INTERNATIONAL COMPANY LAW IN THE EUROPEAN INTERNAL MARKET: THREE DECADES OF JUDICIAL ACTIVITY

DIREITO INTERNACIONAL EMPRESARIAL À LUZ DO MERCADO INTERNO EUROPEU: TRÊS DÉCADAS DE ATIVIDADES JUDICIAL

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ABSTRACT

In the past three decades, the European Court of Justice has issued a series of judgments in which it has interpreted the free movement of companies within the European internal market. Due to the lack of a uniform European choice-of-law rule for companies, this significant case-law sheds light on the impact of the EU law on the right of establishment on the cross-border activities of companies in the internal market and, therefore, on the relationship between that fundamental right and international company law. The present contribution is meant to introduce the reader, through a brief analysis of the ECJ case law, to the interaction of the two main choice-of-law rules in company law -the real seat and incorporation theories- with the requirements and opportunities brought about by the European internal market.

Keywords: Right of establishment, internal market, conflict of laws, international company law, ECJ, transfer of seat, real seat theory, incorporation theory, mutual recognition, restrictions to free movement

RESUMO

Nas últimas três décadas, o Tribunal de Justiça da União Europeia (TJCE) emitiu uma série de decisões que interpretaram a livre circulação das empresas no mercado interno europeu. Devido à falta de uma norma europeia uniforme sobre o conflito de leis para as empresas, esta jurisprudência significativa lança luz sobre o impacto da legislação da UE sobre o direito de estabelecimento nas atividades transfronteiriças das empresas no mercado interno e, portanto, sobre a relação entre este direito fundamental e do direito internacional empresa. A presente contribuição almeja introduzir o leitor, através de uma breve análise da jurisprudência do TJCE, à interação das duas principais normas de conflitos de leis no direito coorporativo - a sede real e teoria da incorporação

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-, assim como as exigências e oportunidades trazidas pelo mercado interno europeu.

Palavras-chave: Direito de estabelecimento, mercado interno, conflito de leis, direito internacional empresarial, TJCE, transferência da sede, teoria da sede real, teoria da incorporação, reconhecimento mútuo, restrições à livre circulação.

INTRODUCTION

Over the past three decades –from the *'Avoir fiscal'*- and *Segers*-judgments of 1986 until the *VALE*-judgment of 2012- the European Court of Justice (today: Court of Justice of the European Union; hereafter: 'ECJ') has issued a series of judgments in which it has interpreted and explained the European right of establishment for companies. The right of establishment is one of the free movement rights which physical persons and companies enjoy in the internal market, and finds its legal basis in Articles 49-55 of the Treaty on the Functioning of the EU (hereafter 'TFEU')[3].

Although the ECJ judgments in those 30 years have been given in response to national courts' preliminary references in a broad variety of cases, covering an equally broad variety of topics ranging from tax matters to formal issues of company law, these judgments have generally been interpreted as clarifying the ECJ's views on the conformity of the Member States' rules on international company law with EU law [4]. The nature of preliminary proceedings is such that the ECJ is asked to provide the referring courts with precise and useful answers to particular questions on EU law. The Court isn't invited nor expected to use this procedure to define complete and detailed theoretical frameworks, e.g. to announce a full theory of international company law within the internal market. Still, the gradual development of its case law allows to gain insight in the impact of EU free movement law on the status and cross-border activities of companies in the internal market and, therefore, in the relationship between the right of establishment and international company law[5].

For the purposes of this contribution, international company law is understood as that part of conflict of laws which holds the pertinent legal rules on the status, position and activities of companies in a cross-border context. Although the TFEU grants the EU the competence to "adopt measures (…) aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction"[6]

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[3] The Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390.

[4] BARENTS René "The Court of Justice after the Treaty of Lisbon" **CMLR**, Vol. 47, 2010, p. 726.

[5] MYSZKE – NOWAKOWSKA Mirosława. **"The role of choice of law rules in shaping free movement of companies"**. Intersentia, Antwerp, 2014, p. 166; RÖSLER Hannes, **Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts, Strukturen, Entwicklungen und Reformperspektiven des Justiz- und Verfahrensrechts der Europäischen Union.** Beiträge zum ausländischen und internationalen Privatrecht 96, Mohr Siebeck, Tübingen, 2012, p. 121.

[6] Article 81 point 2 (g) TFEU.

which is understood as the power to harmonize the Member States' rules on conflict of laws, particularly when necessary for the proper functioning of the internal market, and the EU has intensely used this power, it has never done so for international company law. In the absence of such rules, the respective ECJ judgments on the right of establishment for companies in the internal market –which is by definition a zone for cross-border movement- allow a number of conclusions on the do's and don'ts of Member State conflict of laws rules on this issue.

The ECJ appears to have deliberately seized the opportunity of the preliminary questions referred to it on the right of establishment to clarify its position on the Member States' choice-of-law approaches and their conformity with EU law. As a result, the ECJ has in no other field of conflict of laws delivered so many judgments. From *'Avoir fiscal'* to *VALE*, a line of cases has been developed upon which, through the interpretation of Articles 49 and 54 TFEU, a theory of international company law within the EU can be built. For conflict of laws, this is a *novum* as other aspects have only been touched upon disparately by the ECJ.

Apart from the judicial evolutions, the European legislator has intervened as well, in particular through the adoption of the Cross-Border Mergers Directive[7] and the Regulation on the Statute for a European Company, i.e. a company with mainly European instead of national origins[8]. Both instruments provide pertinent tools to increase the effectiveness and coherence of international company law. On the other hand, the European Commission in 2007 suddenly, and to the unpleasant surprise of many, ended its preparatory activities for a 14th company law directive on the cross-border transfer of the registered office of limited companies[9], referring *i.a*. to the evolution of the ECJ's case law on the interpretation of the Treaty provisions on right of establishment[10]. The same happened to the proposal on the Statute for a European Private Company that has been abandoned due to failure to secure the unanimity required for the proposal to be approved[11].

Taken together, the series of ECJ judgments makes clear within what precise

[7] Directive 2005/56/EC of the European Parliament and of the Council of 28 October 2005 on cross-border mergers of limited liability companies – OJ L 310 of 25.11.2005, p. 1.

[8] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) – OJ L 294.

[9] European Commission "Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office of a Company from one Member State to another with a Change of Applicable Law" (1997), doc no XV/D2/6002/97-EN REV 2,

[10] MÖRSDORF Olivier, "The legal mobility of companies within the European Union through cross-border conversion", **CMLR,** Vol. 49, Issue 2, 2012, 657-658.

[11] Proposal for a Council regulation on the Statute for a European private company COM (2008) 396/3.969 Commission Communication, Revised Presidency compromise proposal or a Council Regulation for a European Private Company, Annex to Addendum 1 16115/09 Brussels 27 November 2009, The review of the Communication – 23 February 2011, COM (2011)78 final. For further reading see: MYSZKE – NOWAKOWSKA Miroslawa "The European Private Company – Dream Big but Cautiously?" **Journal for the International and European Law, Economics and Market Integration** INTEREULAWEAST Vol.2., Issue 1, June 2015.

limits the Member States must develop and apply their choice-of-law rules. While the Court's yardstick is the internal market, which is defined by the Treaty as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (….)"[12] and which provides an elaborate framework promoting freedom of trade through the prohibition of discriminatory and non-discriminatory restrictions, the interest of these judgments goes well beyond the European Union. Its case law can indeed be a source of inspiration for other legal systems, national or international, which pursue similar goals.

One important question which will be examined on the following pages is whether this case law should be understood as the gradual elaboration of a Court-made, single European choice-of-law rule for companies in the internal market. Up till now, both the incorporation and the real seat theories, moreover with different nuances, are prominently present in the Member States' systems of private international law[13]. According to the former approach, a company is governed by the law of the country where it is incorporated; according to the latter, a company is governed by the law of the country where its real seat –i.e. the head office- is located. In practice, a number of Member States adheres to a mixed system, containing elements of both approaches[14].

Often, it is claimed that only the incorporation theory, which is said to promote private autonomy and commercial freedom, satisfies the requirements of the internal market and its focus on unrestricted freedom of movement. The main argument is based on the fact that the incorporation theory, in contrast to the real seat theory, enhances mutual recognition of companies by accepting the localization of the registered office of a company and its real seat in two different States. Many of the debates therefore center around the issue whether, and under what conditions, Member States can continue to adhere to the real seat theory which is often considered to be too much centered on state instead of private and commercial interests to survive in the internal market[15]. Of special importance in that regard is the requirement – proper to the real seat theory's purest form- that the registered office of a company and its real seat are located in the same Member State, and therefore that a cross-border transfer of the company's head office is impossible, as it necessarily implies the winding up of the company and the establishment of a new head office, and thus a new company, in the country of destination whose law will apply as the new *lex societatis*; it goes without saying that such operation is burdened by many financial and administrative requirements. Apart from the transfer of the real seat, many

[12] Art.26 point 2 TFEU.

[13] Commission's staff working document "Impact assessment on the Directive on the cross-border transfer of registered office", SEC (2007) 1707, p.9.

[14] PASCHALIS Paschalidis **Freedom of Establishment and Private International Law for Corporations** Oxford University Press 2012, p. 4 – 14.

[15] WELLER Marc-Philippe "IPR – Methodik für grenzüberschreitende gesellschaftsrechtliche Sachverhalte" **ZGR**, 2010, p. 679–705; TEICHMANN Christoph "The Downside of being a Letterbox Company" **European Company Law,** Vol. 9, Issue 3, 2012, p. 180; RINGE Wolf – Georg "Corporate Mobility in the European Union –a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition" **ECFR,** Vol. 2, 2013, p. 231.

companies in the EU are interested, mostly for legal and/or commercial reasons, to move their registered office to another country than the one where their head office is located[16]. Further, according to a recent survey, both the companies involved and many interested parties and experts strongly support the idea of the EU facilitating cross-border transfer of the registered office without loss of legal personality[17]. These and other issues have come up in the ECJ's case law.

The following pages provide a brief overview of the pertinent ECJ case law. Of course, most of the issues touched, and those which are left open by the ECJ at this stage, would deserve more attention. For that purpose, the reader is referred to the many doctrinal contributions on these matters. The present contribution is meant to introduce the reader to the gradual elaboration of some, albeit still incomplete system of conflict of laws, in interaction with the requirements and opportunities brought about by the internal market.

I. SETTING THE SCENE: *'AVOIR FISCAL'* AND *SEGERS*

Since 1986, the ECJ has interpreted the right of establishment for companies in several judgments, mostly preliminary judgments on the interpretation of (current) Articles 49 and 54 TFEU. Our overview starts with 2 judgments of 1986, whose pertinence for this subject is often ignored today but the considerations of which already hold essential elements of the ECJ's case law which have been confirmed and further detailed in later judgments.

A. *'Avoir fiscal'* (1986)[18]

In this case, the ECJ held that France, by failing to grant to the branches and agencies in France of insurance companies with a registered office in another Member State the benefit of shareholders' tax credits which insurance companies with a registered office in France enjoy, had discriminated and so restricted the rights of the former companies. '*Avoir fiscal'* indeed constituted a clear discrimination case in which the ECJ found that French law didn't distinguish between these companies where the taxing of their profits was concerned, but treated them differently, without a convincing justification, in regard to an advantage related to that taxation.

For our purposes, three of the ECJ's considerations are particularly pertinent. First, the ECJ referred to the wording of then Art.58 EEC-Treaty (today: Art.54

[16] Commission's staff working document **Impact assessment on the Directive on the cross-border transfer of registered office**, SEC(2007) 1707, p.10-11. Consultation on the cross-border transfers of registered offices of companies (January- April 2013), see http://ec.europa.eu/internal_market/consultations/2013/seat transfer/ index_en.htm.

[17] European Commission**, Feedback Statement – Summary of responses to the public consultation on the future of European company law**, July 2012, p.9-10.

[18] ECJ, 28 January 1986, Case 270/83, Commission of the European Communities v. French Republic.

TFEU), that the freedom of establishment recognized by then Art.52 EEC-Treaty (today: Art.49 TFEU) to the nationals of the Member States extends to the companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, and explicitly considered that "it is their registered office in the above-mentioned sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons"[19]. Second, the ECJ clearly held that the fact that insurance companies whose registered office is situated in another Member State are at liberty to establish themselves by setting up a subsidiary in order to have the benefit of the tax credit could not justify different treatment, as Art.52 of the EEC Treaty expressly left traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions[20]. A final pertinent point, intellectually more or less in the same vein as the former one, is the ECJ's swift rejection of the French justification ground that different measures were necessary in order to take account of the differences between the non-harmonized taxation systems and in particular to prevent tax evasion. According to the ECJ, "the risk of tax avoidance cannot be relied upon in this context. Article 52 of the EEC Treaty does not permit any derogation from the fundamental principle of freedom of establishment on such a ground"[21].

The parallels which the ECJ detects with regard to the factors which define the right of establishment's scope of application in Art.54 TFEU are both unsurprising and remarkable. The link which the ECJ creates between the three factors and the nationality of natural persons can be situated in the line of the traditional (though today mostly abandoned) attribution of nationality to legal persons, but also follows logically from the wording of Art.54 TFEU which explicitly holds that these companies must "be treated in the same way as natural persons who are nationals of Member States"[22].

Further, it is rather remarkable that the ECJ identifies these factors "as the connecting factor with the legal system of a particular State", while the Treaty itself refers to their localization "within the Union" and so distances itself from requiring a precise link with a particular Member State. As they are inserted in the Treaty, these factors in the first place serve to determine the scope of application of the companies' right of establishment and are meant to express a link with the EU as a whole and not with a particular Member State.

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[19] Point 18 of the ECJ Case 270/83.

[20] Ibidem point 22.

[21] Ibidem point 25.

[22] SCHÜTZE Robert "From Rome to Lisbon: 'Executive Federalism' in the 'new' European Union" **CMLR**, Vol. 47, 2010, p. 1396; ROTH Wulf-Henning in Dauses (Hsgr) **EU-Wirtschaftsrecht** 26 Aufl., C.H. Beck, München 2010; TEICHMANN Christoph "**Gesellschaften und natürliche Personen im Recht der europäischen Niederlassungsfreiheit**" in: Festschrift für Peter Hommelhoff zum 70. Geburtstag / hrsg. von Bernd Erle [et al.] Verlag Otto Schmidt, Köln, 2012, p. 2013; SCHÖN Wolfgang "Das System der gesellschaftsrechtlichen Niederlassungsfreiheit nach VALE" **ZGR** 2013, p. 350.

Still, this connection with a particular Member State as well as the parallel which the ECJ draws with the nationality of natural persons, sound familiar to the adepts of conflict of laws. In other words, the ECJ's interpretation of Art.54 TFEU suddenly puts the right of establishment for companies in a choice-of-law context, although the formal phrasing of this Treaty provision doesn't oblige nor even encourages it to do so.

The swift rejection by the ECJ of the justification ground found in the prevention of tax evasion and the emphasis placed upon the traders' freedom of choice shed light on the Court's fundamental approach to the internal market and the freedom of movement. As the Court will later confirm in other words, free choice by the private parties involved is vital to free movement and must be protected against Member State restrictions.

B. *Segers* (1986)[23]

A few months later, the ECJ in *Segers* confirmed the approach which it had first adopted in '*Avoir fiscal*'. While the latter judgment concerned a tax case, the former one related to social security. Yet, its wording makes this judgment pertinent for conflict of laws as well[24].

Mr Segers, the Dutch director of a company incorporated under English law, with its registered office in London but solely active through its subsidiary in the Netherlands, brought an action in the latter Member State against the refusal of the local authorities to accord him sickness insurance benefits. In the Netherlands, directors who own 50% or more of the shares of a company were considered to work in a subordinate position and therefore to be insured, but only if that company had its registered office in the Netherlands. The ECJ referred to *'Avoir fiscal'* to consider that acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would deprive former Art.58 EEC Treaty of all meaning. While it was true that the entitlement to reimbursement of sickness costs pertained to a person and not to a company, the Court held that discrimination of the company's employees indirectly restricted the freedom of establishment of the companies themselves. Articles 52 and 58 EEC Treaty therefore prohibited the exclusion of Mr Segers from the insurance scheme for the sole reason that his company was formed in accordance with the law of another Member State where it also had its registered office.

In *Segers*, the ECJ was inspired by the same fundamental concerns as in *'Avoir fiscal'*.

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[23] EC.J, 10 July 1986, Case 79/85, D. H. M. Segers/Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen.

[24] TRIDIMAS Takis "Case-law of the European Court of Justice on Corporate Entities" **Yearbook of European Law** 13, 1993, Clarendon Press, Oxford, p. 340; EYLES Uwe **Das Niederlassungsrecht von Kapitalgesellschaften in der Europäischen Gemeinschaft** Nomos, Baden-Baden, 1990; SCHÜMANN Matthias "Die Vereinbarkeit der Sitztheorie mit demeuropäischen Recht" **EuZW**, Issue 4/5, 1994, p. 269–275.

First, it repeated that the companies' registered office in the Treaty's sense "serves as the connecting factor with the legal system of a particular State, as does nationality in the case of natural persons" [25]. Further, the Court rejected a justification based upon the need to combat possible abuse or fraud: while this may justify a difference in treatment in certain circumstances, the refusal to accord a sickness benefit in the said circumstances cannot constitute an appropriate measure in that respect [26]. Last but not least, the ECJ kept to a strict reading of the Treaty when considering that it was immaterial that the English company didn't conduct business in the UK: the Treaty only requires that the companies be formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business in the Union [27].

While the arguments inspiring the ECJ conform to those brought forward in *'Avoir fiscal'*, and it is mainly their confirmation which sends a clear signal here, the Court's considerations in point 16 deserve particular importance. Essentially, the Court here adheres once again to the protection of the parties' freedom of choice: as long as they conform to the letter of the Treaty, they cannot be burdened with additional obligations and enjoy all freedom to organize their business activities according to their own wishes[28]. According to Advocate General Darmon in his Opinion in *Segers*, such interpretation is indeed consistent with the objective behind the recognition of the freedom of establishment, namely the need to promote the free movement of persons and, by the same token, the achievement of a common [internal] market. The fact that a national of a Member State may take advantage of the flexibility of United Kingdom company law and may exploit the effect of the attraction which, in his view, an Anglo-Saxon designation has for his customers must be viewed in that context as well[29]. This unambiguous pro-business approach will in later cases be of great significance as well and clearly positions these cases, and their effects on conflict of laws, in a full freedom of movement framework.

For that same reason, the *Segers* judgment has almost immediately prompted commentators to hold that the ECJ, when having a chance to rule on this, would almost certainly condemn the real seat theory as incompatible with the Treaty. However, this theory was not at all at stake in this judgment, which concerned an issue of social security law. Moreover, the facts of the case connected it only to the legal systems of the Netherlands and the United Kingdom, two Member States which adhere to the incorporation theory. The rights attributed to Mr Segers, however, and the priority which the judgment grants to flexibility and private autonomy over possible, countervailing public interests appear indeed difficult to reconcile with the concerns inspiring the real seat theory.

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[25] Point 13 of the ECJ judgment *Segers*, Case 79/85.
[26] Ibidem point 17.
[27] Ibidem point 16.
[28] BEHRENS Peter "Das Gesellschaftsrecht im Europäischen Binnenmarkt" **EuZW**, Issue 1, 1990, p. 13.
[29] Opinion of Advocate General Darmon to the ECJ judgment *Segers* 79/85.

II. THE ECJ ENTERS THE FIELD OF CONFLICT OF LAWS: *DAILY MAIL* (1988)[30]

Daily Mail is often cited as the first case in which the ECJ interpreted the companies' right of establishment in a way which is pertinent for conflict of laws. Although the earlier *'Avoir fiscal'*- and *Segers*-cases are pertinent as well and the Court in *Daily Mail* wasn't asked to solve questions related to private and company law claims but had to deal again with a tax issue, the attention which many commentators have given to this judgment is quite understandable as the ECJ in this case appears to deliberately use its judgment to link the companies' freedom of establishment to conflict of laws issues[31].

Daily Mail was an investment holding company, incorporated under UK law and with its registered office in the UK, which for tax reasons wished to transfer its central management and control to the Netherlands. Despite the fact that UK company law allowed the transfer of the real seat of a company, UK tax law, on the contrary, prohibited companies resident for tax purposes in the UK from ceasing to be so without the consent of the Treasury. After a long but unsuccessful period of negotiations with the Treasury, Daily Mail initiated court proceedings, claiming that then Articles 52 and 58 EEC Treaty gave it the right to transfer it central management and control to another Member State without prior consent or the right to obtain such consent unconditionally. Although the ECJ first emphasized the great importance of freedom of establishment, both for natural persons and companies, as a fundamental principle which was laid down in directly applicable provisions of European law, and added that this freedom includes the prohibition for the Member State of origin from hindering establishment in another Member State, it eventually held that the Treaty articles mentioned confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State[32].

The grounds cited by the ECJ to explain this decision are precisely those which make this judgment so important for conflict of laws purposes. The ECJ indeed gives a vital place to the international company law rules of the respective Member States by

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[30] ECJ, 27 September 1988, Case 81/87, The Queen/H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.

[31] DROBNIG Ulrich "Gemeinschaftsrecht und internationales Gesellschaftsrecht Daily Mail und die Folgen" in **Europäisches Gemeinschaftsrecht und Internationales Privatrecht,** herausgegeben von Christian von Bar, Carl Heymanns Verlag KG, Köln, 1991, p. 185–206; GEYRHALTER Volker "Niederlassungsfreiheit contra Sitztheorie – Good Bye 'Daily Mail'?" **EWS***,* Issue *6,* 1999, p. 201; KOROM Veronika and METZINGER Peter "Freedom of Establishment for Companies: the European Court of Justice Confirms and Refines its Daily Mail Decision in the *Cartesio* Case C-210/06" **ECFLR**, Vol. 6, No. 1, 2009, p. 125.

[32] BACHNER Thomas "Freedom of establishment for companies: a great leap forward" **Cambridge Law Journal***,* Vol. 62, Issue 1, 2003, p. 49; RAMMELOO Stephan **Corporations in Private International Law: A European Perspective** Oxford University Press, 2000, p. 51; RICKFORD Jonathan "Current developments in European Law on restructuring companies: an Introduction" **EBLR,** Vol. 15, 2004, p. 1231.

holding on the one hand that companies, unlike natural persons, exist only by virtue of the varying national legislation which determines their incorporation and functioning[33] and on the other hand that the legislation of the Member States varies widely in regard to both the connecting factor for incorporation and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor[34]. That variety is reflected in the fact that the Treaty places the registered office, central administration and principal place of business "as connecting factors" on the same footing[35]. Therefore, the ECJ holds that the Treaty "regards the differences in national legislation concerning the required connecting factor and the question whether –and if so how- the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions"[36].

This way, the ECJ responds to the referring national court essentially by interpreting the terms used in the pertinent Treaty provisions as references to the varying, unharmonized choice-of-law approaches of the Member States.[37] While conflict of laws had a background presence in the earlier judgments in *'Avoir fiscal'* and *Segers*, the Court in *Daily Mail* brings it prominently to the foreground in a quite surprising way. The ECJ apparently found itself trapped in a conflict between the strict interpretation of the pertinent, precise Treaty provisions on the freedom of establishment on the one hand and the varying Member States' choice-of-law approaches which grant a much larger impact to the legal requirements relating to the incorporation and functioning of companies, including the transfer of their registered office or head office abroad. This tension is also visible in the considerations of Advocate General Darmon, whose view, based upon academic doctrine but nevertheless debatable, that "it is generally accepted that the winding-up required by national legislation as a condition for the emigration of a company is not contrary to Community law" is decisive in his search for a compromise between the Treaty's freedom of establishment and conflict of laws[38].

The ECJ itself rests the need for such compromise on the interpretation of the three scope factors in Art.58 EEC Treaty as connecting factors, which is in itself not a very evident interpretation[39] and on the incorporation in the then EEC Treaty of Art.220

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[33] Point 19 of the ECJ judgment *Daily Mail,* Case 81/87.

[34] Ibidem point 20.

[35] Ibidem point 21.

[36] Ibidem point 23.

[37] GROSSFELD Bernhard and LUTTERMANN Claus "Anmerkung zu EuGH, Urteil zum 27 Sept. 1988-RsC 81/87Daily Mail" **JZ***,* Issue 2*,* 1989, p. 384, BEHRENS Peter "Die grenzüberschreitende Sitzverlegung von Gesellschaften in der EWG, zu EuGH, Urteil zum 27 Sept. 1988-RsC 81/87 Daily Mail" **IPRax***,* Issue 2, 1989, p. 354; JONET Jean-Matthieu "Sociétés commerciales. La théorie du siège réel a l'épreuve de la liberté d'établissement" **Journal des tribunaux**, No. 96, 2002, p. 33.

[38] Point 13 of the Opinion of Advocate General Darmon tof the ECJ Case 81/87, Daily Mail.

[39] VERSE Dirk A., "Niederlassungsfreiheit und grenzüberschreitende Sitzverlegung – Zwischenbilanz nach 'National Grid Indus' und 'Vale'", **ZEuP**, 2013, p. 462.

(which has meanwhile been eliminated and doesn't figure in today's TFEU) which provides for the conclusion, so far as necessary, of agreements between the Member States with a view to securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to the other and the observation that no convention in that area had yet come into force (as it hasn't today either). While this last reference can possibly be understood indeed as implicating a dependence on national conflict of laws, it isn't that convincing either due to the vagueness of its terms, the proviso that this must only be done "so far as necessary", the limitation to the transfer of the so-called registered office and –in hindsight- the fact that this provision has meanwhile been eliminated without any amendments or visible impact on the meaning of the Treaty provisions on companies' freedom of establishment.

Against the background of these considerations, it is important to note that the ECJ in *Daily Mail* deliberately brings conflict of laws in the arena of freedom of movement and attempts to balance both in a convincing way. By doing so, the ECJ has also strengthened its emphasis on the distinction between companies and natural persons and its focus on the status of companies as "creatures of national law", which is eventually decisive in its further reasoning.

Certainly, the ECJ's prudent approach contrasts with the liberal dynamic which appeared to inspire its judgment in *Segers*. Many doubts about the compatibility with the internal market of the real seat theory had arisen after *Segers*. And although the real seat theory wasn't under examination in *Daily Mail*, its perspectives suddenly looked much better after this judgment[40]. The ECJ indeed appeared to grant a very large room for manoeuvre to the Member States, whose policy and legislative choices for a particular, even restrictive approach and connecting factor in international company law seem to deserve protection, based upon a Treaty interpretation irrespective of their concrete impact on freedom of movement. This way, both the incorporation and the real seat theories are given Treaty protection.

III. REVIVAL OF THE DEBATE: *CENTROS* (1999)[41]

More than ten years after *Daily Mail*, the ECJ's judgment in *Centros* brought the debate on the companies' right of establishment, and its impact on conflict of laws, in the spotlights again. The facts of this case, which represent a typical U-turn construction, lent themselves easily to a judgment in which the ECJ could make clear choices in respect of the right of establishment. And while the preliminary reference to the ECJ once again didn't focus upon conflict of laws issues, the judgment still has

[40] LOWRY John "Eliminating Obstacles to Freedom of Establishment: The Competitive Edge of UK Company Law" **Cambridge Law Journal** 63, 2004, p. 331–345; HOFFMANN Reiner "Neue Möglichkeiten zur identitätswahrenden Sitzverlegung in Europa? Der Richtlinienvorentwurf zur Verlegung des Gesellschaftssitzes innerhalb der EU" **ZHR**, Vol. 1, 2000, p. 43–66.

[41] ECJ, 9 March 1999, Case C-212/97, Centros Ltd/Erhvervs- og Selskabsstyrelsen.

been broadly interpreted in that sense[42].

Centros Ltd is a private limited company with its registered office in the UK, where it has never traded. Its share capital amounts to only GBP 100, which has been neither paid up nor made available to the company, and is divided into two shares held by Mr and Mrs Bryde who are Danish nationals residing in Denmark. Mrs Bryde is the director of Centros. Her request to register a branch of Centros in Denmark was refused by the Danish Trade and Companies Board on the grounds, inter alia, that Centros was in fact seeking to establish in Denmark not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000 by Danish Law.

The ECJ condemned this refusal as a breach of Centros' right of establishment.

First, the said situation fell within the scope of Community law. As became clear earlier in *Segers*, it is in that respect 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. Second, the Danish practice constituted an obstacle to the exercise of the freedom of establishment. The mere fact that Centros pursued its activities solely in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct. Third, the ECJ considered the Danish justification grounds, such as creditor protection and the combating of fraud, unconvincing.

Although neither the preliminary reference nor the ECJ's judgment was framed in terms of conflict of laws, the judgment has been interpreted to a large extent in that sense. Many commentators read *Centros* as an implicit confirmation, on the basis of the Treaty provisions on the right of establishment, of the incorporation theory as the only viable approach for international company law in the EU framework[43]. While more recent judgments make clear that this interpretation is false, *Centros* still remains very pertinent as it holds a clear expression of the ECJ's views on the internal market and freedom of movement.

The ECJ repeats its standard phrase on the role of the criteria mentioned in former Art.58 EC Treaty as "connecting factors" analogous to nationality in the

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[42] HOLST Catherine "European Company Law after Centros: Is the EU on the Road to Delaware?" **Columbia Journal of European Law**, Vol. 8, 2002, p. 323–341; MEILICKE Wienand "Auswirkungen der Centros – Entscheidung" auf die 14. EU – Sitzverlegungs-Richtlinie" **GmbHR**, 1999, p. 896–897; NOVACEK Erich "Zur Niederlassungsfreiheit nach dem Centros-Urteil" **ecolex**, 2002, p. 515–517; ZIMMER Daniel "Mysterium 'Centros'–Von der schwierigen Suche nach der Bedeutung eines Urteils des Europäischen Gerichtshofes" **ZHR** Issue 164, 2000, p. 23–42; KARSTEN Engsig Sorensen, "The fight against letterbox companies in the internal market" **CMLR,** Vol. 52, Issue 1, 2015, pp. 85–117.

[43] FORSTHOFF Ulrich "Abschied von der Sitztheorie" **BB,** Issue 7**,** 2002, p. 318; KIENINGER Eva - Maria "Einschränkung der Sitztheorie in Fällen der Gründung von Zweigniederlassungen ausländischer Kapitalgesellschaften, Anmerkung zum Beschluss des OGH vom 15.07.1999, 6ob. 123/99b" **NZG**, Issue 36, 2000, p. 39; SEDEMUND Jochim, HAUSMANN Friedrich Ludwig "Niederlassungsfreiheit contra Sitztheorie –Abschied von Daily Mail?" **BB**, 1999, p. 809; XANTHAKI Helen "Centros: Is it really the End for the Theory of the Siège Réel" **Company Lawyer,** Vol. 22, 2001, p. 2–8.

case of natural persons, put in the context of the internal market which entitles these companies to carry on their business in another Member State through an agency, branch or subsidiary[44]. Against that background, the ECJ unambiguously rejects the abuse argument invoked by the Danish government. To that end, the Court doesn't solely refer to its reasoning in point 16 of *Segers*. The ECJ in *Centros* adds that as the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. According to the Court, the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty[45].

In other words, the ECJ wishes the full potential of the internal market to be exploited. The persistent differences between national company laws, and the resulting competition between Member States, mustn't be considered a hindrance in that regard, but should rather be considered a state of affairs which legitimates parties to exploit these differences to their advantage and take recourse to the legislation which enables them maximally to reach their economic targets[46]. This approach rests not only upon the desire to allow parties to obtain all advantages which are considered inherent in the internal market and the opening of economic borders –which is no more or less than the Court's duty to ensure the application of EU law and the Treaties in particular- but also upon a clear wish to protect freedom of choice to that end[47]. As Advocate General La Pergola wrote in point 20 of his Opinion in the *Centros* case, "the right of establishment is essential to the achievement of the objectives set in the Treaty, the purpose of which is to guarantee to all Community citizens alike the freedom to engage in business activities through the instruments provided by national law, thus giving them the chance to enter the market, irrespective of the motives that may actually have prompted the person concerned. In other words, it is the opportunity to exercise business activities that is protected, and with it the contractual freedom to make use of the instruments provided for that purpose in the legal systems of the Member States". Natural persons and companies must be enabled as much as possible to make their

[44] Point 20 of the ECJ judgment Centros C-212/97.

[45] Ibidem points 26-27. See also KARSTEN Engsig Sørensen "Branches of Companies in the EU: Balancing the Eleventh Company Law Directive, National Company Law and the Right of Establishment" **ECFR,** Vol. 11, Issue 2, 2014, p 53.

[46] BALLARINO Tito "Les règles de conflit sur les sociétés commerciales à l'épreuve du droit communautaire d'établissement. Remarques sur deux arrêts récents de la Cour de Justice des Communautés européennes" **Revue Critique de Droit International Privé**, Issue 3**,** 2003, p. 373.

[47] SCHÖN Wolfgang "The Mobility of Companies in Europe and the Organizational Freedom of Company Founders" **ECFR**, Vol. 2, 2006, p. 127; SCHÖN Wolfgang "The free choice between the right to establish a branch and to set-up a subsidiary – a principle of European business law" **EBOR**, Vol. 2, Issue 2, 2001, p. 339.

proper economic choices and to set up their actions, including recourse to all legal means in the EU-framework, to reach their goals according to their own wishes, provided however that creditors have access to all pertinent information about the companies' legal status [48]. As long as this last condition is fulfilled, personal commercial or business initiative is encouraged and protected, including the seeking advantage of the different, unharmonized national rules as –as the Advocate General emphasized- "competition among rules must be allowed free play in corporate matters"[49].

Very interestingly, and following up on this last consideration, Advocate General La Pergola also referred to *Cassis de Dijon*[50], considering that the Court must ensure that the spirit of the Treaty prevails by applying the `*Cassis de Dijon*' doctrine on mutual recognition in a consistent manner also to corporate mobility. Therefore, no matter which conflict of laws theory applies, a company legally established in one Member State should be recognized in any other within the EU and must not be prohibited from opening its branch in another Member State. In particular, these issues are difficult to be upheld under the real seat theory[51]. The Advocate General added that this didn't mean that a foreign company which did no business in the country in which it was formed, would not be subject, in respect of the exercise of activities by a branch opened in another Member State, to binding rules of that State applicable to national companies of the same type. But the fact that binding local rules may apply must never mean that the Community company would be prevented from exercising its right of establishment. He therefore argued that, in *Centros*, the Companies Board's claim that the secondary establishment should be accorded the treatment provided under national law for primary establishments, particularly in respect of minimum capital, could be upheld in the presence of suitable reasons to justify it.

To a certain extent, *Centros* could be interpreted as '*Segers* revisited', after the *Daily Mail* intermezzo. Yet, in *Centros*, the Court's focus on private autonomy and full exploitation of the internal market benefits is much more explicit, and this has made this judgment into a hallmark of a liberal interpretation of the European treaties which seems difficult to reconcile with the concerns underlying the real seat theory[52].

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[48] Point 36 of the ECJ judgment Centros C-212/97.
[49] Point 20 of the Opinion of Advocate General La Pergola to the ECJ judgment Centros C-212/97.
[50] ECJ, 20 February 1979, Case 120/78, Rewe-Zentral AG/Bundesmonopolverwaltung für Branntwein.
[51] WOUTERS Jan "Private International Law and Companies; Freedom of Establishment" **EBORev,** Vol. 2, 2001, p. 132.
[52] EBKE Werner "Centros – Some Realities and Some Mysteries" **The American Journal of Comparative Law***,* Vol. 48, 2000, p. 636.

IV. THE GERMAN REAL SEAT THEORY EXAMINED IN A KEY JUDGMENT: *ÜBERSEERING*(2002)[53]

After *Centros*, many commentators expected the ECJ to seize the first opportunity to take a further step and declare the real seat theory contrary to the companies' right of establishment[54]. How indeed conciliate the ECJ's very liberal stance in *Centros*, with its emphasis on the parties' freedom of choice and economic targets and full exploitation of the internal market, with the much more restrictive nature of the real seat theory which balances public and private party interests and essentially prioritizes the former? The preliminary reference by the German Bundesgerichtshof in the *Überseering* case, which concerned a clear conflict of laws issue, offered the ECJ a perfect opportunity to take this step. Yet, and although the ECJ appeared inspired by *Centros* and rejected the stringent German real seat theory, its judgment cannot be read as an adoption of the incorporation theory as the solely acceptable conflict of laws approach in corporate matters. As was true with *Daily Mail*, *Überseering* concerned a case of primary establishment; not surprisingly, the ECJ in its judgment elaborated its earlier considerations from the former case.

Überseering BV, a company incorporated under Netherlands law, acquired a piece of land in Düsseldorf (Germany), which it used for business purposes. It engaged NCC, a company established in Germany, to refurbish a garage and a motel on the site. A contractual dispute arose and *Überseering* instituted proceedings before the German courts. In view of the fact that meanwhile two German nationals residing in Düsseldorf had acquired all the shares in *Überseering*, the courts found that *Überseering* had transferred its actual centre of administration to Düsseldorf and that, as a company incorporated under Netherlands law, it did not have legal capacity in Germany and, consequently, could not bring legal proceedings there. The Bundesgerichtshof eventually referred two questions in this respect to the ECJ for a preliminary ruling. The ECJ especially devoted its attention to the first question, which it summarized as whether, where a company formed in accordance with the legislation of a Member State (`A') in which it has its registered office is deemed, under the law of another Member State (`B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity, and therefore the capacity to bring legal proceedings before its national

[53] ECJ, 5 November 2002, Case C-208/00, *Überseering* BV/Nordic Construction Company Baumanagement GmbH (NCC).

[54] HASE Karl "*Überseering* und Inspire Art. – EuGH formt das Gesellschaftsrecht der Zukunft " **BuW**, Issue 24, 2003, p. 944–950; WEBER Dennis "Exit Taxes on the Transfer of Seat and the Applicability of the Freedom of Establishment after *Überseering*" **European Taxation,** Vol. 43, Issue 10, 2003, p. 350–354; CERIONI Luca "The *Überseering* Ruling: the Eve of a 'Revolution' for the Possibilities of Companies' Migration Throughout the European Community?" **Columbia Journal of European Law**, Vol. 10, 2003, p. 125; ANDENAS Mads "Free Movement of Companies" **The Law Quarterly Review**, Vol. 119, April 2003, p. 225.

courts in order to enforce rights under a contract with a company established in Member State B. This question brought it to the heart of the classical understanding of the real seat theory[55]. It provided the Bundesgerichtshof with an answer in three steps in which it examined the applicability of the Treaty provisions on freedom of establishment, the existence of a restriction on freedom of establishment and its possible justification respectively.

With regard to that first issue, the German government *inter alia* referred to points 23 and 24 of the ECJ's judgment in *Daily Mail*, that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment and that the pertinent Treaty articles therefore cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State. While the German government admitted the differences between outbound and inbound situations in *Daily Mail* and *Überseering* respectively, it pleaded that the same reasoning should apply to both cases and that the question whether, in the host Member State, the law applicable under the rules on conflict of laws allows the company to continue to exist does not fall within the scope of the provisions on freedom of establishment[56]. In other words, the German government wished to receive the ECJ's fiat for its restrictive approach through a separation between conflict of laws on the one hand and freedom of establishment on the other hand, based upon the ECJ's considerations in *Daily Mail*.

The ECJ, however, rejected this argument. It stuck to a strict reading of *Daily Mail*, which allowed it to distinguish between outbound and inbound situations and, consequently, between the *Daily Mail* and *Überseering* cases[57]. In the latter case, *Überseering's* legal existence was never called into question under Netherlands law nor did it cease to be validly incorporated under that law. *Daily Mail* did not concern the way in which one Member State treats a company which is validly incorporated in another Member State and which is exercising its freedom of establishment in the first Member State.

Of course, the ECJ's broad considerations in *Daily Mail* seemed to express its general view on the relationship between freedom of establishment and conflict of

[55] LEIBLE Stefan und HOFFMANN Jochen "*Überseering* und das (vermeintliche) Ende der Sitztheorie" **RIW**, Issue 48, 2002, p. 925; HATJE Armin "Grenzen der Flexibilität einer erweiterten Europäischen Union" **EuR**, Vol. 40, Issue 2, 2005, p. 148; THOMA Ioanna "ECJ, 5 November 2002, Case C-208/00 *Überseering* BV v. NCC Nordic Construction Company Baumanagement GmbH. The *Überseering* ruling: a tale of serendipity" **ERPL**, Vol. 11, Issue 4, 2003, p. 545–554.

[56] Point 30 of the ECJ judgment *Überseering* C-208/00.

[57] Ibidem points 62ff.

laws for companies. For that reason, probably, the ECJ in *Überseering* went further and, in spite of the distinction made, also insisted on the good understanding of its views as expressed in points 20ff of its judgment in *Daily Mail* –in which it held that the Treaty regarded the Member States' different connecting factors as a problem to be dealt with by legislation or conventions and not resolved by the Treaty rules on freedom of establishment. The Court now warns that, "despite the general terms in which paragraph 23 of Daily Mail and General Trust is cast", it did not intend to recognise a Member State as having the power, vis-à-vis companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law. Therefore, there are no grounds for concluding from *Daily Mail* that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State[58]. In other words, *Überseering* was entitled to rely on the principle of freedom of establishment in order to contest the refusal of German law to regard it as a legal person with the capacity to be a party to legal proceedings[59].

Having settled this point, the ECJ is very brief on the two other issues mentioned. First, the refusal by a host Member State (`B') to recognise the legal capacity of a company formed in accordance with the law of another Member State (`A') in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC [60]. Second, while is not inconceivable that overriding requirements relating to the general interest may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment, such objectives cannot, however, justify denying the legal capacity and, consequently, the capacity to be a party to legal proceedings of a company properly incorporated in another Member State in which it has its registered office. Such a measure is tantamount to an outright negation of the freedom of establishment conferred on companies by Articles 43 EC and 48 EC[61].

[58] Ibidem points 72 – 73.
[59] Ibidem point 76.
[60] Ibidem point 82.
[61] Ibidem points 83 – 93.

The ECJ further adds, as its answer to the second preliminary question, that, where a company formed in accordance with the law of a Member State (`A') in which it has its registered office exercises its freedom of establishment in another Member State (`B'), Articles 43 and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (`A')[62].

While the ECJ's judgment in *Überseering* sheds light on the content and extent of the companies' right of establishment, it is very instructive on the European approach to the related choice-of-law issues as well. Advocate General Ruiz-Jarabo Colomer put it in the very first point of his opinion: "This reference for a preliminary ruling gives the Court of Justice the opportunity to clarify the meaning of the *Centros* judgment, and to specify, in general terms, the extent to which Community law influences determination of the legal status of bodies corporate"[63]. And so the ECJ did.

Überseering remains still today a key judgment in the series of cases on the companies' right of establishment in the European Union. Certainly, the ECJ's conclusion is very convincing from a free movement perspective[64]. *Überseering* fulfills all criteria of Article 48 EC –a company validly formed in accordance with Dutch law and having its registered office in the Netherlands- and thus enjoys all rights as a valid legal person to exercise its freedom of establishment in Germany, according to Articles 43 and 48 EC; the German refusal to recognize its legal capacity without prior reincorporation according to German law violates this right of establishment. The ECJ to a large degree reaches this conclusion through considerations which both minimize (that judgment is essentially limited to the relationship between a company and the Member State of incorporation) and precise (that judgment's crux is found in its point 19, which holds that companies are creatures of national law and exist only by virtue of the varying national legislation which determines their incorporation and functioning) the scope of its earlier judgment in *Daily Mail*.

This focus on the Member State of the company's incorporation, which in the perspective of free movement can be translated as the country of origin, permits the interpretation of *Überseering* as a judgment which introduces the well-known rule of mutual recognition in the sphere of the companies' right of establishment. This move is unsurprising, when one takes into account not only the opinion of Advocate General La Pergola in *Centros*[65], but also the liberal spirit of the ECJ's judgments in both *Segers* and *Centros* relating to the right to secondary establishment vis-à-vis discriminatory and non-discriminatory restrictive national provisions.

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[62] Ibidem point 95.

[63] Opinion of Advocate General Ruiz-Jarabo Colomer to the ECJ judgment *Überseering* C-208/00.

[64] GÖTZ Jürgen "Multinationale Konzernstrukturen nach *Überseering* und Inspire Art" **Der Konzern**, 2004, p. 449–455; DYRBERG Peter "Full free movement of companies in the European Union at last?" **ELR,** Vol. 28, 2003, p.535; WOOLDRIDGE Frank "*Überseering*: Freedom of Establishment of Companies Affirmed" **EBLR***,* Vol. 14, Issue 3, 2003, p. 234.

[65] Opinion of Advocate General La Pergola to the ECJ judgment Centros C-212/97.

The ECJ in these cases apparently opted for a remarkably strong protection of the country of origin's position, which is perfectly understandable in a model inbound case as *Überseering* and there leads to the rejection of the stringent German conflict-of-laws approach, but much less in an outbound case as *Daily Mail*, where the Member State of the company's incorporation is allowed to apply its restrictive national rules to the extent that the company's reliance on freedom of movement is blocked. Apparently, the ECJ adheres to the view expressed by Advocate General Darmon in point 13 of his Opinion in *Daily Mail* that "it is generally accepted that the winding-up required by national legislation as a condition for the emigration of a company is not contrary to Community law". Still, the interpretation of other Treaty freedoms of circulation -the free movement of services[66] and even the free moment of natural persons such as workers[67]- obliges to doubt the truth of this conventional wisdom.

The focus on the country of origin, i.e. in this context the Member State in accordance with the law of which the company has been formed or incorporated, also implies a focus on freedom of choice. As long as the company validly exists according to that legislation, it enjoys freedom of establishment and the right to be recognized as such in all other Member States. Still, and in spite of the fact that such characteristics are typically associated with the incorporation theory and that the ECJ condemned the strict German real seat-approach in *Überseering*, this doesn't mean that the ECJ only considers the incorporation theory to conform to the Treaty. The essential impact of its interpretation of the right of establishment on the conflict of laws systems of the Member States, is their duty to recognize the companies which fulfill the criteria of Article 54 TFEU (ex-Article 48 EC). And as the ECJ itself understands these criteria (also) as connecting factors in the sense of conflict of laws, it is beyond doubt that its judgments must not be interpreted as condemning any of the conflicts theories as such[68]. Their application to intra-Community cross-border action however must fit with the principle that recognition of the companies conforming to Article 54 TFEU is ensured. In that sense, the real seat theory must within the EU no longer be applied as a multilateral doctrine –according to which the real seat requirements are also applied to companies which have been validly formed in other countries- but as a unilateral rule which sets forward particular requirements for the valid creation of companies under the home State's legislation and combines these with the full recognition of companies created in other Member States according to their legal rules[69].

[66] ECJ, 10 May 1995, Alpine Investment Case C – 384/93.

[67] ECJ, 15 December 1995, Bosman Case C – 415/93.

[68] HACK Christoph "Die Sitztheorie nach dem EuGH-Urteil *Überseering*" **Der Gesellschafter**, 2003, p. 29–35; EBKE Werner "Die Würfel sind gefallen: Die Sanktionen der Sitztheorie sind europarechtswidrig" **BB**, Issue 1, 2003, p. 1 - 7; KREUZER Karl "Zu Stand und Perspektiven des europäischen Internationalen Privatrechts, Wie europäisch soll das Europäische Internationale Privatrecht sein?" **RabelsZ** Vol. 70, 2006, p. 1 et seq.; HAACK Stefan" Anwendbarkeit der Gründungstheorie bei fehlendem tatsächlichem Verwaltungssitz" **RIW**, 2000, p. 56.

[69] MEEUSEN Johan, "De werkelijke zetel-leer en de communautaire vestigingsvrijheid van vennootschappen. Analyse van het arrest *Überseering* van het Hof van Justitie", **Tijdschrift voor Rechtspersoon en**

V. INTERMEZZO: CONFIRMATION OF EARLIER JUDGMENTS IN *INSPIRE ART* AND *SEVIC SYSTEMS*

A. Inspire Art (2003)[70]

Although the ECJ's judgment in the *Inspire Art* case is widely cited, the judgment isn't really innovative but essentially confirms the approach which the court adopted earlier in *Segers* and *Centros*[71].

This case essentially dealt with the compatibility with (then) EC law of the Dutch legislation on so-called formally foreign companies (WFBV), i.e. capital companies formed under laws other than those of the Netherlands and having legal personality, which carry on their activities entirely or almost entirely in the Netherlands and do not have any real connection with the State within which the law under which they were formed applies. The WFBV imposes on formally foreign companies various obligations concerning the company's registration in the commercial register, an indication of that status in all the documents produced by it, the minimum share capital and the drawing-up, production and publication of the annual documents. The WFBV also provides for penalties in case of non-compliance with those provisions.

Inspire Art is a private company limited by shares under the law of England and Wales with its registered office at Folkestone (United Kingdom). The company has a branch in Amsterdam and is registered there in the commercial register of the Chamber of Commerce without any indication of the fact that it is a formally foreign company within the meaning of Article 1 of the WFBV.

On the issue of the conformity of such legislation with the European freedom of establishment, the ECJ developed its considerations[72] against the background of its earlier judgments, in particular *Segers* and *Centros*:

- it is immaterial that the company was formed in one Member State only for the purpose of establishing itself in a second Member State, where its main, or entire,

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Vennootschap, 2003, p. 95ff.

[70] ECJ, 30 September 2003, Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam/Inspire Art Ltd.

[71] BINGE Christoph, THÖLKE Ulrich "'Everything goes?' Das deutsche Internationale Gesellschaftsrecht nach 'Inspire Art'" **DnotZ**, 2004, p. 21; HOFFMANN Jochen "Die Niederlassungsfreiheit der Gesellschaften im Europäischen Binnenmarkt nach *Überseering* und Inspire Art: Auswirkungen auf die grenzüberschreitende Verschmelzung" **EuR**, Issue 3, 2004, p. 127–143; DE KLUIVER Harm - Jan "Inspiring a New European Company Law? – Observations on the ECJ's Decision in Inspire Art from a Dutch Perspective and the Imminent Competition for Corporate Charters between EC Member States" **ECFR**, Vol. 1, Issue 1, 2004, p. 121–134; REHBERG Markus "Inspire Art – Freedom of establishment for companies in Europe between 'abuse' and national regulatory concerns" **European Legal Forum**, 2004, p. 1–8; ZIMMER Daniel "Nach Inspire Art: Grenzenlose Gestaltungsfreiheit für deutsche Unternehmen?" **NJW**, 2003, p. 3585–3592.

[72] Points 95ff of the ECJ judgment Inspire Art C-167/01.

business is to be conducted. The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment;

- the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State through a branch[73];

- the location of the company's registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular Member State in the same way as does nationality in the case of a natural person. The WFBV's effect is that the Netherlands company law rules on minimum capital and directors' liability are applied mandatorily to foreign companies such as Inspire Art when they carry on their activities exclusively, or almost exclusively, in the Netherlands. The WFBV actually requires the branch which has been formed in accordance with the home State's legislation (the laws of England and Wales) to comply with the host State's rule on share capital and directors' liability (the Netherlands) and so has the effect of impeding Inspire Art's exercise of the freedom of establishment.

The ECJ rejected the argument based upon *Daily Mail* –that the Member States remain free to determine the law applicable to a company- by distinguishing both cases in the same vein as it had done earlier in *Überseering*. According to the Court, the former case concerned the relations between a company and the Member State under the laws of which it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation, and *Inspire Art* concerned the application of the legislation of the State where a company actually carries on its activities when it was formed under the law of another Member State[74].

After rejection of the justification grounds invoked by reference to the rule of reason, the ECJ concluded it to be contrary to Articles 43 and 48 EC for national legislation such as the WFBV to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty (now: TFEU), save where the existence of an abuse is established on a case-by-case basis.

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[73] Later, the ECJ has more concretized this through the rejection of "wholly artificial arrangements" intended solely to escape the law, see ECJ, 12 September 2006, Case C-196/04, Cadbury Schweppes, points 51ff.

[74] Point 103 of the ECJ judgment Inspire Art C-167/01.

As the ECJ itself indicates, the reasoning underlying *Segers*, *Centros* and *Überseering* is very pertinent here as well. Advocate General Alber had written his Opinion along the same lines, explicitly interpreting the Dutch legislative obligation to satisfy the Dutch requirements imposed on the formation of a limited liability company as a refusal to recognise a company established under foreign law[75]. Although the substantive issue submitted to the Court was new, the outcome is unsurprising and confirms its earlier approach to accept Member States' choices on conflict of laws policy and to do the same where the (commercial) autonomy of the private persons and their taking advantage of the benefits of the internal market are concerned, but to be uncompromising where the recognition of a company validly formed in another Member State and falling within the scope of current Article 54 TFEU is concerned.

B. SEVIC Systems (2005)[76]

The *SEVIC Systems* case, referred by a German court for a preliminary ruling, obliged the ECJ to examine the compatibility with EC law of the German prohibition of cross-border mergers (i.e. a merger between a German and a Luxembourg company through the absorption of the latter company and its dissolution without liquidation) while such prohibition didn't exist for mergers between companies established in Germany.

First, the ECJ confirmed that such cross-border merger operation constitutes a particular method of exercise of the freedom of establishment, to which Articles 43 and 48 EC applied[77]. Further, the ECJ observed that the impossibility to have recourse to such means of company transformation where one of the companies is established in a Member State other than Germany, constitutes a difference in treatment between companies according to the internal or cross-border nature of the merger, which is likely to deter the exercise of the freedom of establishment and constitutes a restriction contrary to the right of establishment[78]. Finally, the ECJ rejected the justifications invoked (protection of interests of creditors, minority shareholders and employees and preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions) and held that to refuse cross-border mergers generally goes beyond what is necessary to protect those interests[79].

SEVIC Systems is an important, though unsurprising judgment. The key consideration that cross-border merger operations constitute particular methods of exercise of the freedom of establishment, important for the internal market, and so enjoy Treaty protection against restrictions, is logical and correct. It follows the earlier

[75] Points 99ff of the Opinion of Advocate General Alber to the ECJ judgment Inspire Art, Case C-167/01.
[76] ECJ, 13 December 2005, Case C-411/03, SEVIC Systems AG.
[77] Points 16 – 19 of the ECJ judgment SEVIC, Case C-411/03.
[78] Ibidem points 20 – 23.
[79] Ibidem points 24 – 30.

line of giving room to the parties' proper initiative and economic choices, as least as possible hindered by restrictive Member State legislation[80].

VI. THE REAL SEAT THEORY CHALLENGED BUT CONFIRMED, AND A MORE NUANCED VIEW ON THE HOME STATE'S POSITION: *CARTESIO* (2008)[81]

In the series of ECJ judgments on international company law and the freedom of establishment, *Cartesio* occupies a prominent position, at a similar level as *Daily Mail*, *Centros* and *Überseering*. It is not so that *Cartesio* introduced a new interpretation of the Treaty's freedom of establishment. Rather, it has in a context of pleas for a change mainly confirmed the approach developed earlier, albeit with some new accents, which explains this judgment's importance[82].

Cartesio, a limited partnership established in Hungary, wished to transfer its real seat according to Hungarian law, the place where its central administration is situated- to Italy. However, its application to have this transfer registered and its new real seat entered in the commercial register amended in that sense was rejected on the ground that Hungarian law, according to its adherence to a strict version of the real seat theory, did not allow a company incorporated in Hungary to transfer its real seat abroad while continuing to be subject to Hungarian law as its personal law. The Hungarian court involved referred to the ECJ the question whether Articles 43 and 48 EC preclude legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its real seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

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[80] GEYRHALTER Volker, Weber Thomas "Transnationale Verschmelzungen – im Spannungsfeld zwischen SEVIC Systems und der Verschmelzungsrichtlinie" **DStR**, 2006, p. 146; MEILICKE Wienand, "Die EuGH Entscheidung in der Rechtssache Sevic und die Folgen für das deutsche Umwandlungsrecht nach Handels- und Steuerrecht" **GmbHR**, Vol. 3, 2006, p. 123; BECKER Arnd, BEGEMANN Arndt "The German Law on Cross border Mergers Following the Sevic Decision" **Comparative Law Yearbook of International Business,** Vol. 31, 2009, p. 199–204; BLANQUET Francoise "Les fusions transfrontalieres et la mobilité des sociétés" **Revue des Sociétés**, Vol. 1, 2000, p. 115; ANGELETTE Benjamin "The Revolution that Never Came and the Revolution Coming – De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe" **Virginia Law Review,** Vol. 92, 2006, p. 1189; FOMCENCO, Alex. "The Special Purpose Vehicle: A 'Micro Merger' or Merely a Way of Cooperation?". **European Company Law,** Vol. 10, Issue 1, 2013, p. 13.

[81] ECJ, 16 December 2008, Case C-210/06, Cartesio Oktató és Szolgáltató bt.

[82] BEHRENS Peter "EuGH entscheidet über Sitzverlegung von Gesellschaften" **EuZW**, Issue 13, 2000, p. 385; ROTH Wulf-Henning "Die Sitzverlegung vor dem EuGH" **ZIP**, 2000, 1599; KOVAR Robert "La mobilité des sociétés dans l'espace européen" **Recueil Dalloz**, Vol. 7, 2009, p. 465; VOSSESTEIN Gert - Jan "Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment. Some Considerations on the Court of Justice's Cartesio Judgment" **European Company Law**, Vol. 6, Issue 3, 2009, p. 115–123; CAINS Walter "Case Note on *Cartesio* Decision by the European Court of Justice, Case C-210/06, *Cartesio Oktato es Szolgaltato*" **ERPL,** Vol. 3, 2010, p. 569–578; AUTENNE Alexia, NAVEZ Edouard-Jean "Cartesio: les contours incertains de la mobilité transfrontalière des societies revisités" **Cah. Dr. Eur**. 2009, p. 91–125.

As Advocate General Poiares Maduro summarized this issue, Cartesio sought to transfer its operational headquarters to Italy without reconstituting itself as an Italian company; it wished to remain subject to Hungarian law in spite of the strict terms of the real seat theory[83]. The Advocate General took a critical view to the ECJ's earlier case law, from *Daily Mail* to *Inspire Art*, and concluded it to be impossible to hold that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. In other words, he challenged the privileged position which the ECJ had attributed earlier to the home State. And as Hungary didn't merely set conditions for a transfer of the operational headquarters to another Member State, but completely refused such transfer (without dissolution), he considered this an outright negation of the freedom of establishment and proposed that the ECJ hold that "Articles 43 and 48 preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State"[84].

The Advocate General's Opinion raised the stakes for the ECJ as it was invited to consider a possible reversal of its earlier interpretation, in a case which lent itself perfectly for such move. The Court, in its Grand chamber, didn't however follow the Advocate General's rejection of the real seat theory and stuck to its earlier views. To do so, the ECJ first referred to the core paragraphs of its *Daily Mail* and *Überseering* judgments and maintained the view that, due to the absence of a uniform connecting factor determining the national law applicable to a company, it still remains within the Member State's power to define both the connecting factor required for the company to be incorporated under the law of that Member State (and as such capable of enjoying the right of establishment) and that required if the company is to be able subsequently to maintain that status. In that light, the Court sticks to its view that the home State occupies the dominant position: it adds explicitly that this includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its real seat to the territory of the latter, thereby modifying the connecting factor required under the national law of the Member State of incorporation [85]. This way, the ECJ leaves no doubt that the Treaty rules on the companies' right of establishment respect the Member States' autonomy to adopt and apply their proper conflict of laws approach, even when this approach –such as the real seat theory- has restrictive effects on the cross-border movement and puts limits to the commercial choices of the private parties involved. In contrast to the Advocate General's Opinion, the ECJ's judgment so saves the real seat theory and doesn't pronounce any particular favor for one or the other choice-of-law theory in international company law[86].

[83] Opinion of Advocate General Poiares Maduro to the ECJ judgment Cartesio, C- 210/06.

[84] Points 22 – 35 of the ECJ judgment Cartesio, Case C-210/06.

[85] Ibidem point 110.

[86] TEICHMANN Christoph "Cartesio: Die Freiheit zum formwechselnden Wegzug" **ZIP**, Issue 30, 2009, p. 393; WERNER Rüdiger "Das deutsche internationale Gesellschaftsrecht nach 'Cartesio' und

This interpretation is of course, from a free movement perspective, far from obvious. As from point 111 of its judgment, the ECJ introduces an important *caveat* which nuances the home State's strong position. According to the ECJ, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company, must be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved. In other words, the home State doesn't enjoy "any form of immunity from the rules of the EC Treaty on freedom of establishment"[87]: such a barrier to the actual conversion of the company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned and is prohibited (unless properly justified)[88].

These last considerations of the ECJ are quite remarkable as they were not necessary to rule in this particular case. As the Court itself indicates, Cartesio merely wished to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable[89]. In other words, it must have been quite important for the ECJ, in its grand chamber, to make this statement through a very well developed *obiter dictum*, thus abandoning its customary approach to limit itself to answering the precise question referred to it by the national court. Also without necessity, the ECJ further adds that its judgment in *SEVIC Systems* hasn't qualified the scope of *Daily Mail* nor *Überseering*[90].

The judgment in *Cartesio* can only be understood as a clear confirmation of the Member States' autonomy in international company law, where the definition of the connecting factor and their adherence to a proper choice-of-law theory are concerned. Not only the incorporation theory, but adherence to the real seat theory as well are, in principle, compatible with EU free movement law; this is considered a "preliminary

'Trabrennbahn'" **GmbHR**, 2009, p. 191; MÖRSDORF Olivier "Beschränkung der Mobilität von EU-Gesellschaften im Binnenmarkt – eine Zwischenbilanz" **EuZW**, 2009, p. 97; LEIBLE Stefan, HOFFAMNN Jochen "Cartesio – fortgeltende Sitztheorie, grenzüberschreitender Formwechsel und Verbot materiellrechtlicher Wegzugsbeschränkungen" **BB**, Issue 3, 2009, p. 58–63; GODDIN Gaëtane, GODDIN Brice "Arrêt 'Cartesio': l'étendue de la liberté d'établissement pour les sociétés 'émigrantes'" **JDE**, 2009, p. 77–78; IDOT Laurence "Transfert du siège social sans changement de loi applicable" Europe 2012, Octobre Comm. nº 10, p.33-34; VOSSESTEIN Gert - Jan "Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment. Some Considerations on the Court of Justice's Cartesio Judgment" **ECL,** Vol. 6, Issue 3, 2009, p. 117; SZYDŁO Marek "Emigration of Companies under the EC Treaty: Some Thoughts on the Opinion of the Advocate General in the Cartesio Case" **ERPL**, Vol. 6, 2006, p. 990.

87 Point 112 of the ECJ judgment Cartesio, Case C-210/06.

88 Point 113 of the ECJ judgment Cartesio, Case C-210/06.

89 Point 119 of the ECJ judgment Cartesio, Case C-210/06.

90 Points 121 – 123 of the ECJ judgment Cartesio, Case C-210/06.

matter" within the reign of national law[91].

This absence of the formulation of a proper EU choice-of-law rule for companies is in line with the idea of negative integration, which the Treaty freedoms express. Interpreting the Treaty, the ECJ prohibits Member State legislative action which runs counter of the right of establishment, due to its discriminatory character or its otherwise restrictive effect on cross-border movement. It isn't so much the mere adoption of one of the traditional choice-of-law rules, in particular according to the real seat or incorporation-theories, but rather its application to a cross-border, intra-Union fact situation which can threaten unhindered freedom of movement within the European internal market.

Once again, the ECJ draws a parallel with the question whether a natural person is a national of a Member State, hence entitled to enjoy freedom of movement. Still, the ECJ adds an important nuance to this as regards the conversion into a company governed by the law of another Member State insofar as the latter State's law permits such change. The home State's priority position is maintained, though combined with a reference to the host State's law in so far as the latter accepts to validate the cross-border transfer of the company's seat in such sense that it constitutes the new *lex societatis*[92].

VII. NATIONAL GRID INDUS (2011)[93]

The *National Grid Indus* case again brought a tax issue, within the sphere of freedom of establishment and international company law, to the ECJ's docket[94]. In contrast to earlier cases, like *Daily Mail*, where the tax questions were absorbed into a more general issue of company law, the ECJ's judgment in this case gives ample attention to the fiscal debate concerned[95].

National Grid Indus was a limited liability company incorporated under Netherlands law which at a given moment decided to transfer its place of effective

[91] FROBENIUS Tilmann "'Cartesio': Partielle Wegzugsfreiheit für Gesellschaften in Europa" **DStR**, Issue 10, 2009, p. 487; KINDLER Peter "Droht vom EuGH ein neues 'Daily Mail'?" **GmbHR**, Issue 1, 2006, p. 365; KINDLER Peter "Ende der Diskussion über die sogenannte Wegzugsfreiheit" **NZG**, 2009, p. 130; HELLGARDT Alexander und ILLMER Martin "Wiederauferstehung der Sitztheorie?" **NZG**, 2009, p. 94.

[92] DEAK Daniel "Outbound establishmentrevisited in Cartesio" **EC Tax Review**, Vol. 6, 2008, p. 251; WELLER Marc-Philippe "Die Rechtsquellendogmatik des Gesellschaftskollisionsrecht" **IPRax**, Issue 3, 2009, p. 202.

[93] ECJ, 29 November 2011, Case C-371/10, National Grid Indus BV/Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam.

[94] DE LA MOTTE Alexandre Maitrot, 'Tax sovereignty, national transfers of tax losses within international groups of companies and freedom of establishment: Felixstowe Dock and Railway Company Ltd.' **CMLR**, Vol. 52, Issue 4, 2015, p. 1079–1094.

[95] STRICKLIN- COUTINHO Kelly "Where now for exit taxes after NGI decision?" **International Tax Review**, 28 November 2011; Deloitte "ECJ rules Dutch exit charge is disproportionate and infringes EU law" **International Tax**, EU Tax Alert, 30 November 2011; Ashurst "National Grid Indus: exit charges" **Tax newsletter**, January 2012.

management to the UK. A dispute arose about the final tax settlement imposed by the Netherlands on the gain of the exchange rate (unrealised capital gains tax), which National Grid Indus considered an obstacle to its freedom of establishment and challenged before the courts in the Netherlands.

The ECJ first examined whether National Grid Indus could rely on Article 49 TFEU against the Member State under whose law it was incorporated. The ECJ first referred to *Daily Mail*, *Überseering* and *Cartesio* to confirm the position of the home State, which has the power to define both the connecting factor for incorporation of the company and that required in order to maintain that status, which includes the right to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer abroad of the company's place of effective management. Once again, the ECJ compared the legal treatment of companies with the determination of the nationality of natural persons[96]. In this particular case, in view of the incorporation theory as applied in the Netherlands, the transfer of the place of effective management didn't affect the status of National Grid Indus as a company incorporated under Netherlands law and the national legislation concerned confined itself to attaching tax consequences to the transfer; the company's right to rely on Article 49 TFEU to challenge the lawfulness of the tax imposed hence remained unaffected as well. In this sense, *National Grid Indus* provides a logical follow up on *Cartesio*, with its strong emphasis on the position of the home State, though with the continued nuancing of the latter's status. As its status as a company validly existing under the law of the home State was not affected, National Grid Indus could fully rely on the Treaty-granted right of establishment and challenge the lawfulness of a tax imposed on it on the occasion of the outbound transfer of the place of effective management[97].

The ECJ further concluded that the different treatment of companies incorporated under Netherlands law transferring their place of effective management to another Member State in comparison with companies incorporated under Netherlands law transferring their place of effective management within Netherlands territory constitutes a restriction that is in principle prohibited by the Treaty provisions on freedom of establishment[98]. As to the possible justification, the ECJ recalled its earlier case law holding that preserving the allocation of powers of taxation between the Member States is a legitimate objective and that, in the absence of EU legislation, the Member States retain the power to define the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation[99]. The intra-Union transfer of the place of effective management cannot mean therefore that the Member

[96] Points 26 – 27 of the ECJ judgment National Grid Indus, Case C-371/10.

[97] Point 33 of the ECJ judgment National Grid Indus, Case C-371/10.

[98] Point 41 of the ECJ judgment National Grid Indus, Case C-371/10.

[99] ECJ, 13 December 2005, Marks &Spencer, Case C – 446/03; ECJ, 18 July 2007, Oy AA, Case C-231/05; ECJ, 15 May 2008, Lidl Belgium, Case C-414/06; ECJ, 19 November 2009, Case C-540/07 Commission v Italy.

State of origin must abandon its right to tax a capital gain which arose within the ambit of its powers before the transfer. As to the proportionality of the legislation concerned, the ECJ distinguished between the timing of the establishment of the amount of tax on the one hand and of its immediate recovery on the other hand and gave positive and negative answers respectively [100].

A very important consideration which the ECJ brought up in the course of its examination of the first proportionality issue, but which has a broader significance, is that the Treaty offers no guarantee to a company covered by Article 54 TFEU that transferring its place of effective management to another Member State will be neutral as regards taxation. Freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes all disparities arising from national tax rules[101].

Certainly, the reference to the Member States retaining their power to define the criteria for allocating their powers of taxation will sound familiar to those who are concerned about the impact of EU law on conflict of laws. The latter discipline essentially covers the same subject-matter –the allocation of regulatory power- and it is clear that the Member States retain their power to define their conflict of laws systems, within the framework of course of EU law (be it harmonized legislation or the impact of the Treaties as interpreted by the Court of Justice). An intriguing question, however, is how to understand the broader significance (if there is any) of the ECJ's considerations in point 46 of this judgment, according to which a Member State is entitled to impose a capital gain tax at the time when the taxpayer leaves the country as such measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States. In this respect, the Court refers to the principle of fiscal territoriality. As this principle is linked directly to the allocation of powers between the Member States, and the preservation of the latter recognized as a legitimate justification for restrictive measures, the question arises whether similar principles of conflict of laws can be detected and be considered worthy of a similar protection?

Further, the ECJ's remarks in point 62 of its judgment could be pertinent for conflict of laws purposes as well. As is well known, one of the main problems in private international law is the threat for international decisional harmony, and the ensuing problems for private persons who must deal with contradictory legal obligations stemming from different national sources[102]. Where tax matters are concerned, the ECJ

[100] Points 42 – 86 of the ECJ judgment National Grid Indus, Case C-371/10.

[101] Ibidem point 62.

[102] OTTERSPEER, HAASNOOT & Partners, Dutch and International Tax Counsel, **Tax News Bulletin**, 6 January, 2012; KPMG Report **EU Tax Centre**, Issue 174 – November 29, 2011; BENABDALLAH Mounia, DE WIT Cyntia Wijnen, "ECJ Disallows Immediate Collection of Tax Upon Migration" Baker & McKenzie

absolves the Member States from a possible obligation to draw up their national tax rules in a coordinated way in order to ensure neutrality. Certainly, this perspective on the extent of the Member States' obligations is not only very understandable but also fully in line with the core of internal market law. Undoubtedly, it must be taken into account also where the impact of EU law on the Member States' choice-of-law rules is concerned. In that sense, it can be interpreted as another confirmation by the ECJ of the valid existence of a variety of choice-of-law approaches with an equally varying impact on the commercial position and freedom of the companies involved.

VIII. VALE (2012)[103]

Up to date, *VALE* is the last important ECJ judgment on the subject-matter which interests us here[104]. It concerned a case of cross-border conversion of a company. VALE Costruzioni was a limited liability company governed by Italian law, registered in the Rome commercial register. As this company wished to transfer its seat and its business to Hungary, and to operate there under Hungarian law, its entry in the commercial register in Rome was deleted, the articles of association of VALE Építésikft (a limited liability company governed by Hungarian law) were adopted and the share capital was paid up to the extent required under Hungarian law for registration in its commercial register. The application for registration of VALE Építésikft, which mentioned VALE Costruzioni as its predecessor was rejected by the Hungarian authorities as Hungarian law only applied to domestic company conversions and didn't cover cross-border conversions. The competent Hungarian court expressed doubts concerning the compatibility of Hungarian legislation with EU law and referred to the ECJ the question whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation which, although enabling a company established under national law to convert, does not allow a company established in accordance with the law of another Member State to convert to a company governed by national law by incorporating such a company.

The ECJ first confirmed that national legislation which enables national companies to convert but doesn't allow companies governed by the law of another

– Nederlands Client/Legal Alert, 5 December 2011.

[103] ECJ, 12 July 2012, VALE Építésikft, Case C-378/10.

[104] BEHRENS Peter "Kommt der grenzüberschreitende Formwechsel von Gesellschaften?" **EuZW**, Issue 4, 2012, p. 121; BÖTTCHER Leif, KRAFT Julia "Grenzüberschreitender Formwechsel und tatsächliche Sitzverlegung – Die Entscheidung VALE des EuGH" **NJW**, Vol. 65, Issue 37, 2012, p. 2701; THÖMMES Otmar "Grenzüberschreitende Umwandlung von Gesellschaften" **NWB** 2012, p. 3018 – 3021; RUBNER Daniel, LEUERING Dieter "Grenzüberschreitende Verlegung des Satzungssitzes" **NJW Spezial** 2012, p. 527 – 528; WICKE Hartmut "Zulässigkeit des grenzüberschreitenden Formwechsels - EuGH - Rs." "Vale" **DStR** 2012, p. 1756 – 1759; THÖMMES Otmar "Zulässigkeit einer identitätswahrenden Sitzverlegung von Gesellschaften in der EU" **IWB** 2012, p. 571 – 576; BIERMEYER Thomas, "Shaping the space of cross-border conversions in the EU. Between right and autonomy: VALE Építési kft" **CMLR,** Vol. 50, Issue 2, 2013, p. 571–589.

Member State to do so, falls within the scope of the Treaty articles mentioned[105]. The Court came to this conclusion, referring to and explaining some of its earlier statements in *Daily Mail*, *Cartesio* and *National Grid Indus*. It confirmed the prime position of the Member States and their national law to determine the valid incorporation of a company and held that any obligation under Articles 49 and 54 TFEU to permit a cross-border conversion doesn't infringe the host Member State's determination of the rules governing the incorporation and the functioning of the company resulting from a cross-border conversion[106].

Having confirmed the applicability of the Treaty rules on freedom of establishment, the Court continues to examine the existence of a restriction on that freedom and its possible justification. First, the ECJ confirms that the different treatment of companies according to whether the conversion is domestic or cross-border is likely to deter companies which have their seat in another Member State from exercising the freedom of establishment and amounts to a restriction[107]. Next, the ECJ rejects justification, due to the fact that the legislation examined precludes in a general manner cross-border conversions and thus goes beyond what would be necessary to protect legitimate interests[108].

In its response to the third and fourth questions submitted to it, the ECJ further examines, in points 42ff, the operation of a cross-border conversion, which in the absence of Union legislation is governed by the consecutive application of the national laws of the home and host States respectively though within the limits set by Union law which oblige Member States permitting domestic conversions to grant that same possibility in a cross-border context. Yet, it is up to the Member States to govern the implementation of this Treaty-based right to carry out a cross-border conversion, although they have to conform to the principles of equivalence and effectiveness (which have been put forward earlier in the ECJ's case law on national procedural autonomy)[109].

First, the ECJ observes that the refusal by the national authorities to record in the commercial register the company of the Member State of origin as the 'predecessor in law' to the converted company, is not compatible with the principle of equivalence if such a record is made in the context of domestic conversions. Second, and pursuant to the principle of effectiveness, the authorities of the host Member State must take due account of documents obtained from the authorities of the Member State of origin

[105] Point 33 of the ECJ judgment VALE, Case C-378/10.

[106] RAMMELOO Stephan "**Companies migrating in Europe, from Hungary to Italy and back**…" Workshop Corporate Law, Ius Commune Utrecht, November 24, 2011, Universiteit Maastricht; VAN GELDER Gabriël "The European Cross-Border Conversion from a Dutch Tax and Legal Perspective" **EC Tax Review,** Vol. 4, 2013, p. 203.

[107] Point 36 of the ECJ judgment VALE, Case C-378/10.

[108] Point 40 of the ECJ judgment VALE, Case C-378/10.

[109] WELLER Marc - Philippe, RENTSCH Bettine "Die Kombinationslehre beim grenzüberschreitenden Rechtsformwechsel – Neue Impulse durch das Europarecht" **IPRax,** Issue 6, 2013, p. 536; VAN ARENDONK Henk "National Grid Indus and Its Aftermath" **EC Tax Law,** Vol. 4, 2013, p. 170.

certifying that that company has indeed complied with the conditions laid down in that Member State, provided that those conditions are compatible with EU law.

The *VALE* judgment is interesting and important from several viewpoints.

First, of course, the ECJ confirms that cross-border conversion is a way for companies to exercise their freedom of establishment within the EU as a result of which neither discrimination nor any other restriction is, in principle, allowed[110].

Second, the ECJ emphasizes throughout its judgment, and even twice in these precise terms, that companies "are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning" and that the respective Members States –and national laws involved- play a pivotal role to regulate the companies' existence and operations in this context[111].

Third, the ECJ uses this last point to decide on the role of the diverse laws involved: the provisions which enable such an operation to be carried out are those of the law of the Member State of origin (or home State) of the company seeking to convert and those of the law of the host Member State in accordance with which the company resulting from the conversion will be governed. Embedded in its interpretation of the freedom of establishment and the Treaty articles concerned and the observation that this is a matter for national law in view of the absence of secondary Union law on this topic, the ECJ really launches a choice-of-law rule which defines the respective powers of the Member States involved. It mentions twice, in points 37 and 44, that cross-border conversions require the consecutive application of two national laws.

Fourth, as is logical in view of the fact situation at issue and evidenced by the Court's answer to the first two questions, the *VALE* judgment specifically relates to the host State's obligations under EU law and more particularly, its duty to allow cross-border conversions in case that it allows national conversions[112]. As such, the clarification which the judgment brings on this issue is very precise, and must not be interpreted as an expression of the ECJ's view on the broader issue of cross-border conversion. This means that VALE must not be relied upon to impose particular obligations under EU law on the home State, e.g. a duty to permit company conversions in all circumstances[113]. Yet, the ECJ does suggest that, in view of the fact that company transformation operations are, in principle, amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment[114], the home State doesn't escape supervision either.

Fifth, the ECJ limits the powers of the host Member State specifically. It mentions that the host State's power to determine the rules governing the incorporation

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[110] Point 36 of the ECJ judgment VALE, Case C-378/10.

[111] Ibidem points 27 and 51.

[112] HANSEN Jesper Lau "The Vale Decision and the Court's Case Law" **ECFR,** Vol. 1, 2013, p. 10.

[113] GOETTE Wulf, HABERSACK Mathias (Hrsg.), **Münchener Kommentar zum Aktiengesetz**, 3. Aufl., C.H. Beck, München 2012; WICKE Hartmut „Zulässigkeit des grenzüberschreitenden Formwechsels Rechtssache „Vale" des Europäischen Gerichtshofs zur Niederlassungsfreiheit" **DStR** 2012, p. 1756.

[114] Ibidem points 24 - 33 of the ECJ judgment VALE, Case C-378/10.

and functioning of the company resulting from conversion is not infringed by the existence of an obligation under EU law to permit a cross-border conversion[115] and that the host State's legislation on company conversions is not removed from the scope of the Treaty provisions on freedom of establishment[116]. Its core point, mentioned twice in its judgment[117], is of course that if the host State's law permits domestic conversions, it must grant that same possibility to companies governed by the law of another Member State which are seeking to convert to companies governed by the law of the first Member State. The fact that the host Member State, according to the same logic as the one underlying procedural autonomy, determines the applicable national law, is not capable of calling into question its compliance with the obligations under Articles 49 and 54 TFEU[118].

Sixth, the analogy with the logic underlying procedural autonomy, including the pertinence of the principles of equivalence and effectiveness, is very interesting. It allows the ECJ to insist on its view that Member States are not required to treat cross-border operations more favourably than domestic operations but that the detailed national rules applicable to cross-border conversions cannot be less favourable, e.g. where the recording of the predecessor company in the commercial register is concerned, than those governing similar situations under national law [119]. Insofar as the principle of effectiveness is concerned, the ECJ translates this in a duty to take due account of documents obtained from the authorities of the Member State of origin certifying that the company has indeed complied with the conditions laid down in that Member State , in other words a duty of mutual recognition[120].

CONCLUSION

Three decades of ECJ case law, from '*Avoir fiscal*' to *VALE*, have eventually led to a quite consistent view on international company law within the internal market. Still, due to the technique of preliminary rulings which are meant (only) to provide an answer by the ECJ to the specific question(s) submitted to it by a national court, which must solve a case brought to its docket, the judgments taken together do not yet shed light on all pertinent issues and questions in this field[121].

Of course, the pertinence of conflict of laws for the right of establishment for companies is now beyond doubt, although the ECJ has generally –and rightly-

[115] Ibidem point 30.
[116] Ibidem point 32.
[117] Ibidem points 36 – 41 and 45 – 46.
[118] Ibidem point 50.
[119] Points 54 - 56 of the ECJ judgment VALE, Case C-378/10.
[120] Ibidem points 58 – 61.
[121] GEENS Koen , "De rol van het nationale recht in het Europese vennootschapsrecht" in I. Samoy, V. Sagaertand E. Terryn (eds.), **De invloed van het Europese recht op het Belgische privaatrecht**, Intersentia, Antwerp, 2012, p. 340-341.

refrained from recognizing too large an influence from the one upon the other. In the absence of harmonization, the Member States retain a large degree of autonomy in conflict of laws, certainly where the adoption of their choice-of-law rules and their option for one of the various approaches ranging from the incorporation until the real seat theory, is concerned[122].

The non-formulation of one consistent European choice-of-law rule for companies doesn't mean that the TFEU lacks all impact on the Member States' conflicts systems, quite the contrary. In its almost three decades of preliminary judgments on this matter, the ECJ has been able to develop a consistent interpretation of the effects which the joint reading of Articles 49 and 54 TFEU has on the Member States' rules of international company law, and on their application in a number of particular circumstances[123].

Unsurprisingly, the Member States which have adopted the incorporation doctrine will satisfy the Treaty requirements more easily than those sticking to the real seat theory. Still, in spite of the many pleas to the ECJ to condemn the latter theory as incompatible with the requirements of the internal market, and the sometimes brash remarks that the ECJ had finally done so, the real seat theory still survives as a legally valid choice-of-law approach for EU-Member States, albeit in a unilateral form (*Überseering*)[124]. Of course, legal validation mustn't be equated with the expression of support for such rule; nor should it necessarily be understood as a validation of the ways in which this theory is applied. The application of the real seat theory in particular has indeed been made subject to a number of strict requirements The same is true however for the incorporation theory; yet, due to the specific nature of the latter theory, it is more rare that these requirements are touched upon in concrete cases submitted to the ECJ and/or the Member State courts[125].

More generally, the ECJ manages to maintain and even strengthen throughout its judgments on this matter the coherence of EU law in two particular respects.

First, the ECJ has focused on the parallels between natural and legal persons, and more particularly on the unilateral determination of the nationality of natural

[122] DAVIS Paul and WORTHINGTON Sarah, **Gower and Davies' Principles of Modern Company Law** ,9th edn, Sweet & Maxwell, London 2012, p. 10; KLÖHN Lars "Supranationale Rechtsformen und vertikaler Wettbewerb der Gesetzgeber im europäischen Gesellschaftsrecht - Plädoyer für ein marktimitierendes Rechtsformangebot der EU" . **RabelsZ** Bd. Issue 76, 2012, p. 291; HABERSACK Mathias, VERSE Dirk A.,"Europäisches Gesellschaftsrecht" 4 edn., C.H. Beck, München, 2011, p. 171 – 176.

[123] MATHISEN Gjermund "Consistency and coherence as conditions for justification of Member States measures restricting free movement" **CMLR,** Vol. 47, 2010, p. 2021; HOPT Klaus "Europäisches Gesellschaftsrecht im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012" **ZGR**, Issue 2, 2013, p. 177.

[124] TEICHMANN Christoph "Modernising the GmbH: Germany's Move in Regulatory Competition" **European Company Law**, Vol. 7, Issue 1, 2010, p. 20; WEDEMANN Frauke "Der Begriff der Gesellschaft im Internationalen Privatrecht - Neue Herausforderungen durch den entrepreneur individuel à responsabilité limitée" **RabelsZ** Bd., Issue 75, 2011, p. 362.

[125] KUBAK Erk N. "The Cross-Border Transfer of Seat in European Company Law: A Deliberation about the Status Quo and the Fate of the Real Seat Doctrine" **EBLR**, Vol. 3, 2010, p. 445.

persons combined with the other Member States' duty to recognize this nationality on the one hand and the unilateral determination of the *lex societatis* combined with a similar duty of recognition on the other hand[126].

Second, and in a similar logic, the ECJ transposes the rule of mutual recognition as it has been developed since *Cassis de Dijon*[127] to international company law within the internal market[128]. Of course, this doesn't come as a surprise, as the right of establishment more generally is governed, both through the text of the TFEU and its interpretation by the ECJ, by the same rules on non-discrimination, non-restriction and mutual recognition as the other freedoms[129]. Yet, the determination and the application of the *lex societatis* according to a logic which lays various duties upon the home and host States respectively, also results in a paradigm shift in conflict of laws. The traditional multilateral and universalist approach which characterizes (continental) conflict of laws possibly must make room for a unilateral approach which grants a central place to intra-Union mobility and recognition of rights granted by other Member States. The ECJ has already made such choice in its *Grunkin and Paul* judgment, on the issue of the determination of surname for mobile Union citizens[130].

All taken together, its judgments on the position of companies within the internal market, express a similar approach which can greatly impact conflict of laws and lead to a very specific understanding of private international law, its role and its content, in the internal market.

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