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The Transfer of the Company Seat: The Freedom of Establishment and National Laws[1]

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Abstract. This paper intends to analyse how the interaction between EU law and national laws influence the possibility of the transfer of the company seat. After reviewing the provisions of the Treaty on the Functioning of the European Union and the 'classical' cases of the Court of Justice of the European Union on the freedom of establishment, one can conclude that many questions remained open concerning the cross-border transfer of the company seat. In absence of harmonisation and taking into consideration the uncertainties stemming from the case law of the Court of Justice of the European Union, the competence of the Member States is retained in many respects. This increases the significance of national laws and therefore it is worth scrutinising the different paths of development of the legislation and judiciary practice of the Member States in this field.

Keywords: transfer of the company seat; freedom of establishment; EU law and national laws

I. The Cross-Border Transfer of the Company Seat: the Interplay between EU Law and National Laws

The necessity of an EU-level regulation on the cross-border transfer of company seat is on the agenda of the European Union (the 'EU') for a long time, primarily in the form of the 14th Company Law Directive,[2] but no such legislation has been adopted so far. At the end of 2010, the European Commission formed an expert

1 This paper is based on the lecture held on 10 May 2012 at the conference 'Present and Future of the European Private Law' organised by the Sapientia Hungarian University of Transylvania.

2 Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the De Facto Head Office of a Company from One Member State to Another. The text of the proposal is available in Rammeloo 2001. 296–300. On the proposal: Rammeloo 2001. 296–311; Roussous 2001. 17–22; Rohde 2002; Cerioni 2003. 132–137; von Bismarck 2005; Király 2005. 39–41; Vaccaro 2005. 1361–1363.

group to reflect on the current issues of EU company law and the report provided by the reflection group analyses in detail, among other aspects of EU company law, corporate mobility.[3] The report of 2011 finds that primarily due to the decisions of the Court of Justice of the European Union (the 'Court') there has been a significant step forward regarding the issue of the transfer of the company seat, but something more is needed than the Court's rulings.[4] The report points out that in respect of companies the freedom of establishment remains incomplete and in need of reform.[5] In accordance with the almost dominant view of the legal literature, the report concludes that the reform should take the form of an EU legislative act.[6]

Still, even in absence of such EU-level regulation the cross-border transfer of seats of companies is a reality in the Internal Market. Although it must be acknowledged that the Court played a significant role allowing more and more freedom to corporate mobility, the existing possibilities of the transfer of the company seat is to a large extent due to the particular legal solutions adopted in national laws, or more precisely due to the creative interaction between EU law and national laws. Albeit the attention of legal scholarship primarily turns to the layer consisting of the primary and secondary EU legal sources together with the Court's judgments, the national legal material touching upon the issue of the cross-border transfer of seat is not negligible, either.

The judgments on the mobility of companies decided by the Court (*Daily Mail*,[7] *Centros*,[8] *Überseering*,[9] *Inspire Art*,[10] *Sevic*[11] and *Cartesio*[12]) are well-known and widely discussed in the legal literature.[13] Nevertheless, national courts play an equally crucial role. In the majority of cases, the Court has to rule in relation to preliminary requests. But national courts have to 'implement' the Court's decision. It cannot be overlooked, however, that this process is many times not a simple implementation since the Court's statements are often quite abstract and require concretisation. There are, however, many cases where the national court does

3 Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011. <http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf> accessed 22 May 2012.

4 Report of the Reflection Group, 13.

5 Report of the Reflection Group, 17.

6 Report of the Reflection Group, 20.

7 Case 81/87 *R. v H.M. Treasury and Commissioners of Inland Revenue Treasury ex p Daily Mail* [1988] ECR 5483.

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

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

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

11 Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805.

12 Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* [2008] ECR I-9641.

13 From the Hungarian literature see: Burián-Kecskés-Vörös 2006. 158–160; Király 2010. 134–144; Vörös 2012. 76–78.

not refer the question to the Court where it finds that it can decide the question itself since it considers that the case is purely national or the application of EU law is clear. There are many cases not referred by national courts to the Court that remain in shadow. Moreover, the 'cases in shadow' decided by national courts autonomously constitute in fact the overwhelming majority.[14]

II. The Court's Case Law on the Freedom of Establishment

In light of Articles 49 and 54 of the Treaty on the Functioning of the European Union (the 'TFEU') and the Court's case law, the scope of action of Member States may be determined from a negative aspect ascertaining the precise content and scope of application of the freedom of establishment.[15] As it is a question affecting the Internal Market, the competence on the regulation of the cross-border transfer of seat is shared between the EU and the Member States. Therefore, first it is to be examined what kind of issues are settled by EU law. Issues not addressed by EU law remain in the competence of the Member States.

However, the scope of application of the freedom of establishment is in many respects uncertain. Articles 49 and 54 TFEU are open-textured: they provide only for a very broad framework. The Court's interpretation helps only in a limited way, too. The Court interpreted the current Articles 49 and 54 TFEU in several judgments concerning the free movement of companies. It is, however, somewhat surprising how briefly one can summarise those conclusions on which one can rely with certainty concerning a transfer of seat.

Thus, among others, (i) a company can transfer its real seat to another state (*Überseering*),[16] provided that the home state allows it by keeping to treat the company as constituted under the law of the home state (*Daily Mail*, *National Grid Indus*),[17] or set up a secondary establishment there (*Centros, Inspire Art*);[18] (ii) if the real seat is being transferred, the host state must take the company's legal capacity and the capacity to be party to legal proceedings into consideration in accordance with the law of incorporation (*Überseering*[19]) and treat the company in accordance with its status acquired in the state of origin, among others, in terms of minimum

14 Van Harten 2009. 136.

15 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83.

16 See the Court's conclusions in *Überseering*.

17 *Daily Mail*, paras. 23–24; Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [nyr] paras 27; 31–33.

18 *Centros*, para 20; *Inspire Art*, para 97.

19 See the Court's conclusions in *Überseering*.

capital requirement and directors' liability (*Inspire Art*[20]); (iii) if a company intends to transfer its real seat to another Member State with the maintenance of the governing law, the home Member State may impede it raising barriers related to the status of the company as constituted under the law of that state (*Daily Mail*, *National Grid Indus*);[21] (iv) if the company transfers its registered office together with its real seat and it intends to retain its status as a company under the law of the state of origin, this state can inhibit the emigration of the company and otherwise determine the preconditions for the maintenance of the legal status acquired under the law of that state (*Cartesio*);[22] (v) if the company wishes to convert itself into a company form of the host state with a change in the applicable law, the home state cannot hinder it to the extent that the host state permits it (*Cartesio*).[23]

III. Open Questions and National Laws

The Court did not discuss many possible scenarios and, even in relation to the cases decided by the Court, a lot of questions remained open. This is because the Court can rule only on cases referred to it. There are many situations not covered by the Court so far and even in cases decided by the Court there are many questions left open. Regarding these questions, gaps may be filled in by the future judiciary practice of the Court or by the legislation or court practice of the Member States. In the following, the emphasis will be put on this latter aspect demonstrating how Member States pioneered in issues not settled by EU law.

1. Companies from EEA states

Certain questions, such as the applicability of the freedom of establishment to companies from the non-EU members of the EEA may be easily answered.

In the absence of cases referred to it on this subject, a question left open by the Court is whether the freedom of establishment is applicable to companies from non-EU members of the EEA in the same manner as to companies from the EU. No decision was passed on this issue by the Court, but the question may be answered with great certainty in the affirmative.

The wording of Articles 31 and 34 of the EEA Agreement providing for the freedom of establishment is the same as that of the TFEU.[24] Presumably, the Court would require the identical treatment of companies from non-EU

20 *Inspire Art*, para 105.
21 *Daily Mail*, paras 23–24; *National Grid Indus*, para 27.
22 *Cartesio*, para 110.
23 *Cartesio*, para 112.
24 Agreement on the European Economic Area arts 31–35.

members of the EEA since according to its constant case law Articles 31 and 34 of the EEA Treaty are consistent with Articles 49 and 54 TFEU.[25] In addition, the EFTA Court takes into account the Court's decisions and it held that there is no reason to interpret the provisions on freedom of establishment contained in the EEA Agreement differently from the relevant provisions in the EC Treaty (and probably now the TFEU).[26]

In the absence of the Court's case law, national courts had to provide an answer. German courts treat companies from non-EU members of the EEA in the same way as companies from the EU. This may be illustrated by the decision of the OLG Frankfurt am Main adopted on 28 May 2003, by which the principles laid down in the *Überseering* decision were expressly extended by the national court to companies established in an EEA state. Consequently, the legal capacity and standing of a company incorporated in Liechtenstein was recognised by the national court.[27]

2. Compatibility of the real seat doctrine with the freedom of establishment

A much more debated topic has been the compatibility of the real seat doctrine with the freedom of establishment. In the private international laws of the Member States, the determination of the law applicable to companies takes place along two famous theories: the real seat theory and the incorporation doctrine.

Neither primary, nor secondary EU legal sources determine expressly the law applicable to companies. According to the dominant view, Articles 49 and 54 have neither an explicit, nor an implied conflict of laws contents that would make obligatory the application of the incorporation theory.[28] Articles 49 and 54 impose an obligation of result on the Member States and simply require them to keep in force national laws that respect the freedom of establishment as set out in the TFEU and the Court's case law. Member States are free to adopt any rules, but they cannot apply rules that lead to discrimination in terms of the freedom of establishment rights or render less attractive the exercise of the freedom of establishment.

The Court does not scrutinise private international law provisions of the Member States in themselves, but together with substantive provisions. This

25 Case C-471/04 *Finanzamt Offenbach am Main-Land v Keller Holding GmbH* [2006] ECR I-2107; Case C-522/04 *Commission of the European Communities v Kingdom of Belgium* [2007] ECR I-5701; Case C-345/05 *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10633; Case C-104/06 *Commission of the European Communities v Kingdom of Sweden* [2007] ECR I-671. Bayer and Schmidt 2009. 735, 738; Braun 2010. 60–61.

26 Baudenbacher and Buschle 2004. 26–31.

27 OLG Frankfurt a. M. 28 Mai 2003 23 U 35/02; IPRax (2004) 56-59. Discussed by Baudenbacher and Buschle 2004. 26–31; Spahlinger and Wegen 2005. 54–55. Confirmed by the BGH, BGH 19.9.2005 Urteil – II ZR 372/03.

28 Rauscher 1999. 136; Eidenmüller and Rehm 2004. 164–166; Spahlinger and Wegen 2005. 45; Forsthoff 2006. 25–26; 53–59; Michalski and Funke 2010. 692–693.
Wymeersch 2003. 681.

implies that even Member States traditionally following the incorporation doctrine can provide for restrictions on the free movement of companies.[29] Consequently, Member States are free to apply either the real seat theory or the incorporation doctrine, but these must conform in their combined effect with substantive provisions to the freedom of establishment.

Nevertheless, legal development goes undoubtedly towards the acceptance of the incorporation doctrine even by those Member States that previously followed the real seat doctrine. In Austria, after the *Centros* judgment, the OGH declared that in spite of the express provision of the Austrian Code of Private International Law laying down the real seat principle the application of the real seat principle is contrary to the freedom of establishment – at least in the case of a secondary establishment – and the incorporation theory is to be applied.[30] In Germany, the amendment of the AktG[31] and the GmbHG[32] by the MoMiG enabled AGs and GmbHGs to transfer their real seat abroad.[33] Opposite examples may also be found. Thus, the Belgian Code on Private International Law of 2004 preserved the real seat principle,[34] albeit one must acknowledge that this is coupled with a quite flexible court practice not excluding the transfer of seats of companies.[35]

3. Company formation

A third question is whether the freedom of establishment covers a situation where the company has its real seat in a Member State other than the one in which it has its registered office already at the time of the formation.

From the perspective of the state of origin where the company has its registered office, the Court's case law leaves to that Member State the possibility to determine the required connecting factor and to require the coincidence of the registered office and real seat in the same Member State. In *Cartesio*, the Court stated that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and

29 See the facts of Centros, Inspire Art and Centros where Denmark, the Netherlands and Hungary respectively followed the incorporation doctrine.

30 OGH 6Ob123/99b, 15.07.1999.

31 Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 6 des Gesetzes vom 9. Dezember 2010 (BGBl. I S. 1900) geändert worden ist (AktG).

32 GmbH-Gesetz (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) Gesetz vom 20.04.1892 (RGBl. I S. 477) zuletzt geändert durch Gesetz vom 31.07.2009 (BGBl. I S. 2509) m.W.v. 05.08.2009.

33 Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen vom 23. Oktober 2008 (BGBl. I S. 2026).

34 Loi du 16 juillet 2004 portant le Code de droit international privé BOB-FR, 27 juillet 2004, art 110.

35 See, for example, *Lamot*, Cass., 12 novembre 1965, *Pas.*, 1966, I, 36. RCDIP (1967) 506–509.

that required if the company is to be able subsequently to maintain that status'.[36] Member States can require companies to locate their registered office and real seat in the same Member State.[37] If the company wishes to be governed under the law of the state of origin, it must respect its provisions,[38] such as a requirement that the real seat and the registered office must be in the same country. The real seat doctrine may thus be applicable in such a scenario. The freedom of establishment provisions do not come into play here, since the company is not yet constituted under the law of the Member State concerned.[39]

The possibility of such a formation with a real seat in another Member State is much more debated from the aspect of the host state. A part of the literature is against the application of the freedom of establishment in a scenario where the real seat is already located abroad at the time of the formation of the company. The main argument is that there is no element of mobility present; consequently the freedom of establishment does not apply.[40]

Interestingly, if a citizen of Member State A would not incorporate the company in the same Member State, but in Member State B, and the real seat would be placed already at the time of formation in Member State C, it would probably be covered by the freedom of establishment, since the formation of a company in another Member State is clearly covered by the freedom of establishment. In addition, an international mobility element is clearly present here.

It is odd to treat an immediate formation with a foreign real seat and a formal transfer of the real seat immediately after the incorporation of the company in the state of origin differently.[41] Accordingly, it is irrelevant whether a company carries out economic activity in another Member State through a branch (*Centros, Inspire Art*) or the '*de facto*' transfer of its real seat (*Überseering*); the host state must accept the presence of the foreign entity on its territory independently of the fact whether the real seat of the company was (re)located to that Member State at the time of the establishment of the company or later.[42] In addition, the Court applied the freedom of establishment provisions in the *Centros* and *Inspire Art* cases, although the letter-box companies had their real seat (although in the form of a secondary establishment) already at the time of the formation in another Member State.[43] It may be suggested that this interpretation could be extended to real seats located in another Member State from the outset, even if they do not have the form of a subsidiary, branch or agency.

36 *Cartesio*, para 110.
37 Lagarde 2003. 534; Diego 2004. 99–100; Frobenius 2009. 491; Heymann 2009. 561–563.
38 Klinke 2005. 290.
39 Lagarde 2003. 534.
40 Wöhlert 2009. 161–162; Kindler 2010. para 427.
41 Spahlinger and Wegen 2005. 47–48.
42 Behrens 2000. 385-386.
43 Weller 2004. 43.

The Court did not have to decide on such a case and therefore national courts had to address this issue without any help on the part of the Court. The judgment of the OLG Frankfurt am Main of 28 May 2003 confirmed an earlier decision of the OLG Zweibrücken and applied the principle of recognition in accordance with the constitution in the home state even where the foreign company already had its real seat in the host Member State at the time of foundation. In this way the freedom of establishment could be said by German courts to cover situations where there was no seat transfer or other type of movement at all.[44] In its judgment, the OLG Frankfurt found that it was insignificant whether the company's real seat was in another Member State at the outset or transferred it there later.[45]

4. International conversion

According to the *Cartesio* case, a company may convert itself into a company form provided for by the state of destination with an attendant change in the applicable law. The home state cannot restrict this to the extent that the host state permits it. In *Cartesio*, if both the registered office and the real seat of the company had been transferred and if this had taken place with an attendant change of law and the adaptation to the law of the host state, that would have clearly constituted an international transformation covered by the freedom of establishment. It is, however, not clear how it would be judged if only the registered office was transferred retaining the real seat in the Member State of origin.[46] A part of the laws of the Member States, such as German[47] or English law,[48] exclude the possibility of the transfer of the registered office of companies.

Eckert argues that the isolated transfer of the registered office from a real seat state while leaving the real seat in that country does not fall within the scope

44 OLG Zweibrücken 26.03.2003, 3 W 21/03. Leible 2006. 381; Bayer and Schmidt 2009. 747–748.

45 OLG Frankfurt a. M. Urteil 28.05.2003 - 23 U 35/02.

46 Gerner-Beuerle and Schillig interpret Cartesio as covering also the simple transfer of registered office. Gerner-Beuerle and Schillig 2010. 314–316; 320–321.

47 Excluding the possibility of the transfer of the registered office from Germany to abroad: OLG München Beschluss 04.10.2007 - 31 Wx 36/07; BayObLG Beschluss 11.02.2004 - 3Z BR 175/03; OLG Brandenburg Beschluss 30.11.2004 - 6 Wx 4/04; OLG Düsseldorf Beschluss 26.03.2001 - 3 Wx 88/01; OLG Hamm Beschluss 1.2.2001 - 15 W 390/00. For associations (Verein): OLG Zweibrücken Beschluss 27.09.2005 - 3 W 170/05.

48 *Bateman v Service* [1881] App Cas 386; *Saccharin Corp Ltd v Chemische Fabrik Von Heyden AG* [1911] 2 K.B. 516 CA; *Gasque v Inland Revenue Commissioners* [1940] 2 KB 80 (KBD); *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515 (QBD); *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1970] Ch. 506 Chancery Division; *Tayside Floorcloth Co. Ltd.* [1923] SC 590; *Re Baby Moon (UK) Ltd* [1985] PCC 103. Smart 1990. 126; Lewis 1995. 295; Cheffins 1998. 427; North and Fawcett 1999. 175; Rammeloo, Corporations in Private International Law 2001. 148–149; Lewis 2002. 38; Prentice 2003. 633; Birds, Boyle, MacNail, McCormack, Twigg-Flesner, Villiers 2004. 99; Mayson, French and Ryan 2005. 90; Collins 2006. 1336; Mößle. 2006. 46–47.

of the freedom of establishment. In his view, the simple choice of applicable law in itself is not the subject of the freedom of establishment, therefore the home Member State can inhibit the transfer of the registered office and make it conditional upon the transfer of the real seat.[49] He adds that the company can locate its real seat to the state of origin again if this is permitted by the host Member State.[50]

Metzinger argues that, by virtue of the definition of establishment in EU law, it may seem that the simple transfer of the registered office as a formal seat is not covered by the freedom of establishment.[51] Pursuant to the case law, establishment means the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.[52] The requirement of establishment is not complied with where the registered office as a simple formal address of the company would be relocated to another Member State.

This approach can find a justification in the Court's statements in the *Cadbury Schweppes* judgment. One can argue that the transfer of the registered office is only an artificial arrangement that does not reflect economic reality and aims only at the circumvention of national legislation.[53]

A further question is what kind of rights are enjoyed by the host state in relation to a cross-border conversion. In *Cartesio*, the Court ruled that the Member State of origin cannot prevent a 'company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so'.[54] However, the interpretation of the phrase 'to the extent that it is permitted under that law to do so' may be questionable.

In the case of an international conversion (as opposed to the simple transfer of the real seat), the host state can impose requirements on the company as a precondition for acquiring a new status and being considered as existent under the law of the host Member State. A host state has the right to restrict the conversion, determining those conditions that are required to link the company to the host state.[55] Real seat states could thus require the simultaneous location of the registered office and real seat in their territory following the pattern of the *Cartesio* case. Hence, the host Member State appears to be entitled to prohibit a conversion if the immigrating company does not fulfil its attachment criteria. Moreover, the host state can require the adaptation to its company law rules

49 Similarly, Däubler and Heuschmid 2009. 494.
50 Eckert 2010. 559–560.
51 Metzinger, Nemessányi and Osztovits 2009. 138.
52 Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905, para 20; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-7995 para 54; Metzinger, Nemessányi and Osztovits 2009. 129, 138.
53 *Cadbury Schweppes*, paras 51 and 55.
54 *Cartesio*, para 112.
55 Martin and Poracchia 2010. 392; Eckert 2010. 560–563.

(company structure, requirements on minimum capital and capital maintenance) applied also to companies originally established in that country.[56]

Others refer to the *Sevic* decision, by virtue of which the freedom of establishment also embraces (although not defined more closely in the judgment) international transformations.[57] If the host state provides for the conversion of domestic companies, it also has to permit an international conversion. This follows from the *Sevic* judgment that prohibits discrimination between domestic and international situations.[58]

The question to what extent host Member States are free to allow or prohibit the cross-border conversion of companies from other Member States has not yet been answered by the Court. In this respect, the pending *VALE* case may be to a certain extent helpful.[59] The case raises the question whether the host Member State, in the given case Hungary, can impede the re-establishment of an Italian company as a Hungarian company and what kind of rights the host Member States have in relation to this transaction. The Court has not yet ruled on the question referred to it, but AG Nilo Jääskinen has already delivered his opinion. The case raises the question whether the host Member State, in the given case Hungary, can impede the re-establishment of an Italian company as a Hungarian company and what kind of rights the host Member States have in relation to this transaction. However, as the AG points out, the case is to be distinguished from the previous cases, including Cartesio that it is not only about a cross-border conversion, but a cross-border re-formation. The Italian company had been deleted from the Italian registries several months earlier, when the entry into the Hungarian company register was requested. Due to this, the Advocate General found that, although the freedom of establishment is applicable and, generally speaking, the law of the host state has to permit the company to let it be known that it is the successor of another company, under the circumstances of the case the Hungarian authorities are not obliged to recognise that the Italian VALE Srl. was the predecessor of the Hungarian VALE Kft. Otherwise, in accordance with the *Sevic* case, the host Member State can require the company to comply with the requirements of Hungarian law applicable to similar situations, but it cannot prohibit the cross-border re-formation only on the basis that the domestic law does not provide for such a cross-border transaction.

56 Eckert 2010. 563.

57 *Sevic*, para 19.

58 Mörsdorf 2009. 100, 102; Bayer and Schmidt 2009. 760; Frobenius 2009. 490; Wisniewski and Opalski 2009. 614–617; Teichmann and Ptak 2010. 819.

59 Opinion of Advocate General Nilo Jääskinen in Case C-378/10 *VALE* (15 December 2011).

5. Exceptions and justifications

Where no secondary EU law exists, restrictions on the freedom of establishment cannot be maintained unless they are justified. Restricting national measures may be justified on the basis of the express exceptions provided for by Article 52 TFEU or overriding requirements relating to the general interest if they comply with the *Gebhard* criteria, namely that they are not discriminatory; they are justified by imperative requirements in the general interest; they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.[60] These criteria are also taken up by the Court's judgments on the freedom of establishment of companies.[61]

Article 52 allows national regulations or administrative actions providing for special treatment of foreign nationals on the grounds of public policy, public security or public health. The possibility of Member States to make recourse to these exceptions is quite limited.[62] There is no example in the case law on the freedom of establishment of companies where the Court would have accepted such an assertion.

In its case law, the Court recognised the protection of the interests of employees, minority shareholders and creditors as a reason justifying a restriction on the freedom of establishment of companies. However, the reliance on any of these exceptions was rejected by the Court in its judgments.[63] It is, therefore, questionable to what extent one can rely on these exceptions and this is particularly true for the abuse of law exception.

In *Centros* and *Inspire Art*, the Court opined that restricting national measures may be justified on the grounds of preventing fraud and abuse. Nevertheless, in *Centros* and *Inspire Art* the Court interpreted the possibility of an assertion of an abuse of law restrictively. The recourse to this means is quite limited pursuant to the Court's case law. In principle, availing of a more favourable legal environment or tax advantages does not constitue an abuse.[64] The avoidance of the minimum capital requirements through the establishment of a letter-box company that pursues economic activity exclusively in another state did not qualify as an abuse. In order to be justified, a national measure must be proportionate. Moreover, the prevention of abuse can justify a restriction on the freedom of establishment

60 Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.

61 *Centros*, para 34; *Inspire Art*, para 133.

62 Sandrock 2003. 2589; Forsthoff 2006. 75–77.

63 *Überseering*, paras 87–93; *Sevic*, paras 24–31.

64 *Centros*, para 27 and 29; *Inspire Art*, para 96; Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003] ECR I-15013, para 71.

only in an individual case.[65] General rules for prevention of fraud and abuse are therefore not allowed.[66] Taking into account the above requirements and the Court's practice, it is questionable what kind of national measure could conform to the above criteria.

There are, however, situations where abuse could be raised eventually with more success to justify restriction. In *Cadbury Schweppes*, it was held that a national measure restricting the freedom of establishment may be justified on the ground of prevention of abusive practices where it specifically relates to wholly artificial arrangements, which do not reflect economic reality, aimed at circumventing the application of the legislation of the Member States concerned.[67]

In its decision of 7 May 2007, the BGH had to answer the question whether the registration of a branch of a UK private limited company may be refused if a prohibition to exercise a profession was imposed on its director by German authorities.[68] The BGH found that the rejection of the registration of the branch is in conformity with the freedom of establishment for two grounds. First, it argued that the reliance on the freedom of establishment is excluded in the event of an abuse of law, such as in the given case. Secondly, the BGH stated that, even if the freedom of establishment could be applied, the restriction would meet the *Gebhard* test and considered the rejection as justified on the grounds of the protection of the creditors and the safeguarding of the unity of domestic legal order.

IV. Conclusion

There is no doubt that nowadays, primarily due to the crisis, scepticism towards the institutions and the indisputable achievements of the legal development of the EU is increasing. As professor *Mario Monti*, who became in the meantime prime minister of Italy, put 'The single market today is less popular than ever, while Europe needs it more than ever.'[69] In my view, this statement is not true for the transfer of the company seat. It seems that the regulation on the cross-border transfer of the company seat is not only necessary, but what is more, there is a demand for a regulation that reflects reality. These demands for the regulation on the cross-border transfer of seat of companies are articulated unequivocally on the part of business players.

At this moment, it cannot be foreseen whether the EU intends to settle the issue of the cross-border transfer of the company seat in the near future and if

65 Centros, para 38.
66 Looijestijn-Clearie 2004. 410.
67 *Cadbury Schweppes*, para 51.
68 BGH Beschluss 7.5.2007 - II ZB 7/06. See also OLG Dresden: Beschluss 07.02.2006 - Ss (OWi) 955/05.
69 Monti 2010. 6, 20.

yes, in what way. The Court laid down indeed crucial principles in its case law on the freedom of establishment. However, the fragmented nature of the Court's judiciary practice increases the significance of national rules on the transfer of seat. The inherent uncertainties related to the Court's judgments give an impetus to the development of national laws. Due to the absence of a detailed EU-level regulation, national laws adopt innovative solutions that shape the possibility of the transfer of seats of companies in a creative interaction with the freedom of establishment provisions of the TFEU and the Court's case law. This is illustrated by the legal solutions rooted in national laws that were presented above in the fields left untouched by the Court's judiciary practice.

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