJ that, since companies only exist by virtue of the national law under which they were incorporated, Member States are free to hinder and place restrictions on the transfer of companies registered seats from their territory. This means that it is not possible for a company to transfer its seat from one Member State and keep its legal status, as long as it does not follow from the national law of the State of origin.

In the USA it is both possible and occurs frequently that companies are established in one state and later transferred and re-incorporated in another. The possibility to re-incorporate has led to a regulatory competition, often referred to as the *race to the bottom* and the *Delaware-effect*, which has had the consequence that states have created more lenient company laws, where the protection for minority shareholders and workers has been neglected. Legal scholars unanimously agree that the reason behind the regulatory competition between states in the USA is primarily fiscal, since the states are entitled to levy franchise tax on companies incorporated under their legislation. The franchise tax constitutes a significant part of the income of states in the USA.

Over the last decades a ferocious debate regarding whether the EU is facing a future similar to that in the USA, where company laws have been undermined, has been going on. This thesis shows that even if the USA and the EU are similar to structure, the differences are prominent and thus the problems in the EU, would re-incorporation become possible, would not be the same as those present in the USA. The differences, such as the

prohibition for Member States to levy franchise tax or incorporation fees on companies wishing to establish in their territory, differences in ownership structure, do weaken the incitements for Member States within the EU to enter into regulatory competition. The fact that the incitements for Member States to enter into regulatory competition are weak, in combination with numerous other factors, *inter alia* the harmonisation process taking place within Community company law, language and cultural differences and the traditional non-competition perspective within company law making in the EU points towards a future, if re-incorporation will become possible, where an effect similar to that in the USA is not likely to occur.

# Sammanfattning

Den etableringsrätt, som föreskrivs medborgare i medlemsstater, och som även inkluderar juridiska personer, som bildats enligt lagen i en medlemsstat, är i dagsläget en sanning med modifikation. Fysiska personer kan utan restriktioner etablera företag i den medlemsstat de önskar och juridiska personer kan fritt bilda så kallade sekundära etableringar, det vill säga, filialer, dotterbolag eller öppna kontor i en medlemsstat annan än ursprungsstaten. Den stat där en fysisk person önskar bilda bolag, eller där en juridisk person önskar bilda en sekundär etablering, kan inte lagenligt, med vissa undantag, sätta upp restriktioner för eller hindra ett sådant händelseförlopp. För att rättfärdigas enligt undantagsregler måste de vidtagna åtgärderna uppfylla vissa krav och än så länge finns det ingenting i EG-domstolens rättspraxis eller i övrig doktrin som ger några indikationer på vilka situationer eller åtgärder som skulle kunna kvalificera under ovannämnda undantag och det är överhuvudtaget osäkert huruvida en situation skulle kunna uppstå där dessa skyddsintressen skulle komma att anses vara av större vikt än den fundamentala rätten till etableringsfrihet.

Situationen ter sig dock mer problematisk om ett företag skulle vilja flytta sitt registrerade säte, det vill säga, sitt huvudkontor, sin centrala administration eller sitt huvudsakliga verksamhetsområde från en medlemsstat till en annan. EG-domstolen har uttalat sig att då företag endast existerar på grund utav och i enlighet med den nationella lag som de etablerade sig under är det möjligt för medlemsstater att fritt hindra eller utfärda restriktioner mot företag som önskar flytta från deras territorium. Med andra ord - det är inte möjligt för företag att flytta sitt registrerade säte från en medlemsstat och behålla sin legala status utan att detta följer av den nationella lag som råder i ursprungsstaten.

I USA är däremot ett sådant förfarande möjligt och det sker frekvent att företag etablerar sig i en delstat för att sedan flytta sitt säte och återinkorporera sig i en annan. Återinkorporationsmöjligheten har haft regelkonkurrens som följd, vilket i sin tur lett till en urholkning av många delstaters bolagsrätt. I den juridiska debatten är man rörande överens om att det primära bakomliggande skälet till regelkonkurrensen i USA är av fiskal karaktär, då delstaterna har rätt att beskatta bolag, inkomponerade under deras lagar, med en så kallad *franchise-skatt*, vilket inbringar stora delar av delstaternas inkomst.

De senaste årtiondena har det pågått en hätsk juridisk debatt angående huruvida en eventuell liknande situation, med urholkad bolagsrätt som följd, skulle kunna komma att uppstå i EU om etablering utan restriktioner skulle bli möjlig. Detta examensarbete visar att även om USA och EU liknar varandra på ytan, så förekommer det skillnader så stora att de problem som skulle kunna uppstå i samband med att återinkorporation eventuellt skulle bli möjligt, är väsentligen annorlunda i EU än i USA. Skillnaderna, så som

till exempel förbudet för medlemsstater att belägga företag, som önskar etablera sig i en viss stat, med en skatt liknande franchise-skatten eller någon form av inkorporationsavgift, försvagar incitamenten för medlemsstater att påbörja regelkonkurrens.

De svaga incitamenten för medlemsstater att ge sig in i regelkonkurrens kombinerat med ett stort antal andra faktorer, bland annat den harmonisering av bolagsrätten som sker inom EU, språk- och kulturella skillnader, samt den traditionella åsikten att medlemsstater inte ska konkurrera med varandra vad gäller bolagsrättslig lagstiftning, tyder på att det är mindre troligt att EU, om återinkorporation skulle bli möjligt, skulle gå samma framtid som USA till mötes.



# Abbreviations

Art	Article
Commission	The European Commission
Community	The European Community
EC	European Community
ECJ	European Court of Justice
EC Treaty	Treaty Establishing the European Community as Amended by Subsequent Treaties, Rome, 25 March, 1957
EU	The European Union
Member State/ State	Member State of the European Union
The Union	The European Union
UK	United Kingdom
USA	United States of America

# 1 Introduction

One of the fundamental purposes of the European Union is to establish a common market and an economic and monetary union<sup>1</sup>, doing so by creating a common internal market where goods, persons, services and capital can move freely<sup>2</sup>. In accordance to Art 43 and Art 48 EC Treaty this includes the right to freedom of establishment, meaning that individuals as well as companies have the right to take up and pursue activities in other Member States of the EU than that of their domicile without being discriminated.

Lately the interest in and the need of expanding the companies via establishment of branches in, or the movement of entire companies to other countries and cross-border cooperation, has been growing. Consequently, in order to increase the access to the market and facilitate the exchange between the Member States of the EU (further referred to as *the Member States*) there has been a constant development in harmonising the national laws of the Member States and drawing up supranational company formations. This leads to the question whether establishment can really occur without restrictions and, if so, are we facing the risk of the so-called Delaware-effect? Is a possible outcome of the strive towards a common market that the Member States will change their national company laws in order to attract more companies and initiate what is known as a race to the bottom? A scenario that might lead to the undermining of national company laws and at the same time have the effect of making the EU less competitive than if there was complete harmonisation in the company laws of its Member States.

At large, this thesis will investigate to what extent companies are entitled to free movement within the EU. It will contain a report on ECJ case law in the field of freedom of establishment and what consequences that case law may have. Will it lead to an undermining of company laws within the Member States, meaning that the EU might be facing a possible Delaware-effect or are we looking at a future with harmonised company law within the Union?

## 1.1 Purpose and Method

The purpose of this thesis is to analyse the freedom of establishment of companies within the EU in order to find an answer to how vast the freedom of establishment really is. This will be done using regulations, directives, case law, preparatory legal material and legal writing. Since one of the purposes of this thesis is to investigate what consequences have followed or might follow from ECJ case law, primarily case law and legal writing will be used.

---

<sup>1</sup> Art 2, EC Treaty.

<sup>2</sup> Art 3(c), EC Treaty.

Further, the purpose of this thesis is to, in the light of the *real seat theory* and the *incorporation theory*, as well as ECJ case law discuss a possible Delaware-effect within the EU.

It will be investigated if freedom of establishment without restrictions may lead to a situation similar to the one in the USA, where more than 50% of the companies are registered in one state (Delaware).<sup>3</sup> This would mean that the Member States could be facing a future where the company laws provide no or a very small protection for shareholders, creditors and workers.

## 1.2 Delimitations and Disposition

This thesis will describe the current legal situation regarding EC freedom of establishment, including the issues arising from the application of it, meaning it will concentrate on Art 43 and 48 of the EC Treaty and what the case law concerning those two articles have brought forward.

The rules governing the choice of law and the real seat theory as well as the incorporation theory will be described, followed by what problems occur in situations when the two principles are in conflict.

Further, the thesis will describe and discuss if any restrictions on freedom of establishment are allowed, and if so, to what extent those restrictions limit the right to freedom of establishment.

Chapter 5 and 6 will deal with the matters of the Delaware-effect and harmonisation within the EU. A comparison between the EU and the USA will be accounted for, to see if the EU is facing a future similar to that in the USA. The harmonisation taking place in the EU will be described, as an important factor affecting the future of EC Company law.

The thesis will be completed with a discussion and conclusion on what the future has to bring for EC Company Law.

---

<sup>3</sup> <http://www.corp.delaware.gov/aboutagency.shtml> 28<sup>th</sup> of September 2008.

## 2 Background

### 2.1 The EC Treaty and the Freedom of Establishment

Art 43 EC Treaty (further, if nothing else is indicated, all Articles referred to will be of the EC Treaty) provides that no restrictions on the freedom of establishment of nationals of another Member State are allowed. This freedom of establishment also includes the right to set up and manage offices, branches or subsidiaries. It is made clear in Art 48 that this also applies to “companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community”.<sup>4</sup> Companies and firms are thus equal to natural persons, who are nationals of Member States.<sup>5</sup> The ECJ has ruled that the *registered seat* of the company connects the company to the legal system of a State. The registered seat of a company can be found in the State in which the company or firm, formed in accordance with the law of a Member State, has its registered office, central administration or principal place of business.<sup>6</sup>

Activities that, even if just occasionally, are connected with the exercise of official authority can legitimise exceptions from the freedom of establishment. Art 46 allows deviation from the freedom of establishment if it can be justified on grounds of public policy, public security or public health, but these measures have to be applied restrictively.<sup>7</sup> In the case where there are no Community rules concerning a specific profession, each Member State can regulate freely, in so far as the measures are not discriminatory, either directly – nationals are treated more favourably than migrants, which is a breach of Art 43 and can only be justified by one of the abovementioned exceptions, or indirectly.<sup>8</sup> Indirect discrimination is when measures seem to treat nationals and migrants equally but actually are disadvantageous to migrants, as can be the case where national licences are required in order to perform a specific profession. This, as well, constitutes a breach of Art 43 and the Member State must in such a case show that the criteria creating the negative effect is objective in relation to its purpose and that the reason for the measure is not based on the nationality of the economic activity. If that can be shown by the Member State the measure will not be seen as discriminatory.<sup>9</sup>

---

<sup>4</sup> Art 48(1) EC Treaty.

<sup>5</sup> Op. cit.

<sup>6</sup> C-270/83 *Commission v. France*, [1986] ECR 273, para. 18.

<sup>7</sup> Bogdan, M, *Rätt att välja nationella bolagsformer inom EU*, p 8.

<sup>8</sup> C-107/83 *Klopp* [1984] ECR 2971, para 17.

<sup>9</sup> See C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, para 34 and joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831.

In the *Gebhard* case<sup>10</sup> it was stated by the ECJ that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be *applied in a non-discriminatory manner*; they must be *justified by imperative requirements in the general interest*; they must be *suitable for securing the attainment of the objective which they pursue*; and they must *not go beyond what is necessary in order to attain it*”<sup>11</sup>. These four requirements are usually referred to as the *Gebhard test*, which is further described in chapter 4.3.

## 2.2 Primary and Secondary Establishment

The freedom of establishment is applicable to both *primary* and *secondary* establishments. *Primary establishment* equals a complete transition, from one Member State to another, of a permanent establishment, that is; the transfer of the company’s registered seat. The transfer of a primary establishment from one Member State to another is prohibited<sup>12</sup> by many Member States, hence, such a transfer is very scarce.<sup>13</sup> Contrariwise, the transfer of *secondary establishments*, that is, the transfer of a second professional base, which was set up and maintained by a legal person in another Member State, occurs more frequently.<sup>14</sup>

## 2.3 The Incorporation Theory and The Real Seat Theory

Legal scholars distinguish between two theories used by the Member States to decide where a company has its registered seat. The colliding interests between these two principles – the *real seat theory* (also known as *siège réel*) and the *incorporation theory* and the fact that two different principles of law are used within the EU create difficulties.<sup>15</sup> The difficulties become especially clear in the situation of interest in this thesis – when a company wants to conduct activity in, or move its activity or its registered seat from, one Member State to another.

---

<sup>10</sup> C-55/94 *Gebhard* [1995] ECR I-4165.

<sup>11</sup> *Ibid.* para 37.

<sup>12</sup> Such restrictions can only be placed by the State of origin and not by the Member State to which the company wishes to transfer.

<sup>13</sup> Barnard, C, *The substantive Law of the EU*, p 312 et seq.

<sup>14</sup> Bernitz, U and Kjellgren, A, *Europarättens grunder*, p 257.

<sup>15</sup> Barnard, C, *The Substantive Law of the EU*, p 342 et seq.

## 2.3.1 The Incorporation Theory

Following the incorporation theory, applied in for example England, Sweden, Ireland and the Netherlands<sup>16</sup>, a company will be considered as being subject to the law of the State where it is incorporated, regardless of if it has its registered seat there or if it even will conduct activity within that State.<sup>17</sup> That is, where the actual activity of the company is conducted is immaterial when deciding upon applicable law, the company will be considered as having its registered seat in the State in which it is incorporated and thus it is regulated according to the laws of that State. A company established according to the rules of the Member State in which it is registered can in other words, according to the incorporation theory, conduct activity in another Member State and still retain its legal identity when transferring its registered seat to another Member State.<sup>18</sup>

## 2.3.2 The Real Seat Theory

From the real seat theory, traditionally applied in countries such as France, Germany and Italy<sup>19</sup> follows that it is the law of the State where the company has its principal place of business, that is, where the main activity is conducted i.e. where the head office is situated, that will be applied.<sup>20</sup>

The real seat theory has been subject to discussion within the EU, since it can be seen as controversial and restricting in relation to the freedom of establishment, as will be shown in the following chapters.

## 2.3.3 Possible Outcomes of a Transfer of an Establishment from one Member State to Another

There are four possible scenarios when a company transfers its registered seat from one Member State to another:

### 2.3.3.1 Incorporation Theory versus Incorporation Theory

Would the case be that a company transfers its registered seat between two Member States, *both applying the incorporation theory*, the applicable law will remain the same. The company is considered by both Member States to have its registered seat in the Member State in which it is registered and this means that it is the law of that Member State that will be applicable and the company will keep its identity. Though, as will be shown in the third

---

<sup>16</sup> Dotevall, R, *Samarbete i bolag*, p. 32.

<sup>17</sup> Werlauff, E, *EU-selskabsret*, p 4.

<sup>18</sup> Mucciarelli, M.F, *Company "Emigration" and EC Freedom of Establishment: Daily Mail Revisited*, p 272.

<sup>19</sup> Barnard, C, *The Substantive Law of the EU*, p 343.

<sup>20</sup> Op. cit.

chapter, the Member States are entitled to set up restrictive requirements on the transfer out of the Member State.<sup>21</sup>

### **2.3.3.2 Real Seat Theory versus Real Seat Theory**

Does a company move its registered seat between two Member States, *both applying the real seat theory*, the law of the State of arrival will apply to the company. Even if the company after the transfer will be subject to the company law of the State of arrival it will keep its identity, meaning that the company will keep its legal and partial capacity, all assets, liabilities and contractual relations will remain unaffected in the State of arrival.<sup>22</sup>

### **2.3.3.3 Incorporation Theory versus Real Seat Theory**

If a company would move its registered seat *from a Member State applying the incorporation theory to a Member State applying the real seat theory* both Member States will claim to have the applicable legal system. The State of origin (i.e. the State of departure) will claim that the law where the company was registered will be applicable while the State of arrival will claim that it is the law where the company has its registered seat or where the main activity is conducted that shall apply. This would have the effect that the company, if the State of arrival would recognise the company, would be subject to two company laws.<sup>23</sup>

### **2.3.3.4 Real Seat Theory versus Incorporation Theory**

The last possibility would be that a company transfers *from a Member State applying the real seat theory to a Member State applying the incorporation theory*. The State of origin will consider the company as being dissolved when the registered seat is transferred. The State of arrival will consider the law of the State where the company was registered as applicable. Since none of the States would claim to have the applicable law system<sup>24</sup> this would, in my opinion, probably have the consequence that the company would be considered as non-existing and in order to conduct activity it has to re-establish in the State of arrival. Worth mentioning is that the company will keep its legal capacity after the transfer under the condition that it still exists according to the law of the State of origin.<sup>25</sup>

Summarising, it can be said that if the company transfers the connecting factor in accordance with the conflict rules of the State of origin as well as the conflict rules of the State of arrival, the applicable company law will change. The substantive law of each Member State, regardless of what conflict rules are applicable, determines whether a continuance of the legal

---

<sup>21</sup> Skog, R, *Kan aktibolag emigrera?*, p 21 et seq. and C-81/87 *Daily Mail* [1998] ECR 5483.

<sup>22</sup> Neville, M and Sørensen, E, *Selskabers Nationalitetsskifte*, p 37 and C-208/00, *Überseering* [2002] ECR. I-9919.

<sup>23</sup> Skog, R, *Kan aktiebolag emigrera?*, p 21.

<sup>24</sup> Werlauff, E, *EC Company Law: the common denominator for business undertakings in 12 states*, p 198.

<sup>25</sup> Skog, R, *Kan aktiebolag emigrera?*, p 22 and C-208/00, *Überseering* [2002] ECR. I-9919.

identity of the company is at hand or not, i.e. if both the State of origin and the State of arrival agree upon it the company will retain its legal identity.<sup>26</sup>

---

<sup>26</sup> Roth, W-H, *From Centros to Überseering: free movement of companies, private international law, and community law*, p 184 et seq.



## 3 ECJ Case Law

As described in the previous chapters the freedom of establishment, the right for companies in one Member State to freely establish themselves, including the right to set up and manage offices, branches or subsidiaries in another Member State, is granted by Art 43 and 48. Over time, the ECJ has presented preliminary rulings on the interpretation of this freedom. The preliminary rulings that have had impact on and consequences for the freedom of establishment will be described and discussed in this chapter.

### 3.1 C-81/87 *Daily Mail*

C- 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483

According to United Kingdom company law it is possible for a company incorporated under UK legislation and is having its registered office there, to establish its central management and control outside of the UK without losing its legal personality, or cease to be a company under UK law.<sup>27</sup> In accordance with the UK tax legislation, a company is considered resident for tax purposes in the place in which its central management and control is located, and generally only those companies resident in the UK for tax purposes, are liable to UK corporation tax.<sup>28</sup> Companies resident in the UK for tax purposes are prohibited from moving their central management and control without the consent of the Treasury.<sup>29</sup> The British company Daily Mail applied for such consent with the Treasury in order to move its central management and control to the Netherlands for tax purposes<sup>30</sup>, which would, in reality, mean a transfer of the registered seat of the company.

Daily Mail proceeded with the plan to transfer, without waiting for the consent of the Treasury and decided to open an investment management office in the Netherlands. The UK Treasury found that the transfer could be made if some of the company's assets were sold before the transfer. Daily Mail initiated proceedings claiming that, according to, at that time, Art 52 and 58 (today Art 43 and 48) no consent with the Treasury was necessary. Daily Mail claimed that, as a UK company, incorporated under the UK

---

<sup>27</sup> C- 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483, (further referred to as Daily Mail) para 3.

<sup>28</sup> *Ibid*, para 4.

<sup>29</sup> *Ibid*, para 5 and the Income and Corporation Taxes Act 1970 of the UK, Section 482(1)(a).

<sup>30</sup> The main reason for Daily Mail to transfer was to be able to sell non-permanent assets in order to buy its own shares without having to pay tax in the UK.

legislation it had the right to move its registered seat without losing legal capacity.<sup>31</sup>

The ECJ stated that it is not possible to transfer a company's registered seat from a State using the incorporation theory as long as it does not follow from the national law of that Member State. Further, it was stated by the ECJ that, "unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation, which determines their incorporation and functioning".<sup>32</sup> This means that the sole existence of the company is depending on the incorporation of the registered seat under the law of the State of origin and thus it is not possible, provided that it does not follow from the law of that State, to move the registered seat and preserve legal identity. As long as harmonisation in the area has not taken place, it is only possible to set up and manage secondary establishments in a Member State other than that of the company's origin, or to wind up the company and then re-establish in the State of arrival, if nothing else follows from national law.<sup>33</sup>

To resume: the ECJ established that a company exists only by virtue of the national law according to which the company was formed. Further, it was stated that the Treaty does not regulate the differences that exist between the Member States national rules on connecting factors between the company, its existence and the State of origin, as well as the possibility to later change that connecting factor. The ECJ left this problem to be solved by future harmonisation. Hence, the Member State, that a company wishes to transfer from, but still keep its legal identity in, is entitled to place restrictions on the transfer, if the company is formed in accordance with the laws of that Member State.

It is important to point out that the ruling in the *Daily Mail* case concerned emigration, i.e., a company wishing to transfer its registered seat, while retaining its legal status in the State of origin and invoking its rights against that State and not against the State of arrival.

The conclusion drawn from this case, with the latter statement in mind, is that Community law does not provide companies with a right to freely transfer their primary establishment, in lieu the right to transfer primary establishments and keep legal identity has to be granted by the national law under which the company is incorporated.

---

<sup>31</sup> *Daily Mail*, para 7 et seq.

<sup>32</sup> *Ibid.* para 19.

<sup>33</sup> *Ibid.*, para 14 et seq.

## 3.2 C-212/97 Centros

C-212/97 *Centros Ltd. v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459

United Kingdom law imposes no requirements on limited liability companies as to the provision for, and the paying-up of a minimum share capital.<sup>34</sup> Knowing this, two Danish nationals established the company Centros Ltd (further referred to as Centros) in the UK, with the intention to thereafter set up a branch in Denmark. The Danish Board of registration did however refuse such a registration on the grounds that the company conducted no activity in the UK and thus the sole purpose of the registration of the branch was to avoid the Danish national rules regarding minimum share capital. Further, the Board claimed that, in order to protect private or public creditors and other contracting parties, as well as preventing fraudulent insolvencies, the refusal had to be considered as justified.<sup>35</sup> Centros invoked its right to freedom of establishment by referring to Art 52 and 58 (today Art 43 and 48).

The ECJ stated that it “is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted”<sup>36</sup>. Creating an obstacle for a company established in accordance with the rules of another Member State, to set up a secondary establishment in another Member State is a restriction to the freedom of establishment. Thus, the refusal by the Danish Board to register the branch was seen by the ECJ as being unlawfully restrictive to the freedom of establishment.<sup>37</sup> The Danish authorities objected that since the purpose of the actions taken by the Danish couple was to circumvent the application of the national law governing formation of private limited companies it should be considered as abuse of the freedom of establishment.

A Member State is entitled to take measures to prevent its nationals from attempting, under cover of the freedom of establishment, improperly to circumvent the national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law<sup>38</sup>. Such measures have to be taken with the objectives pursued by the provisions granting the rights (here; the right to freedom of establishment) in mind.<sup>39</sup> The provisions of the Treaty on freedom of establishment intend to enable secondary establishment. Hence, a national of a Member State who sets up a company in the Member State, which he finds has the least restrictive company laws and then wishes to set up branches in other

---

<sup>34</sup> C-212/97 *Centros Ltd. v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459 (further referred to as Centros) para 3.

<sup>35</sup> Ibid. para 12.

<sup>36</sup> Ibid. para 17.

<sup>37</sup> Ibid. para 19 et seq.

<sup>38</sup> Ibid. para 24 and C-115/78 *Knoors* [1979] ECR 399, para 25, and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, para 14.

<sup>39</sup> *Centros*, para 25.

Member States cannot be seen as abusing the right to freedom of establishment.<sup>40</sup>

Even though it was not explicitly stated in the judgement, it can be seen that the ruling in the *Centros* case creates an obstacle for the use of the real seat theory and speaks in favour for the use of the incorporation theory. The consequence then would be that companies to a wider extent would be able to transfer between Member States. However, since Member States are entitled to take restrictive measures on the emigration of companies, there will be no prominent difference in the legal situation, other than a possible tendency towards the use of solely the incorporation theory.

### 3.3 C-208/00 *Überseering*

C-208/00, *Überseering BV. v Nordic Construction Co Baumanagement GmbH* [2002] ECR I-9919

Überseering BV (further referred to as Überseering), a company incorporated under the law of the Netherlands, had acquired a piece of land in Germany, which it used for business purposes. By a project-management contract NCC was obliged to perform certain construction work on the site. As the obligations had been performed by NCC Überseering claimed part of the work to be defective, though, NCC was unwilling to meet with the requirements. Two years later, two German nationals residing in Germany acquired all the shares in Überseering and they unsuccessfully sought compensation from NCC for the defect work. Überseering then brought an action before the Regional Court in Germany.

The Regional Court and later the Higher Regional Court dismissed the action on the grounds that, as Germany applies the real seat theory, the registered seat of the company had been moved from the Netherlands to Germany when the shares had been acquired by the German nationals. The German Courts thus stated that the legal capacity of Überseering should be assessed in accordance with German law and, since the company had not been re-established as required by German law when the registered seat was transferred, the company had no legal capacity and thus it could not be subject to a trial in Germany.<sup>41</sup>

The case ended up in the German Federal Court of Justice, which stayed the proceedings and asked for a preliminary ruling from the ECJ. The Federal Court of Justice of Germany referred questions asking whether or not, based on the fact that the company's actual centre of administration had been transferred to another State, the freedom of establishment laid down in Art 43 and 48 prohibits connecting the company's legal capacity with the law of

---

<sup>40</sup> Ibid. para 26 et seq.

<sup>41</sup> C-208/00, *Überseering BV. v Nordic Construction Co Baumanagement GmbH* [2002] ECR I-9919 (further referred to as Überseering), para 6-12.

the Member State in which its registered seat is located.<sup>42</sup> The ECJ stated that Art 43 and 48 guarantees the freedom of establishment and it is necessary that the companies wanting to exercise that right are recognised by any Member State in which they wish to establish themselves.<sup>43</sup> Following this, the ECJ stated that, by demanding re-establishment of a company having transferred its registered seat from one Member State to another German law constituted a restriction to the freedom of establishment.<sup>44</sup>

This ruling and the judgement in *Centros* implement restrictions on the use of the real seat theory and speak for a development towards making it impossible for Member States to apply the real seat theory.

### 3.4 C-167/01 *Inspire Art*

C-167/01, *Kamer van Koophandel. en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155

Inspire Art Ltd (further referred to as Inspire Art) was established under the laws of England and Wales. Inspire Art had established a branch in the Netherlands, where the sole director of the company was resident. Inspire Art traded solely in the Netherlands, i.e. this is where the main activity of the company was performed. The Dutch branch of Inspire Art was registered at the Commercial registry in the Netherlands. The registry, however, took the view that, since the company had been formed according to the laws of a State other than the Netherlands but performed its main activity in the Netherlands, the company should, according to Dutch law, inform the registry about the situation and be registered as a formally foreign company.<sup>45</sup> Being a formally foreign company in the Netherlands, Inspire Art would have to, *inter alia*, comply with the minimum capitalisation rules for Dutch limited liability companies.<sup>46</sup>

The ECJ continued its tendency of deciding in favour of freedom of establishment. It held that Art 2 of the Eleventh Directive<sup>47</sup>, which is considered to be exhaustive, in so far as it does not affect the information obligations imposed on branches under social or tax law, or in the field of statistics, does not provide for the recording in the commercial register that the company is formally foreign.<sup>48</sup> Noticeable is that ECJ reasons around

---

<sup>42</sup> Ibid. para 22.

<sup>43</sup> Ibid. para 59.

<sup>44</sup> Ibid. para 82.

<sup>45</sup> C-167/01, *Kamer van Koophandel. en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155 (further referred to as Inspire Art), para 22 and para 34-37.

<sup>46</sup> WFBV (Wet op de formeel buitenlandse vennootschappen) 17<sup>th</sup> december 1997, para 2-5.

<sup>47</sup> Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC).

<sup>48</sup> *Inspire Art*, para. 69.

rules in the Dutch legislation other than that in question, expressing that the information obligation would constitute a breach to the freedom of establishment even in the case that the Eleventh Directive<sup>49</sup> would not exist.<sup>50</sup>

The ECJ, yet again,<sup>51</sup> stated that, with regard to application of the rules of freedom of establishment, a company is entitled to have any reason, as long as it is not fraudulent or abusive, for choosing to establish in a particular Member State. The fact that a company chooses to form in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation, could not be seen as fraud, regardless of whether the main or entire activity of the company is conducted elsewhere.

### 3.5 C-210/06 *Cartesio* (Case pending)

C-210/06 *Cartesio Oktató és Szolgáltató bt* (Reference for a preliminary ruling from the Szegedi Ítéltábla (Hungary))

*Cartesio*, a Hungarian limited partnership applied to the Hungarian Court of Registration for registration of the transfer of the company's registered seat to Italy. *Cartesio* had the intention to transfer solely its operational headquarter (i.e. its registered seat<sup>52</sup>) and still continue to operate under Hungarian company law, by remaining its legal capacity under the latter.<sup>53</sup> The real seat theory is applied in Hungary and according to Hungarian law such a procedure is not possible. In order to transfer its operational headquarters *Cartesio* would have to dissolve in Hungary and then re-establish under Italian law.<sup>54</sup>

*Cartesio* brought an appeal against the decision of the Commercial Court before the Court of Appeal, who stayed the proceedings for a preliminary ruling and asked whether Art 43 and 48 preclude a Member State from not allowing a company, incorporated under its legislation to transfer its registered seat to another Member State.

---

<sup>49</sup> Eleventh Council Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (89/666/EEC).

<sup>50</sup> Bogdan, M, *Rätt att välja nationella bolagsformer inom EU*, p 17.

<sup>51</sup> *Inspire Art.* para. 96 and C-79/85 *Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen* [1986] ECR 2375, para. 16 and C-212/97 *Centros*, para. 17.

<sup>52</sup> Opinion of Advocate General Maduro in C-210/06 *Cartesio Oktató és Szolgáltató bt* (Reference for a preliminary ruling from the Szegedi Ítéltábla (Hungary), lodged on 5 May 2006, delivered on 22 May 2008, (further referred to as *Cartesio*) para 22.

<sup>53</sup> *Ibid.* para. 1.

<sup>54</sup> *Ibid.* para. 3.

### 3.5.1 Possible Outcome in Case C-210/06 *Cartesio*

As mentioned before, the ECJ stated, in the *Daily Mail* case<sup>55</sup> that unlike natural persons, companies are creatures of national law and exists only by virtue of that law<sup>56</sup>. Therefore, the ECJ came to the conclusion in the *Daily Mail* case that, the UK, being the State of origin was not, when imposing certain conditions on UK companies wishing to transfer their registered seat, in breach of Community law.

However, as shown in the previous chapters, Community law and recent case law have had the tendency to move towards a more liberal stand regarding the freedom of establishment. Advocate General in the *Cartesio* case is of that same opinion, saying that the case law has developed since the ruling in the *Daily Mail* case, apparent due to the fact that more recent case law has been moving in the opposite direction of the view taken in the *Daily Mail* case.<sup>57</sup> According to Advocate General national law can no longer be seen as a matter falling outside the scope of the principle of freedom of establishment.<sup>58</sup>

Further, he argues that the Hungarian rule infringes the freedom of establishment by prohibiting company migration. The Advocate General also finds that a rule completely prohibiting company migration cannot be seen as proportionate in comparison to the objective it was aimed at satisfying (here; public interest).<sup>59</sup>

Whether the ECJ will follow the opinion of the Advocate General or not is impossible to answer. On the one hand we have seen a tendency that the freedom of establishment is such a fundamental right that it should be protected to the widest extent possible. On the other hand we have the fact that there already exists a ruling regarding a very similar question.<sup>60</sup> Though, the controversy of the ECJ overruling itself is not present here, since the *Cartesio* case concerns a complete restriction on the transfer of the registered seat of a company, while *Daily Mail* does not. This might have the outcome that completely restricting companies from transferring their registered seat will be seen as incompatible with Community law, but restrictions solely making it more difficult for companies to emigrate will still be allowed under the prerequisites discussed in chapter 4. Even though, I find it more likely, that the ECJ will come to a decision that will not distinct variations in the way of restricting, but treat them equally as just restricting measures.

---

<sup>55</sup> *Daily Mail* and chapter 3.1.

<sup>56</sup> *Ibid.* para. 19.

<sup>57</sup> *Cartesio*, para. 27.

<sup>58</sup> *Op. cit.*

<sup>59</sup> *Ibid.* para 32 et seq.

<sup>60</sup> *Daily Mail* and chapter 3.1.

Should the ECJ come to a similar conclusion as Advocate General Maduro the Member States will no longer be able to place restrictions on the transfer of the registered seat of companies and this will eliminate the use of the real seat theory. Such an outcome will also make it necessary to review whether restrictive measures, such as the fees/taxes that some Member States impose on companies emigrating are to be incompatible with the freedom of establishment. Today these fees and taxes are possible as long as Community law does not already regulate the matter.<sup>61</sup>

### 3.6 “Immigration” and “Emigration” Cases

As stated above, the *Daily Mail* case concerned the transfer of a company’s registered seat *from* its State of origin. In its ruling the ECJ found no violation of Community law in the fact that the State of origin did not allow such a transfer. The ECJ distinguished the matter at issue in *Überseering* and *Inspire Art* from the issues discussed in *Daily Mail* without overruling the decision in the latter. *Daily Mail* concerns what impact the laws of the State of origin may have on the continuing existence of the company, while *Centros*, *Überseering* and *Inspire Art* as a contrast, concern the impact the laws of the State of arrival have on a company making use of the right to freedom of establishment.

To summarise: the conflict law and company law of a Member State can place limitations on the transfer abroad of the registered seat of domestic companies but the State of arrival may not, without violating Art 43 and 48, refuse to recognise the existence of the company or place restrictions on the continuing existence of the company, except if it is incorporated under the laws of another Member State, which recognises its continued existence. However, it was stated, probably in *obiter dictum*, in *Daily Mail* that even though Art 43 and 48 “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 (...) a company incorporated under its legislation (...). The rights guaranteed by Articles 52 et seq. (today; Articles 43 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”<sup>62</sup>. This statement did not affect the ruling in that specific case but was later used as a *ratio decidendi* in for example the *Marks & Spencer* case.<sup>63</sup> It was also used in the *ICI* case<sup>64</sup>, where a tax relief, only applicable to companies resident and

---

<sup>61</sup> C-107/83 *Klopp* [1984] ECR 2971, para 17.

<sup>62</sup> *Daily Mail*, para. 16.

<sup>63</sup> C-446/03 *Marks & Spencer plc v David Halsey (Her Majesty’s Inspector of Taxes)* [2005] ECR I-10837, para 31.

<sup>64</sup> C-264/96 *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty’s Inspector of Taxes)* [1998] ECR I-4695, para 16.



conducting their main activities of the controlling entities in the UK, was considered as incompatible with freedom of establishment.

The abovementioned quote shows incitements that as clear as it has been that Member States can place restrictions on companies wanting to transfer *from* that Member State, but not on companies transferring *to* it, there is now a tendency in not making the same sharp distinction between cases of emigration and immigration, but instead treat emigration cases as similar to immigration cases.

### **3.7 Concluding Remarks on the Discussed ECJ Case Law**

It is apparent from the case law discussed in the previous chapters that any person, natural or legal, who is a national of a Member State has the right to choose where it wishes to establish itself. It is immaterial whether the reason for that choice is that they consider the legal framework of that particular State to be the most advantageous or if they have intentions to conduct their main activity through secondary establishments in a different State. If an establishment has been incorporated under the law of a Member State any other Member State must recognise the legal capacity of that establishment.

It can be said that the freedom of establishment is considered a very fundamental right of great importance in order to be able to create a common market within the Community. Even though, there are some restrictions, further discussed in the following chapter, that are exempted and it remains to be seen if there will be a change regarding the restricted transfer of primary establishments, it is evident that the ECJ has given Art 43 and Art 48 a vast interpretation and so far only restrictions on the transfer by a company from a Member State have been considered by the ECJ to be justified.

# 4 Restrictions on the Freedom of Establishment

As shown above, the freedom of establishment is a very strong and fundamental right granted to companies in the EU. The ECJ has found that even in cases, where it is clear that the sole purpose of a certain incorporation has been to circumvent the rules and regulations of one Member State, such an act is not to be considered as abuse of the freedom of establishment. According to the ECJ it is rather the purpose of the freedom of establishment to be able to freely choose where to establish.<sup>65</sup>

There are however some allowed restrictions on the freedom of establishment which will be described below. The central question is what Member State interests that could be considered by the ECJ as more important than the purpose to strengthen the inner common market.

## 4.1 Art 46

Art 46 allows Member States to lay down laws, regulations or take administrative measures that restricts the freedom of establishment, in so far as it is called upon by public policy, public security or public health.<sup>66</sup> So far, the ECJ has in its rulings repeatedly concluded that the exceptions laid down in Art 46 have not been applicable, but not specified when restrictive measures taken by Member States can be justified by Art 46, hence it is uncertain if there is actual cases that the ECJ would find to be covered by that exception.

## 4.2 Fraud and Abuse

As shown in *Centros* and *Inspire Art*<sup>67</sup> the prevention of fraud and abuse can justify restrictions on the freedom of establishment. In both cases the ECJ treat the question of fraud and abuse in connection with the security of public creditors, but nothing in the rulings implies that fraud and abuse would not be able to justify restrictions on the freedom of establishment even in cases concerning other matters.

Member States are entitled to, under the consideration of the purpose with the rules concerning freedom of establishment<sup>68</sup>, take actions in order to prevent its nationals from improperly evading national law or refer to Community law with the purpose of acting fraudulent or abusive.<sup>69</sup>

---

<sup>65</sup> *Centros*, see chapter 3.2.

<sup>66</sup> Art 46(1), EC Treaty.

<sup>67</sup> See chapter 3.2 and 3.4.

<sup>68</sup> *Centros*, para 25.

<sup>69</sup> Looijestijn, A-C, *Have the dikes collapsed? Inspire Art a further breakthrough in the freedom of establishment of companies?* p 393.

The ECJ made clear in the *Centros* case that the main purpose of Art 43 and 48 is to make it possible for companies, incorporated in accordance with the law of a Member State, to conduct activity in another.<sup>70</sup> Further, it was clarified in *Inspire Art*<sup>71</sup> that the question on existence of abuse has to be considered in every case individually. Meaning that, a Member State can only take action against abuse or fraud when it has been established that fraud or abuse is present in the particular case and Member States can therefore not take general measures in order to prevent fraudulent or abusive acts.

### 4.3 The Gebhard-test – the Rule of Reason

The ECJ has in the above-mentioned cases repeatedly stated that an overriding reason relating to the public interest, such as the protection of creditors, minority shareholders, employees, or fiscal interests<sup>72</sup>, can justify restrictions on the freedom of establishment. For national rules and measures that impose restrictions on the freedom of establishment to be justified it is necessary that they comply with the so called *Gebhard-test*, which means that they are *applied in a non-discriminatory manner*; they are *justified by imperative requirements in the public interest*; they are *suitable for securing the attainment of the objective which they pursue*, and *not go beyond what is necessary in order to attain it*.<sup>73</sup>

The Gebhard-test has developed from the well-known judgement in the *Cassis de Dijon* case<sup>74</sup> according to which limitations on the free movement of goods may be justified for reasons related to the public interest if they do not go beyond what is necessary to attain the goal of public interest.

In none of the above-mentioned cases did the ECJ find the measures to be justified in accordance with those requirements and the question of when these requirements are considered to be fulfilled and consequently can justify restrictions on the freedom on establishment remains unanswered.

---

<sup>70</sup> Ibid. para. 26.

<sup>71</sup> *Inspire Art*, para. 105 and para. 143.

<sup>72</sup> See for example Ibid. para. 132 and 135 and *Centros* para. 34-37.

<sup>73</sup> The so-called *Gebhard-test*, see C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, para. 32, and C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 37.

<sup>74</sup> C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

# 5 Will There Be a Race to the Bottom?

By giving an extensive interpretation to the rules of freedom of establishment the ECJ opened up for the possibility for any national of a Member State, who wishes to establish itself within the EU to go *forum shopping*<sup>75</sup>, that is to find and choose to establish in the Member State with the, from his/her point of view, most profitable legal framework.

Forum shopping may have the consequence that the Member States start to compete amongst each other, developing more liberal company laws in order to get as many companies as possible to establish within their State. Some legal scholars claim that this will lead to an undermining of company laws within the EU – known as *the race to the bottom*.<sup>76</sup> Such an outcome has been seen in the USA, where more than 50 percent of all the companies are registered in the state of Delaware.<sup>77</sup>

## 5.1 The Delaware-effect

Since the delivery of the judgement in the *Centros* case there has been a debate between European legal scholars as to whether the EU is facing a development similar to the one in the USA. Such a development is often referred to as a *race to the bottom*, meaning that a regulatory competition is initiated and followed by more lenient company laws that only will benefit the interests of the founders and directors and not shareholders, workers etc. In the following sections it will be discussed if it is likely that regulatory competition will occur within the EU and if so if such a regulatory competition will lead to a Delaware-effect.

### 5.1.1 The *Delaware-effect* – a Background

The states of the USA apply the incorporation theory, meaning that nationals can freely choose a state, which ever they find has the most attractive company laws and establish themselves there, while conducting their main activity elsewhere.<sup>78</sup> It is even possible for founders of companies

---

<sup>75</sup> I am conscious about the fact that “forum shopping” traditionally refers to the process by which a plaintiff chooses among two or more courts that have the correct jurisdiction and venue to consider his/her case. But I have decided to use forum shopping in this thesis as referring to when founders or decision makers of companies chooses between the laws of different Member States when setting up a primary or secondary establishments.

<sup>76</sup> Sevrinsson, D. *EG:s etableringsrätt för bolag*, p 86f. and Søndergaard. B, H, *The fear of the Delaware-effect, the american demon?* p 247.

<sup>77</sup> <http://www.corp.delaware.gov/aboutagency.shtml> 21<sup>st</sup> of October 2008.

<sup>78</sup> McCahery. A, J. and Vermeulen, P.M., E, *Does the European Company Prevent the “Delaware-effect”?*, p 7.

to incorporate under the laws of one state and later re-incorporate under the laws of another. This has led to a competition where the states constantly revise their company laws in order to attract as many companies as possible.<sup>79</sup> New Jersey and Delaware were the first two states, in the late 19<sup>th</sup> century, to adopt modernised general incorporation statutes and eventually, in 1920, Delaware was the leading incorporation state in the USA. Since then it has kept its leading role, hence - *the Delaware-effect*, and has developed a great judicial expertise and extensive case law within the field of company law.<sup>80</sup>

### 5.1.2 Forum Shopping

As mentioned, it is possible to forum shop within the EU, save as not transferring the company's registered seat, and as has been shown,<sup>81</sup> even if it is uncertain to what extent, forum shopping actually occurs. When natural or legal persons, who are nationals of a Member State wish to establish themselves or to set up secondary establishments they can freely choose where to do so. Most likely, they will choose to establish in the Member State that they find most advantageous. Affecting the choice of where to establish is the general company law of a Member State, but also, *inter alia*, the procedure and minimum share capital connected with the establishment as well as taxation, protection of minorities and creditors and an attractive location, worker conditions and, in my opinion, different companies emphasise on different things when establishing. For example, if the founders of the establishment are shareholders in majority there is an imminent risk that they will choose to incorporate in a Member State where the rights of shareholders in minority are put aside and where they will remain in control of the company, whereas the situation will be the reverse if the founders are shareholders in minority. Other factors that play a great role when choosing where to establish are existence of qualified workforce, accessibility of raw materials as well as labour law and environmental law.<sup>82</sup>

### 5.1.3 Regulatory Competition

In order for any competition to occur there has to be a supply and a demand side. In order for regulatory competition to occur there must be a possibility to choose applicable law by choosing the place of either incorporation or re-incorporation, i.e. demanding advantageous company laws. At the same time company law makers must be willing to supply laws, that will be considered by founders and directors (since directors in many cases make the decision or have a great impact on the decision where to establish) as

---

<sup>79</sup> Søndergaard, B, H, *The fear of the Delaware-effect, the american demon?* p 245.

<sup>80</sup> McCahery, A, J. and Vermeulen, P.M., E, *Does the European Company Prevent the "Delaware-effect"?*, p 7 et seq.

<sup>81</sup> See chapter 3.

<sup>82</sup> Kieninger, E-M, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared - Part II/II*, p 742.

advantageous.<sup>83</sup> Therefore - with the possibility for founders and directors of establishments to choose under what regulatory framework to establish comes the incentive for Member States to compete for the most profitable regulations and thus attract more companies.

In my opinion the supply and demand sides are based on a “win-win-situation”, that is - the companies will not choose to incorporate under the legislation of a State if it is not beneficial enough and the State will not make an effort to attract companies if the benefits with doing so will not outweigh the disadvantages.

#### **5.1.4 Consequences of Forum Shopping and Regulatory Competition**

There are different views on whom the regulatory competition benefits - the shareholders or the directors? Does regulatory competition make individual states adapt their laws into legislation that enables companies to optimise shareholder investments or into legislation that is more favourable to directors than to shareholders? Does forum shopping and regulatory competition lead to a “*race to the bottom*”, “*a race to the top*” or neither?

##### **5.1.4.1 Race to the Bottom**

Some legal scholars oppose competition and advocate an increase in company regulation at federal level, in fear that company law will be more beneficial to directors than to shareholders if regulatory competition becomes a fact.<sup>84</sup>

In the USA the general assumption is that the directors of the company make the actual decision on re-incorporation and consequently, the directors will choose to re-incorporate in the State that, from their point of view, offers the most favourable legislation. In the USA this has had the consequence that states are trying to create company laws that are attractive to the company decision-makers and, according to those advocating an increase in company regulation at federal level, finally an undermining of company laws.<sup>85</sup>

##### **5.1.4.2 Race to the Top**

Other legal scholars are of the same opinion – that regulatory competition will lead to an undermining of company laws but they, on the other hand, see this resulting in company laws more beneficial to company shareholders than to directors. They are of the opinion that the company directors will, controlled by market forces, seek to maximise values for both shareholders and directors and thus choose to re-incorporate in the State that, according to them, meet with those requirements. Would the management be poor, the price on the shares of the company would decrease and the risk of a hostile

---

<sup>83</sup> Op. cit.

<sup>84</sup> Søndergaard, B, H, *The fear of the Delaware-effect, the american demon?* p. 247.

<sup>85</sup> Op. cit.

takeover, where new directors will be appointed, will increase. The directors of companies will therefore try to maximise the earnings of the companies, which is naturally followed by an increase in the value for the shareholders. Correspondingly, the Member States will compete to offer optimal, value maximising legislation, beneficial to both directors and shareholders.

## **5.2 Is the Future of the EU Comparable to the Present Situation in the USA?**

Looking at the USA and the EU they, *prima facie*, are similar. They both consist of states with their own legislation at national/state level, provided that the legislations are compatible with EU law/national law. The USA and the EU have a system with individual states where the states/Member States have the power to regulate company matters, save as in the EU, within the framework of directives.<sup>86</sup> As mentioned above<sup>87</sup> the incorporation theory is applied throughout the USA as well as in many Member States of the EU but, the application of the real seat theory in the EU is still widespread. Many Member States today apply the real seat theory and fear, since the ECJ one time after another has broadened the meaning of the freedom of establishment, that forum shopping will be possible without any restrictions, neither to secondary establishments, nor to primary. What the future rulings of the ECJ will bring regarding the possibility to establish freely remains to be seen, however, further a description of possible outcomes would the freedom to establish in any Member State become unrestricted will be given.

The following sections will discuss the differences and similarities between the EU and the USA in order to determine whether the formal and statutory frameworks as well as the incentives for Member States to compete are directly comparable.

### **5.2.1 Differences Between the USA and the EU**

#### **5.2.1.1 Incorporation and Re-incorporation**

The first and most legible difference between the EU and the USA is that within the USA all formal and statutory rules allow forum shopping in the situation of both incorporation and re-incorporation. Re-incorporation, that is when the company transfers its registered seat from one Member State to another while retaining its identity, is only possible within the EU if it follows from national law, in any other case the company will be seen as dissolved in the State of origin and for one thing be liable to pay tax as if it was liquidated.

When incorporating a company, within the USA as well as in the EU, the promoters have to choose where to incorporate the company. Potential

---

<sup>86</sup> Ibid. p 244.

<sup>87</sup> See chapter 4.1.1.

shareholders will have the information about where the company is incorporated and thus they will know what rules will apply to the company and with that information decide whether to subscribe on shares in a company incorporated in that state/Member State. This safeguards the shareholders from the situation where a company might transfer its registered seat and therefore become subject of the law of another state/Member State. It does not, however, protect the shareholders from the situation where the State of origin weakens its company law in order to attract more companies.<sup>88</sup>

With the possibilities of being able to re-incorporate, which has the consequence that the company will no longer be subject to the law of the State of origin but to the law of the State of re-incorporation, comes the possibilities for company founders and directors to change applicable law without agreement from the shareholders. Such a scenario enables the founders and directors to look after their own interests and not those of the shareholders, meaning that with re-incorporation comes the risk of insufficient protection of shareholder interests.

In the USA there is a predominant tendency of having diversified ownership, where it is fairly easy for the owners to affect the directors of the company to collectively agree on one matter, while it is harder for the shareholders and this gives the directors of the company a great power when choosing where to re-incorporate. In the EU, however, the ownership is usually, save as the UK is not included, concentrated, which means that ownership and control is merged.<sup>89</sup> Therefore, protecting the shareholders against the acts of the directors will not be a problem within the EU, would re-incorporation become possible. The problem will be to ensure that majority shareholders do not act opportunistically at the expense of interests of minority shareholders. This may be the case if no rules on voting ceilings apply and a majority shareholder owns a proportion of shares that is sufficiently large to vote in favour of a re-incorporation from which he will benefit or use his votes to appoint directors that are likely to act in accordance with what the majority shareholder wishes.<sup>90</sup>

### **5.2.1.2 Other Factors of Significance in Connection with Re-incorporation**

If re-incorporation would become possible within the EU, there are several other differences between the USA and the EU which, in my opinion, makes it less possible that a Delaware-effect will occur within the EU.

There are the obvious differences that in the USA there are no language differences and no, or very small, cultural and economic differences between the states and within the EU there are significant differences between the languages spoken in and the cultures and the economics of the

---

<sup>88</sup> Søndergaard, B, H, *The fear of the Delaware-effect, the american demon?* p 252 et seq.

<sup>89</sup> Neville, M, *Ejerstruktur och Corporate Governance*, p 72 et seq.

<sup>90</sup> Engsig Sørensen, K and Neville, M, *Corporate Migration in the European Union*, p 200 et seq.



various Member States. Problems may arise for example in legal matters. Since not many national laws can be found in other languages than the national language of the Member State in question the communication between the company and the legal advisers will occur in a foreign language, which may lead to complications as to interpretation and understanding, a risk that may increase even more if the cultures differ. Further, there are two differences of great significance between the USA and the EU. First, which will be discussed below in chapter 6, there is the harmonisation process of company law within the EU that has been taking place and most likely will continue to take place. Even if that process is taking place very slowly and today leaves a great opportunity for competition to occur in many areas, it is a fact that harmonisation within the EU is taking place, contrary to what has happened and is happening in the USA. Second, even if the harmonisation process would cease to continue, the fact that legal expertise and case law concerning newly created laws in the Member States will be undeveloped, compared to the experience of over a hundred years in Delaware, will also create a hindrance to the development of regulatory competition.

#### **5.2.1.2.1 Incentives for Member States to Compete**

The main reason to why states in the USA have entered regulatory competition is to a great extent fiscal, due to the fact that a *franchise tax* is paid by companies to the state of incorporation<sup>91</sup>, but a similar tax<sup>92</sup>, as well as a registration fee exceeding the real cost<sup>93</sup> is prohibited within the EU. Even if the income of the franchise tax is undisputedly the main reason to why regulatory competition began and still is taking place in the USA<sup>94</sup> and similar measures are prohibited within the EU it does not mean that the establishment of companies would not mean an income to the State of incorporation – a company is liable to pay tax on its income. Where the tax will be paid is today determined either by where the company is registered or where the main activity of the company takes place or, as in some Member States, where both criteria are applied. If both criteras are applied a company may be fully liable to pay tax in the Member State in which it is has its registered seat. However, the Member State, in which the company has its source of income, is entitled to, conferred by a double taxation convention, levy tax on a substantial part of the income earned in that Member State. A company liable to pay tax in two Member States is usually considered to be resident in the Member State in which the company has its registered seat according to the provisions of a double taxation convention,

---

<sup>91</sup> Ibid. p 766.

<sup>92</sup> Directive 69/335/EEC of July 17, 1969, Art. 2 (1) and Art. 10(a).

<sup>93</sup> C-71/91 and C-178/91 *Ponente Carni Spa et al. v Amministrazione delle finanze dello stato* [1993] ECR I-1915, para 41 et seq. C-188/95 *Fantask A/S et al. v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783 and C-56/98 *Modelo SGPS SA v Direcção-Geral dos Registos e Notariado* [1999] ECR I-6427.

<sup>94</sup> Søndergaard. B, H, *The fear of the Delaware-effect, the american demon?* p 246.

and thus that Member State will have the right to levy tax on the income of that company.<sup>95</sup>

Further, company incorporation brings the source of revenue that derives from the expansion of for example accountants, financial business, law firms, etc. that follows with new incorporations.<sup>96</sup> Expanding the workmarket is one very important incentive for States to compete for company incorporation, but the question is whether that one incentive, together with the income tax, without the financial benefits of for example franchise tax, is enough reason for the States to weaken their company laws to that extent that it leads Member States to create company laws where only the interests of the directors and not the shareholders are considered.

Since franchise tax and registration fees are not allowed within the EU and double taxation is regulated, the fiscal reasons, which are mainly the base for the regulatory competition in the USA, are not as prominent in the EU and therefore the States within the EU will not have the same strong incentives, as the states in the USA, to compete.

#### **5.2.1.2.2 Different Objectives of Company Law**

In the EU the stakeholder perspective has traditionally been prevalent compared to the USA, where the shareholder perspective has had the leading role, meaning that different subjects are centre of the discussion regarding a possible weak protection that might follow from regulatory competition. In the USA the purpose of the companies is to generate a profit to the shareholders of the company and hence the American company laws are designed to protect the shareholders while EU company laws are designed to protect all the stakeholders in the company.

A wish to keep a strong protection of all stakeholders may have an impact on whether States decide to compete or not. Overall, the view on regulatory competition in the EU has been negative, which likely will have the consequence that Member States will be reluctant to enter into regulatory competition. Should, however, a Member State decide to compete there is nonetheless the risk that the interest of the stakeholders might not be preserved.<sup>97</sup>

---

<sup>95</sup> Søndergaard, B, H, *The Fear of the Delaware-effect - the american demon?* p 266.

<sup>96</sup> Kieninger, E-M, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared - Part II/II*, p 766.

<sup>97</sup> Op. cit.

## 5.3 Concluding Remarks on the Race to the Bottom

This chapter has clarified that regulatory competition in the field of company law has generally been considered as negative in the EU and parallels are often drawn to the American Delaware-effect.

As shown above there are differences between the EU and the USA that most likely will have the consequence that regulatory competition will be less intense in the EU than in the USA. It has also been shown that, as long as re-incorporation within the EU is not possible the focus of the discussion should be the problems and risks with forum shopping and regulatory competition that are related to incorporation of a company and not re-incorporation. The problem with scanty protection for shareholders is not present as long as the shareholders are aware of what rules apply to the company at the time of choosing to subscribe for shares in that company. Of course, the comparison with the American Delaware-effect is of relevance in so far as the judgement in the *Cartesio* case<sup>98</sup>, or any other case or Regulation in the future, would make re-incorporation possible, but there are still a lot of differences speaking for an outcome different in the EU than that in the USA.

There is the difference of diversified ownership structure, predominant in the USA and concentrated ownership structure, predominant in the EU. The problem with directors choosing to re-incorporate in the State that he finds most beneficial to him is not an issue in the EU. Most States apply a structure of concentrated ownership, which instead would have the equally serious consequence that majority shareholders act opportunistically at the expense of minority shareholders, a problem that may be solved through rules on voting ceilings.

The premium reason, in my opinion, to why I find it unlikely that the intensity of the regulatory competition in the EU will be as strong as that in the USA, is, in combination with other differences such as language barriers and the overall negative attitude towards regulatory competition, that the main reason to why states in the USA compete<sup>99</sup> - the income of the franchise tax is not present in the EU -. However, it is worth stressing that even though there are many differences there are also similarities and with those comes the risk of facing a future similar to the American. Due to the fact that there are both differences and similarities it is hard to accurately predict whether the risks in connection with re-incorporation will be the same in the EU as in the USA.

I would, if free to speculate, say that there are incentives pointing to a direction where, would re-incorporation become possible and provided that

---

<sup>98</sup> C-210/06 *Cartesio Okotaó és Szolgáltató Betti Társaság*, case pending.

<sup>99</sup> Søndergaard. B, H, *The Fear of the Delaware-effect - the american demon?* p 268.

full harmonisation of company laws will not take place, regulatory competition and forum shopping will become a fact. From my point of view, the incentives for Member States to compete are not as strong as in the USA and regulatory competition, overall, has been looked upon negatively within the EU, therefore the extent to which regulatory competition will take place within the EU will not be as fierce as in the USA, if noticeable at all.

## 6 Have the Judgements in *Centros*, *Überseering* and *Inspire Art* Led to Regulatory Competition within the EU?

The decisions of the ECJ in the *Centros*, *Überseering* and *Inspire Art* cases<sup>100</sup> placed restrictions on the use of the real seat theory and as a repercussion, legal scholars predicted a regulatory competition between the Member States to begin. The regulatory competition would, *inter alia*, lead to liberalisation on minimum share capital requirements and the rules regarding capital maintenance.<sup>101</sup> Today, it has only been nine years since the ruling in the *Centros* case was delivered and this might be a too short of a time-span to draw final conclusions on to what extent the previously mentioned rulings have led to regulatory competition.

Not to be disregarded, it can be noted, that a few Member States have introduced new company forms. For example, France has introduced a new way to form the *Société à Responsabilité Limitée* (translates “Society with limited liability”), which normally has a minimum authorised capital of 7500€ Since 2003, it is possible to found the new form of *Société à Responsabilité Limitée* within 24 hours and with a minimum authorised capital of 1€ Formalities around the incorporation have been minimised and the newly founded companies benefit from tax reductions and social contributions within the first years of its existence.<sup>102</sup>

A legislation similar to the latter French one was introduced in Spain approximately at the same time as that in France. The Spanish *Sociedad Limitada Nueva Empresa* (translates “Limited Liability New Business”) needs, in contrast to the similar French version, a minimum authorised capital of 3012€ and a maximum authorised capital of 120 200€

It is evident that these new company forms are subject to rules more lenient than their precursors. However, nothing in the preparatory work of the legislations indicates that the legislations were created in order for the States to take part in regulatory competition, but rather that they were designed with a purpose to encourage the start-up of small and medium sized companies.<sup>103</sup>

---

<sup>100</sup> See chapter 3.2 – 3.4.

<sup>101</sup> Kieninger, E-M, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared - Part II/II*, p 766.

<sup>102</sup> Op. cit.

<sup>103</sup> Ibid. p 768.

A company law reform is taking place in the UK. The law reform is explicitly taking place in order to make the UK more attractive to foreign companies and hence, more competitive in comparison to other Member States.<sup>104</sup> What effect the company law reform in the UK will have remains to be seen after the reform process, which has been taking place for several years, is finished. At this stage, it is premature to say if it actually will encourage other Member States to enter into the competition or if the changes made will even be enough to make the UK more attractive, than it is today, to foreign companies.

Evidently, after the judgement in *Überseering* founders of small and medium sized companies have taken advantage of the possibility to establish in Member States other than that of their domicile due to, *inter alia*, differences in minimum capital, access to raw materials and labour, etc. To what extent forum shopping is taking place amongst founders of small and medium size companies I have found no numbers on, what is clear is only that, it does not take place in the majority, or even close to the majority of cases of incorporation or setting up of branches, subsidiaries or agencies.

At the same time as the judgements delivered by the ECJ in cases concerning freedom of establishment have had an impact on the incorporation of small and medium sized companies, the judgements have had a small effect on publicly held, listed companies. This, most likely because of the previously mentioned reasons<sup>105</sup> and because the harmonisation process, that primarily concerns publicly held companies, has left Member States with small possibilities to deviate from Community company law in that specific area.<sup>106</sup>

The result of the decisions of the ECJ has been that the “demand side”, that is the companies, so far mostly small and medium sized companies are forum shopping, even if not to a great extent. The “supply side”- the Member States, on the other hand, apart from the UK, have not started to change company laws in order to meet the demands of companies. The companies solely forum shop based on the differences in company laws that already exists between the Member States and so far, the feared race to the bottom has not been visible.

---

<sup>104</sup> <http://www.berr.gov.uk/aboutus/corporate/performance/strategic-programme/index.html>, 11<sup>th</sup> of November 2008.

<sup>105</sup> See chapter 5.

<sup>106</sup> Kieninger, E-M, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared - Part II/II*, p 770.

# 7 Harmonisation of Company Law within the EU

In the 1960's, a harmonisation process of the company laws, with the purpose to create a common minimum standard in the national company laws of the Member States within the EU (at that time, the EEC) began. Since 1968, when the first Council directive<sup>107</sup> was adopted, the Commission has drafted proposals to directives, *inter alia* directives concerning mergers, branches, accounting, capital, etc.<sup>108</sup>

## 7.1 The 10<sup>th</sup> Company Law Directive

After a lot of resistance, the 10<sup>th</sup> Directive on cross-border merger<sup>109</sup> was adopted by the Council of Ministers in 2005 and it should have been transposed by Member States no later than December 2007.<sup>110</sup> The main objective of the 10<sup>th</sup> Company law Directive is to make mergers between limited-liability companies across Member State borders substantially easier by overcoming obstacles otherwise caused by different national laws.

In accordance with the legal framework the mergers can only occur under a number of limitations, nonetheless, it is a part of the harmonisation process. It is premature to say if the 10<sup>th</sup> Company law Directive will have the actual effect that limited liability companies will make use of the possibility to merge cross-border or if the extent to which cross-border mergers will take place will remain more or less unchanged.

## 7.2 The European Economic Interest Grouping

The Regulation on the European Economic Interest Grouping<sup>111</sup> (EEIG) entered into force in 1989 and made it possible for companies, firms and other legal entities, governed by public or private law, which have been formed in accordance with the law of a Member State and which have their

---

<sup>107</sup> First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

<sup>108</sup> Skog, R, *Harmoniseringen av bolags- och börsrätten inom EU- ny vind i seglen*, p 332.

<sup>109</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (further referred to as the 10<sup>th</sup> Company law Directive).

<sup>110</sup> [http://www.workerparticipation.eu/company\\_law\\_and\\_cg/company\\_law/cross\\_border\\_mergers\\_10th](http://www.workerparticipation.eu/company_law_and_cg/company_law/cross_border_mergers_10th), the 5th of November 2008.

<sup>111</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

registered office in the Community to develop certain joint activities without having to merge or set up a jointly owned subsidiary. An EEIG can move from one State to another by deregistering in the State of origin and later register in the State of arrival.<sup>112</sup> The law applicable to EEIGs is the “internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping”<sup>113</sup>.

The purpose of making EEIGs possible was to facilitate cross-border mergers and to make the common market stronger.<sup>114</sup> Today there are about a thousand EEIGs, mainly formed to reduce the costs of purchases and development and to strengthen the competitiveness toward new and existing clients.<sup>115</sup> EEIGs can be a good alternative for large investments, calling for combined resources. It is beneficial in areas of for example marketing and public procurement, but even with the EEIGs there is still a lot to wish for in the area of company law harmonisation. An individual company with no interest in cooperating but with the wish to move its registered seat will not gain anything from an EEIG, but would be able to draw benefits from the 14<sup>th</sup> Directive on Company Law<sup>116</sup> (described below), would it be adopted, in other words, it is necessary for such a company that re-incorporation is possible.

I would say that the EEIGs constitute a positive element in strengthening the common market. However, the Regulation<sup>117</sup> is very restrictive, most important, an EEIG cannot have as its purpose to make a profit.<sup>118</sup> Because of the restrictive objectives of EEIGs it is not, nor do I see that it will be, a popular business form, nor do I consider it to be a valuable alternative to full harmonisation of EC company law.

## 7.3 Societas Europaea – The European Company

In 1970, the European company, also known as the Societas Europaea, or the SE, was suggested as a business form that allows firms, operating in at least two Member States to re-incorporate. The Regulation on the Statute for a European company<sup>119</sup> was not adopted until approximately 30 years after

---

<sup>112</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), Art 13f.

<sup>113</sup> Ibid. Art 2 para. 1.

<sup>114</sup> Ibid. The preamble.

<sup>115</sup> <http://www.euroinfo.se/ny/hem/foretagsetablering/skrivyta/fordjupning.html> 4<sup>th</sup> of November 2008.

<sup>116</sup> Proposal on a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies.

<sup>117</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

<sup>118</sup> Ibid. Art. 3.

<sup>119</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).



the proposal was made. A European company can move its registered seat from one Member State to another without having to dissolve in the first one<sup>120</sup>, meaning that it will keep its legal status after the transfer. The purpose of the European company is to create a unified European public limited-liability company form in order to facilitate economic cross-border activity.<sup>121</sup>

The European company may only be formed by already existing national legal persons<sup>122</sup> but is at the moment the only company form within the EU that can move its registered seat without being wound up or losing its legal personality.<sup>123</sup>

The rules of the Regulation<sup>124</sup> are often considered as very complex and often refer to national law and that has the consequence that the European company form is not uniform but instead characterized by the Member State in which the registered seat of the company is situated.<sup>125</sup> The Regulation set up rules on how to conduct the activity but the daily activity is still governed by national law. Another problem is the lack of supranational tax legislation. A European company has to pay tax in, and in accordance with the laws of, the Member States in which it conducts activity.<sup>126</sup>

One of the clear benefits with the European company form is that European companies can transfer their registered seats. Nonetheless, I am dubious to what extent, and nothing in the Regulation<sup>127</sup> indicates that, the European company form is the solution of the problems concerning company transfer, however, it is one step forward in the process of creating a common inner market.

## 7.4 The 14<sup>th</sup> Company Law Directive

As made clear in the previous pages, a company's right to freedom of establishment is limited by the ECJ case law and the collision between the real seat theory and the incorporation theory. Only a few Member States admit a company to change nationality while still keeping its original legal identity.<sup>128</sup>

---

<sup>120</sup> Ibid. Art 8.

<sup>121</sup> Werlauff, E, *SE-selskabet - det europaeiske aktieselskab*, p 112.

<sup>122</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), Art. 2.

<sup>123</sup> Ibid. Art 8. para 1.

<sup>124</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>125</sup> Dejmek, P, *Den europeiska bolagsrätten – igår, idag och imorgon. En analys av de senaste utvecklingen med särskild tonvikt på direktivet om offentliga företagsuppköp*, p 603.

<sup>126</sup> Goulet, K, *Europabolaget*, p 311 et seq.

<sup>127</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

<sup>128</sup> Engsig Sørensen, K and Neville, M, *Selskabers nationalitetsskifte*, p 37.

Among the proposals on Directives the Commission has been working on the 14<sup>th</sup> Directive on Company law<sup>129</sup>, which, would it come into effect, will make it possible for companies to transfer their registered seat from one State to another without dissolving in the first State. The 14<sup>th</sup> Company law Directive contains rules designed to protect the stakeholders in the company from the consequences, discussed in the previous chapters, that might come with the possibility to re-incorporate. In practice, these rules might make a transfer of a company's registered seat a complicated procedure<sup>130</sup>, but nonetheless, they would make such a transfer possible.

The 14<sup>th</sup> Company law Directive has not been adopted because the Member States have been divided on the issue of employee participation and tax consequences.<sup>131</sup>

Today, I would say, the future of the 14<sup>th</sup> Company law Directive is depending on the outcome in the *Cartesio* case<sup>132</sup>. Would the ECJ rule making re-incorporation possible and in the judgement specify what restrictions will be applicable, the 14<sup>th</sup> Company law Directive, as drafted today, will be superfluous. Amendments will then be necessary and there is even the possibility that there will be no need whatsoever for the 14<sup>th</sup> Company law Directive. Would the ECJ rule in a way creating a *status quo* in the field of re-incorporation I am of the opinion, that, at some point, it will be necessary to adopt the 14<sup>th</sup> Company law Directive, consolidated or as drafted today.

## 7.5 Concluding Remarks on the Harmonisation of Company Law

As shown above, harmonisation is taking place in various areas in EU company law. Two specific legal entities, the European Company and the EEIG, both existing based upon EC law, are allowed to change the applicable law without losing their legal identity.

So far, I would say, the most significant step towards harmonisation and the freedom to freely choose applicable law has been the approval of the 10<sup>th</sup> Company law directive. The 10<sup>th</sup> Company law Directive prohibits the State of incorporation of a merging company to impose obstacles on such mergers and provides a framework regulation for the proceedings of that merger. The 10<sup>th</sup> Company law Directive and the European company-Regulation and EEIG-Regulation provide legal means for companies to transfer their registered office and change company law without being liquidated in the

---

<sup>129</sup> Proposal on a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies (further referred to as the 14<sup>th</sup> Company law Directive).

<sup>130</sup> Person, L, *Kan aktiebolag flytta?* p 103.

<sup>131</sup> Neville, M and Ensig Sørensen, K, *Selskabers nationalitetsskifte*, p 52.

<sup>132</sup> C-210/06 *Cartesio Okotaó és Szolgáltató Betti Társaság*, case pending.

State of origin and later having to establish yet again in the State of arrival. Together they create extended possibilities for companies wishing to exercise their right to freedom of establishment, however, they do not provide a solution to the issue regarding the freedom of establishment granted by Art 43 and 48. They provide the possibility to fully exercise this right only by mergers or by re-establishing under new company form. A company, incorporated under the law of a Member State, not willing to merge or adjust to another company form, wishing to transfer its registered seat to a Member State other than that of its origin and thereby change applicable national law without being wound-up in the first State is today left without options.

Even if harmonisation is taking place, it is doing so slowly, since Member States are unwilling, given their long tradition of independence, to relinquish their lawmaking autonomy in this area.

# 8 Analysis and Conclusion

## 8.1 Analysis

Many problems related to the transfer from one Member State to another, of a company's registered seat originate in the divergence between the use of the real seat theory and the incorporation theory within the EU. Companies wishing to transfer their registered seat between Member States run the risk of being dissolved in the State of origin, of losing its legal subjectivity and/or the risk of having to re-establish in the State of arrival. This constitutes a hindrance to the freedom of establishment granted to companies by Art 43 and 48.

As has been shown, it is not possible for Member States to refuse the recognition of a company incorporated under the national law of another Member State. Nor is it possible, without breach of Art 43 and 48, to refuse the establishment of a branch, agency or undertaking of such a company. A State of arrival wishing to hinder companies from establishing in its territory is left with narrow options, stemming from only a few exceptions from the general rule granting the right of freedom of establishment, while the State of origin freely can place limitations on the emigration of companies, which creates a rather controversial legal situation. On the one hand the freedom of establishment is fiercely protected by not letting Member States hinder the entrance *to* their market, while on the other hand restrictions on the freedom of establishment are fully allowed by letting Member States hinder the exit *from* their market. The reason to why seems to be a fear of a race to the bottom, with undermining of company laws as a consequence, should freedom of establishment be possible without restriction.

So far, the controversy of striving towards a common inner market while having two theories applicable to the same phenomenon has not been solved. The ECJ has delivered rulings, which legal scholars mean, speak in favour of the use of the incorporation theory. I am willing to agree, that even if the real seat theory is still, to some extent, in use, a tendency towards the sole use of the incorporation theory can be seen, both in the rulings of the ECJ and in the legal debate.

Before the ruling in the *Centros* case, the widespread application of the real seat theory severely restricted the possibilities for companies to forum shop. Today, which can be the most important conclusion drawn from the *Centros*, *Überseering* and *Inspire Art* cases, it is possible on the incorporation of new companies and on the setting up of secondary establishments to freely choose to establish under the company law most suitable. It is immaterial whether the economic activity of the company is conducted in the State of origin or not, just as it is immaterial if the management seat is located in the Member State where the branch is located and not the State of origin.

I do believe, that even if many Member States, such as for example Germany, are unwilling to give up their traditional use of the real seat theory, Community law has in many cases forced, and will keep forcing, them to do so. If this is the case or not is debated, clear is that, so far, the ECJ has left the question on what theory to apply – the incorporation theory or the real seat theory, without an answer.

It has been shown that the ECJ has given a wide interpretation to Art 43 and 48, nonetheless there are still uncertainties regarding what can be considered as acceptable restrictions on the purview of the Articles. The ECJ has been very moderate in accepting deviation from the freedom of establishment. It can be read from ECJ case law that restrictions on the freedom of establishment can be justified only by Art 46 or in accordance with the doctrine of overriding reasons relating to the public interest. However, the ECJ has repeatedly given, as regards the trial of proportionality and efficiency in connection with overriding reasons relating to the public interest, strict interpretations and thus it is uncertain if and how these exceptions can be applied. Member States are allowed to take measures against a company if, and only if, it can be shown in an individual case, that the company is acting fraudulent or abusive in order to circumvent the rules on freedom of establishment. So far, it has not been clarified by the ECJ what actions can be considered as fraudulent and abusive.

Although the freedom of establishment is a strong fundamental right it is not an unrestricted right – the problem of transferring the registered seat of a company has yet not been solved. If it does not follow from national law, which is very rare, a company cannot transfer its registered seat from one Member State to another. Legal scholars have expressed a concern that with possibilities to forum shop come the incentive for Member States to compete with each other creating more lenient company laws, in order to attract as many companies as possible. In the USA this has initiated a discussion that re-incorporation often has the consequence that the interests of the shareholders are overlooked, since it is likely that founders and directors of companies choose to re-incorporate in the state with, according to them, most beneficial company laws. As long as re-incorporation is not possible within the EU it is possible for shareholders to choose if they wish to invest in a company having its registered seat in a specific Member State or not, without running the risk that the registered seat of the company would be transferred and change regulatory base. Shareholders are, as the situation looks today, nonetheless not protected from the scenario where the State of origin changes its laws.

I, however, together with opposition legal scholars, find telling evidence that a Delaware-effect within the EU is not likely to happen. Would nevertheless a competition between the Member States begin it will not be of the same calibre as in the USA, since the differences between the USA and the EU are numerous. As mentioned, which is the most evident difference, it is not possible to re-incorporate a company in a Member State other than that of the company's origin. It is however, possible to forum

shop when incorporating new companies or setting up agencies, branches or subsidiaries and so far, Member States has not begun a fierce competition. If the current legal situation does not change, I do not see anything speaking for such a competition to begin. Would the pending *Cartesio* case, or any other case Directive or Regulation, make re-incorporation possible the incentives for Member States to compete are still not as strong as the reasons to why states in the USA entered into competition. In the USA, unlike in the EU, it is possible for the states to impose a franchise tax on companies incorporated in that state. Neither is it possible, lawfully, within the EU to charge any kind of incorporation fee on companies wishing to incorporate under the laws of a Member State. The income in form of company tax and the increased work opportunities may be incentives for Member States to enter into competition. In spite of these two important factors the Member States may still be reluctant to compete due to the traditional *stakeholder perspective* within the EU, the interest of all stakeholders in a company is of equal interest and value of protection. Within the EU there is also lack amongst the Member States of acting as a Union, it is positive to be part of the EU and benefit from it, but Member States are primarily acting in their own interests and are reluctant to change their national laws.

Further, in order for a Delaware-effect within the EU to take place it is necessary that company founders and directors are willing to use the possibility to forum shop. Lenient tax legislation and advantageous company laws will most likely have that effect, nonetheless the different languages and cultures and the difficulties and costs combined with establishing in a country other than that of ones origin, may impede the development of forum shopping. Though, I would say, forum shopping comes with more benefits than disadvantages and as the freedom of establishment has been given a wider interpretation more founders and directors of companies are willing to seek outside their national borders when establishing or setting up branches, agencies or undertakings.

Not to disregard, however, is that not every company in the USA is incorporated under the laws of Delaware, despite the fact that Delaware has the most beneficial company laws and efficient administration institutions. All companies are not involved in activities or transactions that benefit from a corporation or re-incorporation in Delaware and the situation would become the same in the EU. Should regulatory competition begin to take place, hence, in one way or another, the market would regulate itself. The conditions and laws differ between the Member States and even if one Member State would have very beneficial laws and regulations those laws and regulations, as well as other conditions, would not suit every company. This is provided that a Member State does not choose to form its company law in the same way as an individual contract, without mandatory rules and easy to adjust to the different needs and structures of companies, in such a case this would create a haven for companies wishing to incorporate.

As has been shown, there is a limited possibility that Member States will engage in regulatory competition. Entering the EU meant entering a long-term non-competition agreement as regards company lawmaking. I do believe that, due to scant harmonisation of company laws, the company laws of the different Member States differ and forum shopping is taking, and will continue to take place, but this does not necessarily lead to a race to the bottom. The general negative view on regulatory competition between the Member States, in combination with insufficient incitements to enter competition, will likely have the effect that Member States will not start a fierce competition in the field of company lawmaking, which diminishes the potential for a Delaware-effect to occur within the EU.

A company law harmonisation process has been and is taking place within the EU in order to facilitate company cross-border activity. It is evident that there is a need of being able to transfer companies between Member States, but none of the steps taken in the harmonisation process seems to be the solution to the problem. The EEIG has the form of a non-profit-making association, the 10<sup>th</sup> Company Law Directive only provides a possibility to transfer for companies willing to merge and the European Company form is complex due to the lack of supranational company law and tax legislation, the various rules applying to the European Companies are as many as there are Member States.

Would the 14<sup>th</sup> Company law Directive be adopted, it would be an important step in the harmonisation process toward a common inner market. A judgement from the ECJ in accordance with the opinion of the Advocate General in the *Cartesio* case would have the same effect – that companies will be able to transfer their registered seat between Member States. If it will be the one or the other that makes re-incorporation possible is of lesser interest to this thesis. It is worth mentioning though, that would it be the latter, I am of the opinion, that, it should be followed by the adoption of the 14<sup>th</sup> Company Law Directive, to provide, *inter alia*, a protection for company stakeholders and to reach harmonisation and make sure that all Member States act equally. However, so far, the process of company law harmonisation has not been very rapid or successful and consequently, today there is room for competition in numerous areas and this makes me doubt whether the ECJ will judge “in favour of” re-incorporation or not. At the same time, there seems to be somewhat a consensus among great part of legal scholars, saying that it is time for a change, and I do agree. In order for EU to become competitive and be looked upon by the rest of the great powers as unified, it is necessary that a common inner market is created to its full extent.

## 8.2 Conclusion

This thesis has shown that, following recent decisions taken by the ECJ on freedom of establishment, forum shopping at the time of incorporation of new companies and at the time of setting up branches, agencies and undertakings is taking place. So far, this has not had the consequence that

Member States has entered into regulatory competition in the field of company lawmaking. By this is not said that regulatory competition does not take place. For example, some Member States have lowered the minimum share capital for certain limited liability companies and even if the purpose of the new company forms has been to promote the start-up of small and medium size companies and not to enter into a competition to attract more companies, the latter may be a natural consequence. Not only nationals of those Member States are entitled to benefit from being able to use those company forms, but also nationals of other Member States, anything else would be discriminating and a breach of Community law. Thus, even if the explicit purpose has not been to enter into regulatory competition, it can, should other Member States follow the same example, become an indirect effect.

The UK has initiated a company law reform process with the outspoken purpose of attracting more companies to incorporate under the laws of the UK. Whether this company law reform will have that effect or not is premature to say, just as it is premature to say whether other Member States will follow. Today, no actions taken by Member States show the intention to enter into regulatory competition and I do believe that as long as the harmonisation process will proceed the negative view amongst Member States on regulatory competition will remain, if nothing else, harmonisation is one way to prevent a race to the bottom.

Even if Member States are not competing to attract companies, it is unambiguous that founders of companies and companies do forum shop. It is uncertain to what extent the forum shopping takes place, but according to what has been laid down in this thesis the number of cases where founders of companies choose to establish in their State of domicile are far more numerous than when they choose to benefit from the possibilities of forum shopping. This, however, does not make the last-mentioned cases insignificant.

As the EU today might be facing a change, where re-incorporation may become possible, legal scholars have debated whether the forum shopping would increase drastically and if it would have the consequence that Member States would initiate regulatory competition.

Founders of companies in the USA often choose to set up their company under the laws of the state where their administrative seat will be situated and if the company becomes successful they later choose to re-incorporate, i.e. move their registered seat. By doing so they do not have to pay the franchise tax in Delaware or any other state granting favourable conditions and take the risk that the business will not thrive. By the time they re-incorporate the benefits of the advantageous legislation outweigh the costs of re-incorporation. Would re-incorporation become possible within the EU this is, in my opinion a possible development. With establishing a company comes expenses. In order to save the expenses on legal investigations on where it is most profitable for that company in particular to establish and to



minimise the risk of unsuccessful business, due to language barriers and poor knowledge of the internal market within a foreign State, it is possible that many founders choose to establish in their State of domicile and when the company is sufficiently prominent they seek to transfer the registered seat of the company to a more beneficial Member State.

Would re-incorporation become possible a feasible development is that the founders that today choose to incorporate under the laws of a Member State other than that of their domicile will instead of taking a risk at an early stage in the development of the company choose to incorporate in the State of their domicile and later re-incorporate in a State with more beneficial laws.

Even if the possibilities to forum shop increase with the possibility to re-incorporate, the same obstacles, that are not present within the USA, will remain. The caution that we see amongst companies today will not disappear due to the fact that re-incorporation is possible, meaning that in the EU, we might not see as drastic rise, as could be seen in the USA in the 1920's, in the number of cases where companies will choose to re-incorporate. However, in my opinion, the forum shopping will, nonetheless, most likely increase along with the globalisation.

On the other hand, it is not the forum shopping that legal scholars are fearing, but the race to the bottom, i. e. regulatory competition with the effect that company laws within the Member States become undermined. Even if forum shopping and regulatory competition go hand in hand, regulatory competition does not seem to be in the interest of the Member States, regardless of the fact that there is a wish amongst company founders and companies to forum shop. Forum shopping is happening without regulatory competition taking place, due to the fact that the Member States have different company laws and different basic conditions for the various branches of industries. Would re-incorporation become possible, I believe that there would be a *status quo* in the reluctance of Member States to enter into regulatory competition and forum shopping would have to take place, as it has done as to this day, between the existing laws of the Member States.

The only risk, as I see it, with re-incorporation becoming possible, would be if one Member State would find the incentives for entering into regulatory competition sufficient enough to actually do so. If the UK law reform or if any other Member State will start a company law reform process that actually will have that effect remains to be seen, but would that be the case this could have the consequence that other Member States will be indirectly forced to do the same, but, from my point of view, this thesis has put forward strong arguments showing that stakeholder protection, as well as the lack of direct sources of revenue connected with company incorporation in combination with the EU non-competition perspective on lawmaking are factors likely to keep Member States from entering into regulatory competition. Further, I am of the opinion, that would Member States nevertheless choose to enter into regulatory competition, this thesis has shown that, the differences between the USA and the EU are so

fundamental, that such a competition would be less intense in the EU than in the USA. Due to the differences it is important to be aware of the fact that the problems that need to be addressed in connection with regulatory competition taking place in the EU differ from those connected with regulatory competition in the USA, regardless of on what level that regulatory competition will take place.

The harmonisation of company laws in the EU has not been very efficient and it is hard to predict whether it will have an impact on a the future, where re-incorporation might become possible.

I find what has been argued above, in combination with the ongoing harmonisation process to be incentives pointing towards a future where, as long as full harmonisation has not been reached, forum shopping will take place among the existing laws of the Member States. As long as full harmonisation is not reached and forum shopping takes place the possibility that Member States will enter into competition in the field of company law making will always exist. We will however, not see a regulatory competition as fierce as that in the USA, will it exist at all.

I do believe, that EU is ready for a change and that we are facing a future, not too distant, where re-incorporation will become possible. To what extent, Member States then will compete in company law making is impossible to predict, but I am of the opinion that the changes will be marginal and the risk that Member States will enter a race to the bottom as well as the risk that the feared Delaware-effect will arise within the EU are small, and provided that the harmonisation process will proceed I would say that they are both close to non-existent.

# Appendix

After I had finished and handed in this thesis the judgement in the *Cartesio* case was delivered. In order for the thesis to still be of relevance I decided to comment on the judgement and what consequences might follow.

As can be read in chapter 3.5 the case concerns a company incorporated under the laws of and having its seat in Hungary. The decision makers of *Cartesio* wished to transfer the registered seat of the company to Italy while keeping the legal identity in Hungary and filed an application with the Hungarian Regional Court to do so. The application was rejected on the ground that the relevant Hungarian law did not allow a company incorporated in Hungary to transfer its registered seat and still retain its legal status.<sup>133</sup>

*Cartesio* lodged an appeal with the Court of Appeal against the decision of the Regional Court. The Court of Appeal decided to stay the proceedings and referred a question to the ECJ as to whether “Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation”.<sup>134</sup>

The ECJ referred back to the statement in the *Daily Mail* case that companies are creatures of national law and exist only by virtue of the law under which they are incorporated. Further it was stated in the judgement of the *Daily Mail* case that the ECJ had taken account of the fact that the legislations of the Member States varies widely concerning *inter alia* what is considered as being a connecting factor between national territory and the incorporation of a company. National legislation also varies in respect of whether or not that connecting factor may be modified.<sup>135</sup>

Further, the ECJ in the *Cartesio* case repeated the statement made in the *Überseering* case where it was clarified that the State of incorporation may place restrictions on the transfer of the registered seat of a company from its territory. In the last mentioned case the ECJ also came to the conclusion that the question of placing restrictions on the transfer of a company’s seat from a Member State cannot be solved by the rules concerning the right to freedom of establishment but must be dealt with by future legislation. Referring back to the statement made by the ECJ in the *Überseering* case the ECJ now stated that since Community law is not uniform in the matter, the question whether restrictions to the freedom of establishment have been

---

<sup>133</sup> C-210/06 *Cartesio Oktató és Szolgáltató bt* para. 22 et. seq.

<sup>134</sup> *Ibid.* para. 40 (4) and para. 99.

<sup>135</sup> *Ibid.* para. 104-106.

placed on a company can only arise if it has been established, in the light of Art 48, that the company actually has the right to that freedom.<sup>136</sup>

Supporting on the reasoning in the judgements in the *Daily Mail*, *Centros*, *Überseering* and *Inspire Art* cases, combined with the previous mentioned reasoning, the ECJ reached the decision that “***As Community law now stands, Articles 43EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.***”<sup>137</sup>

By its judgement the ECJ yet again left the question on re-incorporation to be solved by future Community law and the judgement means a status quo in the legal situation regarding the transfer of primary establishments. Some may find this to be the correct solution as the Member States, as well as legal scholars, have not been able to reach unified opinions in the matter. I am indecisive whether I do agree - it is not up to the ECJ, as Community law stands today, to decide upon a change - or if I find the judgement to be an easy escape for the ECJ.

As mentioned in chapter 3.5.1, I do agree with Advocate General Maduro, the Community is ready for a change. In its recent judgements the ECJ has shown a tendency to judge in favour of the freedom of establishment and case law has had the tendency of moving in direction opposite to the judgement in the *Daily Mail* case. Even if, as earlier argued, it would not be likely for the ECJ to distinguish complete prohibition of company emigration from measures making company emigration more difficult Advocate General Maduro made a good point regarding the proportionality between a complete restriction and the objective the restriction aims at satisfying<sup>138</sup>. By discussing the matter of proportionality the ECJ could have opened up for the possibility that restrictive measures on company emigrations would not overall be considered as justified, but showing that situations possibly could arise when restrictive measures on company emigrations would be a breach of the freedom of establishment. This would open up possibilities for transfers of registered seats, at the same time as not letting such transfers occur without restrictions.

One can now reflect over the fact whether the judgement will impede the harmonisation process and especially the implementation of the 14<sup>th</sup> Company Law Directive. I am of the opinion that due to the statement “As Community law now stands (...)”, the harmonisation process should continue to take place without being hindered by the judgement in the case, since this statement means no actual change in the legal situation. If this will be the case or not is hard for me to predict, the statement can be seen as an

---

<sup>136</sup> Ibid. para 108. et seq.

<sup>137</sup> Ibid. para 124.

<sup>138</sup> Opinion of Advocate General Maduro in the *Cartesio* case, para 32 et seq.

argument setting back the process as well as an argument encouraging a change, as long as the change is made by Community lawmakers.

I cannot answer if the judgement will impede the harmonisation process or not but in my opinion a change is still necessary and I do believe that re-incorporation will become possible in the future. Since it is unlikely that the ECJ will overrule itself it is necessary that the 14<sup>th</sup> Company Law Directive, or a similar Law, Regulation or Directive will be adopted for this to happen. As discussed in chapter 7.4 the rules laid down in the 14<sup>th</sup> Company law Directive are complex and the Member States are still divided in the matter of employee participation and tax consequences. However, if the judgement does not mean a change in the legal situation it is likely that the 14<sup>th</sup> Company Law Directive will be adopted either in its present form or in a consolidated version, as it, according to me, is a necessary step in making the EU competitive in comparison to the other great powers.

# Bibliography

## Books

Barnard, Catherine

The substantive Law of the EU -  
The four freedoms, Second Edition  
Oxford University Press Inc. New  
York 2004  
ISBN 9780199290352

Bernitz, Ulf  
Kjellgren, Anders

Europarättens grunder, Edition 3:1  
Nordstedts Juridik AB, Stockholm  
2007, ISBN 9789139204145

Dotevall Rolf

Samarbete i bolag. Om personbolag  
Norstedts Juridik AB, Stockholm  
2005  
ISBN 9139203484

Werlauff, Erik

EC Company Law: the common  
denominator for business  
undertakings in 12 states, Jurist- og  
Økonomforbundets Forlag,  
Copenhagen, 1993  
ISBN 8757455627

SE-Selskabet – det europæiske  
aktieselskab, Jurist- og  
Økonomforbundets Forlag,  
Copenhagen, 2002  
ISBN 9788757407914

## Articles

Bogdan, Michael

Rätt att välja mellan nationella  
bolagsformer inom EU, Ny Juridik,  
1:2004, p. 7-20

Dejmek, Paulina

Den europeiska bolagsrätten – igår,  
idag och imorgon. En analys av den  
senaste utvecklingen med särskild  
tonvikt på direktivet om offentliga  
företagsuppköp, Svensk  
Juristtidning, Iustus förlag, 2002, p.  
588-607

- Engsig Sørensen, Karsten  
Neville, Mette
- Corporate Migration in the European Union, *The Columbia Journal of European Law*, vol 6, 2000, p. 181-206
- Selskabers nationalitetsskifte. *Nordisk Tidsskrift for Selskabsret*. 1999, 1, p. 37-62.
- Goulet, Katarina
- Europabolaget, *Europarättslig tidsskrift*, 4/2001, p. 299-315
- Kieninger, Eva - Maria
- The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared - Part II/II, *German Law Journal* No. 4 (1 April 2005), p. 741-770
- Looijestijn-Clearie, Anne
- Have the dikes collapsed? Inspire Art a further breakthrough in the freedom of establishment of companies? *European Business Organization Law Review* 5, 2004, p. 398-418
- McCharey, A, J.  
Vermeulen, P.M. Erik
- Does the European Company Prevent the “Delaware-effect?”, *TILEC Discussion Paper DP 2005-010*, Tilburg University, March 2005
- Mucciarelli, M.F
- Company ”Emigration” and EC Freedom of Establishment: Daily Mail Revisited, *European Business Organization Law Review* 9 (2008)
- Neville, Mette
- Aktieselskabers tillknytning, *Juristen* nr 4, 1997, p. 145-172
- Ejerstruktur og Corporate Governance, *Nordisk Tidsskrift for Selskabsret*, vol 1, 2000 p. 72-98
- Pehrson, Lars
- Kan aktiebolag flytta? *Årsbok för Europaforskning inom ekonomi, juridik och statsvetenskap*, Bernitz, Ulf m fl. (red), Nerenius & Santérus förlag 1999, p. 89-106

Roth, Wulf-Henning	From Centros to Überseering: Free Movement of Companies, Private International Law and Community Law, Oxford Journal – International and Comparative Law Quarterly, volume 52, Issue 1, January 2003, p. 177-208
Severinsson, Daniel	EG:s etableringsrätt för bolag, Juridisk Tidskrift, 2003-04, p. 69-89
Skog, Rolf	Kan aktiebolag emigrera? Balans 8-9/97, p. 20-24
	Harmoniseringen av bolags- och börsrätten inom EU– ny vind i seglen, Nordisk Tidskrift for selskabsret, 2001:3, p. 331-351
Søndergaard Birkemose	The fear of the Delaware effect – the american demon? The internationalisation of companies and company laws, Neville, M and Ensig. S, K, DJØF, Copenhagen, 2001

### **Table of Cases**

- C-115/78, *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399
- C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649
- C-107/83, *Ordre des avocats au Barreau de Paris v Onno Klopp* [1984] ECR 2971
- C-270/83, *Commission v. France* [1986] ECR 273
- C-79/85, *Segers v Bedrijfsvereniging voor Bank- en Verzekeringswegen, Groothandel en Vrije Beroepen* [1986] ECR 2375
- C-352/85, *Bond van Adverteerders and Others* [1988] ECR 2085
- C- 81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483
- C-61/89, *Bouchoucha* [1990] ECR I-3551



Joined cases C-71/91 and C-178/91, *Ponente Carni Spa et al. v Amministrazione delle finanze dello stato* [1993] ECR I-1915

C-19/92, *Kraus v Land Baden-Württemberg* [1993] ECR I-1663

C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165

C-188/95, *Fantask A/S et al. v. Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783

C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)* [1998] ECR I-4695

C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459

C-56/98, *Modelo SGPS SA v. Direcção-Geral dos Registos e Notariado* [1999] ECR I-6427

Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98  
*Finalarte* [2001] ECR I-7831

C-208/00, *Überseering BV. v Nordic Construction Co Baumanagement GmbH* [2002] ECR I-9919

C-167/01, *Kamer van Koophandel. en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155

C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)* [2005] ECR I-10837

Opinion of Advocate General Maduro in C-210/06 *Cartesio Oktató és Szolgáltató bt* (Reference for a preliminary ruling from the Szegedi Ítéletábla (Hungary), lodged on 5 May 2006, delivered on 22 May 2008

C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-000

# Treaties, Regulations, Directives and National Legislations

## **Treaties**

Treaty Establishing the European Community as Amended by Subsequent Treaties, Rome, 25 March, 1957

## **Regulations**

Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)

## **Directives**

First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital

Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (further referred to as the 10<sup>th</sup> Company law Directive

Proposal on a 14th Company Law Directive on the cross-border transfer of the registered office of limited companies

## **National Legislations**

Income and Corporation Taxes Act 1970 of the UK

Wet op de formeel buitenlandse vennootschappen, 17<sup>th</sup> December 1997, Netherlands

# Internet

<http://www.euroinfo.se/ny/hem/foretagsetablering/skrivyta/fordjupning.html>  
the 4th of November 2008

[http://www.workerparticipation.eu/company\\_law\\_and\\_cg/company\\_law/cross\\_border\\_mergers\\_10th](http://www.workerparticipation.eu/company_law_and_cg/company_law/cross_border_mergers_10th)  
the 5th of November 2008

<http://www.berr.gov.uk/aboutus/corporate/performance/strategic-programme/index.html>  
the 28<sup>th</sup> of November 2008