Corporate mobility in the EU
-Freedom of establishment for national companies

Bachelor’s thesis within European company law

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Abstract

The freedom of establishment is considered to be one of the essential freedoms in establishing the European internal market. Article 49 and 54 in the Treaty on the Functioning of the European Union (TFEU) grants persons and companies the right to set up establishments and pursue economic activity within the Member States of the European Union, the articles are however complicated and the Court of Justice has in many case explained how these articles are to be interpreted.

A company is free to establish itself through a primary establishment in any Member State and has the right to open up secondary establishment in another Member State. This can be done regardless if this is done just the take advantage of the more favourable legislation in the first state. The transfer of the entire or parts of a company’s establishment fall outside the scope of freedom of establishment, then national legislation determine if transfer is allowed or not. The outcome of a transfer varies widely because of the differences in national law. In some cases a company is forced to wind-up and liquidate while in other cases the transfer is allowed. This shows that there is a need for harmonisation in the freedom of establishment for companies.

A new distinction of transfer was introduces in the latest ruling in the Cartesio case. A company can transfer from one Member State to another if it intends to convert to a company form of the new state, however, only if the legislation of new state allows it. The Court of Justice allowed a new kind of transfer and it must now be regulated in order for companies to be able to take advantage of this increase in corporate mobility.
# Table of Contents

1 Introduction ........................................................................................................... 1
   1.1 Background .................................................................................................... 1
   1.2 Purpose .......................................................................................................... 4
   1.3 Method and Outline ....................................................................................... 4
   1.4 Delimitation .................................................................................................... 5

2 Conflict between National Laws ................................................................. 6
   2.1 Member States Laws .................................................................................. 6
   2.2 Real Seat Theory ......................................................................................... 7
   2.3 Incorporation Theory .................................................................................. 8

3 Case Law Pre Cartesio ...................................................................................... 9
   3.1 Daily Mail .................................................................................................... 9
   3.2 Centros ......................................................................................................... 10
   3.3 Überseering .................................................................................................. 12
   3.4 Inspire Art .................................................................................................... 14
   3.5 Sevic Systems ............................................................................................... 15
   3.6 Summary on case law pre Cartesio ............................................................. 16

4 The Cartesio Case .......................................................................................... 18
   4.1 Background to the National Dispute ......................................................... 18
   4.2 Comparisons with Previous Cases .............................................................. 18
   4.3 Proposal by the Advocate General .............................................................. 20
   4.4 Cartesio Judgement ..................................................................................... 22
      4.4.1 Decision by the Court of Justice ............................................................ 22
      4.4.2 New Distinction of Transfer ................................................................. 24
      4.4.3 Comparison with the Sevic System Case ........................................... 25
      4.4.4 Reception in the Academic Community ............................................ 26
   4.5 Conclusions .................................................................................................. 28

5 Different Situations of Transfer ................................................................. 31
   5.1 General Remarks .......................................................................................... 31
   5.2 Between Real Seat Theory States ............................................................... 32
   5.3 From Real Seat Theory State to Incorporation Theory State ................. 32
   5.4 Between Incorporation Theory States ......................................................... 32
   5.5 From Incorporation Theory State to Real Seat Theory State ............... 33
   5.6 Consequences ............................................................................................. 33

6 Conclusions and Outlook ............................................................................ 35
   6.1 Present Status of Freedom Establishment ............................................... 35
   6.2 Need for Harmonisation? ............................................................................ 36

List of references ................................................................................................. 40
**Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CJ</td>
<td>The Court of Justice</td>
</tr>
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<td>TEFU</td>
<td>The Treaty on the Functioning of the European Union</td>
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<td>TEU</td>
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1 Introduction

1.1 Background

Ever since the founding of the European Union (EU) one of the main aims has been to create an internal market in order to promote development, economic growth and social progress.¹ The internal market shall include the free movement of goods, person, services and capital.² Freedom of establishment is one important part of the internal market and regulated in Article 49 and 54 in the Treaty on the Functioning of the European Union (TFEU). Both persons and companies are granted the right to set up establishments and conduct economic activity throughout the EU.

Article 49 TFEU grants persons the right to freedom of establishment and it stipulates:

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

“Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital”.

The first paragraph in the article focuses on the elimination of all restrictions on both primary and secondary freedom of establishment. Primary establishment means the opening up of a new establishment or complete transfer of an existing establishment.

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¹ Article 3 The Treaty on European Union.
² Article 26 The Treaty on the Functioning of the European Union.
Secondary establishment means the opening up of an agency, branch or subsidiary in another Member State.³

The second paragraph grants the right to pursue activities as self-employed on the same level as nationals in the Member State of establishment. This means that to prohibit discrimination Member States must treat their own nationals equal to nationals from other Member States.⁴

Article 54 TFEU provides companies with the same freedom of establishment as natural persons and it stipulates:

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

The rights granted in Article 49 and 54 TFEU also depends on the Member States national legislation. Conflicts between national laws and European law can arise. If a company only pursues economic activity in one Member State in which it was created the freedom of establishment is of no importance since only domestic law apply. However when a company wants to move and pursue economic activity in one or several other Member States problems can occur.

The differences in Member States´ national legislation become apparent when determining which Member State´s national law should be applicable when a company transfers from one Member State to another.⁵ The rules determining the applicable law are private international law rules and are in this essay referred to as conflict rules or choice of law rules. These rules determine where a company has its seat. Article 54 TEFU gives three different definitions of a company´s seat: registered office, central administration or principal place of business, the definition of seat in the TFEU is similar to that of Arti-

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Article 60.1 in the Brussels I Regulation. This regulation determines which Member State’s court has jurisdiction and it also contains rules the right to enforce judgements in civil and commercial matters.

There are essentially two different theories, the real seat theory and the incorporation theory. According to the real seat theory the law of the state where the company has its central administration and real seat should determine the applicable law. The incorporation theory on the other hand refers to the law where the company was incorporated.

The conflict rules determine the applicable national company law. Basically the national company law determine if the company’s transfer of seat is allowed or not. These two different conflict rules and the different national company laws obviously lead to difference between Member States when put to use on companies’ transfer of seat. The freedom of establishment is an area where multiple conflicts can occur since Article 49 and 54 TFEU are complicated.

In order to try and clarify the scope of freedom of establishment the Court of Justice (CJ) has in a number of cases explained how Article 49 and 54 TFEU should be interpreted. The most important cases concerning freedom of establishment are Daily Mail, Centros, Überseering, Inspire Art, and SEVIC.

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

The latest case in which the CJ examines the freedom of establishment is *Cartesio*¹⁴ and concerns whether Articles 49 EC and 54 TEFU are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State while retaining its status as a company governed by the law of the Member State of incorporation. The interesting thing about this case is that it is similar to the earlier case *Daily Mail*, and the CJ once again had to address the question if a Member State is prohibited by the freedom of establishment rules to place restrictions on a company moving out of its territory to another Member State.

### 1.2 Purpose

The purpose of this essay is to examine how the freedom of establishment for companies in the European Union has developed through case law leading up to its latest ruling in *Cartesio*.

From this purpose two questions arise that also need to answers.

- What is the current legal position for companies on the freedom of establishment, with focus on corporate mobility?

- Is there need for a harmonization or even unification of the Member States legislation governing the freedom of establishment?

### 1.3 Method and Outline

In chapter two a descriptive method is used in order to describe the differences between Member States laws. Then an analysis of the relevant case law leading up to the *Cartesio* judgement is done in chapter three. After that an analysis of the *Cartesio* is done and a comparison between the relations with the previous case law is done in chapter four. The problems companies will encounter when they want to exercise their freedom of establishment will be illustrated in chapter five. In the final chapter the conclusions drawn will be joined together and the possible need for harmonisation will be discussed.

This essay will use EU law and Articles 49 and 54 of the Treaty on the Functioning of the European Union in particular. These Articles are complicated and only serve as gen-

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eral provisions in this field of law. The interpretation of the Articles has been developed through case law from the CJ and guidance must be sought there. Since analysis of the case law in this area is the main purpose of this thesis this the primary source of materials. The opinions of the Advocate General are used in order to present a better understanding on the CJ: s judgment. Legal writing and literature will be used when describing the background and in order to illustrate different opinions in regards to the analysis.

1.4 Delimitation

This paper will focus on companies created under the Member States’ national laws and the current legal position for those companies, no discussion will be made on the companies governed by EU law. The possible effects that the rules of the transfer of companies have on the internal market with regard to competition will not be dealt with. This basically means that a discussion regarding the possible competition between Member States to each other to attract companies and the effects of that competition will not be had.

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2 Conflict between National Laws

2.1 Member States Laws

A company that has been formed in accordance with the law of a Member State will obviously have legal capacity in that state (further referred to as the incorporation state), and as long as the company only conducts activity in that state no problems will occur. If, however, a company conducts activity in several Member States the question arises what is the connecting factor that determines which Member State’s law that should be applicable to the company. Companies as well as persons have what can be described as a nationality. When determining the nationality of a person several problems can occur, but for legal persons the nationality can even be harder to determine since companies can have their business spread in several Member States. A company can move the entire or parts of their establishment from the Member State in which it was created and this leads to certain problems. Which Member States national legislation should be applied when a company move part or its entire establishment to another Member State? 

In the EU there are essentially two different theories that are applied by the Member States in order to determine which national company law that should be applied to a company. However, the distinction made are just done in order to make a general theoretical distinction between different ways of how Member States handle conflicts that occur, two countries applying the same theory might come to different solutions when applying it practically with regard to their own national legislation. The national legislation determines the company’s creation, need for wind-up and liquidation if the company moves. The Member State where the company wants to establish itself is referred to as the host state. The conflict rules answer the questions what is the applicable na-


tional law and when do the applicable law change when a company moves from the incorporation state to a host state.\textsuperscript{19}

\section*{2.2 Real Seat Theory}

The seat theory means that a company should be subject to the laws where its real seat is located. There are many definitions of what real seat actually means and it is different from Member State to Member State.\textsuperscript{20} It has been referred to as central management, head office and central administration.\textsuperscript{21} The core principle seems to be that the Member State who is affected most by the company’s activity should subject the company to its laws.\textsuperscript{22} But the connecting factor that seems to correspond to the real seat is the central administration.\textsuperscript{23} Just because the central administration determines the applicable law does not mean the registered office is allowed to move. The real seat theory requires the central administration and registered office to be in the same place.\textsuperscript{24}

There has been some criticism of the real seat theory. First as described above there is not a clear definition of what the real seat actually is. Further it can cause problem for a company that wants to move out of the Member State where the real seat it located and move to another Member State. The company is forced to wind-up, liquidate and re-incorporate in the host state.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{22} Severinsson, Daniel, \textit{EG:s etableringsrätt för bolag}, Juridisk Tidskrift, 2003/04, No 1, p 71.
\item \textsuperscript{23} Nelson, Maria, \textit{The seat theory and the Incorporation theory- an Analysis of the meaning of freedom of establishment}, IUR INFORMATION, 2004, No 5, p 3.
\end{itemize}
2.3 Incorporation Theory

The incorporation theory means that the Member State laws where a company was incorporated and have been registered should apply. The connecting factor seems to be where the company was incorporated. This means that the connecting factor never changes, once a company been incorporated in a Member State that law will govern the company throughout its existence. From a corporate mobility perspective this is obviously the best theory since it allows the company to move its seat while retaining its status as company in the incorporation state. According to this theory a company does not have to do any business or have its central administration in the Member State of incorporation. 26

The registered office cannot be moved without a change of the applicable law but the central administration can. 27 This gives the companies a greater freedom to move out of a Member State without the fear of winding-up, liquidation and re-incorporation in the host state. 28

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3 Case Law Pre Cartesio

3.1 Daily Mail

This case concerned a British company Daily Mail & General Trust PLC that wished to transfer its central administration from the United Kingdom to the Netherlands without losing their status as a legal person or ceases to be a company incorporated under British law; the company would still have their registered office in United Kingdom. The purpose of this move was done in order to enjoy the lower taxes in the Netherlands.

The company law of the United Kingdom stated that if a company was incorporated and had its registered office in the United Kingdom, it may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company under national law. This shows that the United Kingdom applies the incorporation theory. However, if the move was done for tax purpose consent was needed from the Treasury (British tax department).

The company claimed that Articles 49 and 54 TFEU (Former Articles 52 and 58 of the EEC Treaty, throughout this essay the relevant Articles in the TFEU will be referenced) gave them the right to move its seat without permission and still keep their status as a legal person under British company law.

The CJ stated that Article 49 and 54 TFEU grants companies the freedom of establishment. Companies have the right to secondary establishment in opening up agencies, branches or subsidiaries, company also have the right to incorporate in another Member State. This is however different from when a company want to incorporate in another Member State and keep its legal status as a United Kingdom company.

30 Ibid. paras. 1-10.
31 Ibid, para 3.
32 Ibid para 5.
33 Ibid. para 8.
34 Ibid para 16-17.
The CJ stated with regard to a company in their judgment that: “unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning”\(^\text{36}\). The CJ then stated that there are differences between national legislations concerning the required connecting factor and whether the registered office or central administration of a company may be transferred from one Member State that are “problems which are not resolved by the freedom of establishment but must be dealt with by future legislation or conventions”\(^\text{37}\). This means that the difference in use of the real seat- and incorporation theory are not within the scope of freedom of establishment. The CJ then concluded that the scope of Article 49 and 54 TFEU are not to be interpreted as giving a company, incorporated under the legislation of a Member State and having its registered office there, the right to transfer its central administration to another Member State\(^\text{38}\).

To summarise, the right for a company to transfer its seat, registered office or central administration, and still maintain its status as legal person in the incorporation state is not protected by Article 49 and 54 TFEU. Member States are allowed to place any restrictions on a company’s transfer of seat if it wants to continue to be governed by the law of the incorporation state. This case was about the transfer of establishment, seat, and not opening up of subsidiaries, in other words it was about primary establishment. The fact that the Member States use both the real seat and the incorporation theory are to be solved by future legislation.

### 3.2 Centros\(^\text{39}\)

The Centros case was concerned with two Danish persons that had formed a private limited liability company, Centros Ltd, in the United Kingdom. The company wanted to open up a branch in Denmark but the Danish authorities refused the registry of the branch. The refusal was based on the fact that Centros did not trade or pursue any economic activity in the United Kingdom and in fact had its actual seat in Denmark. This

\(^{36}\) Ibid. para. 19.

\(^{37}\) Ibid. para. 23.

\(^{38}\) Ibid. para. 25.

\(^{39}\) Case C-212/97 Centros vs Erhvervs- og Selskabsstyrelsen, [1999] ECRI-1495.
claim was meaning that Centros had it primary establishment and not secondary establishment in Denmark and it is therefore an internal matter and the Community laws could not be invoked. The reason for incorporation in the United Kingdom was to avoid paying the minimum start up share capital\(^{40}\) in Denmark and the United Kingdom had no requirement on start up share capital. The company claimed that according to Article 49 and 54 TFEU they had the right to open up a branch in Denmark regardless if they exercised any economic activity in the United Kingdom.\(^{41}\)

The CJ started off by examining whether or not this was a concern of Community or just national Danish law since Denmark claimed it was a primary establishment and not a secondary. The conclusion was that it was irrelevant if there was no intent to conduct business in the incorporation state and Community laws were applicable as long as the company has been formed in accordance with the law of a Member State.\(^{42}\)

After confirming that Article 49 and 54 TFEU were indeed applicable the CJ stated that the refusal of registration of branch by a company formed in accordance with the law of a Member States constitutes a limitation on the freedom of establishment and is not allowed.\(^{43}\) Therefore the freedom of secondary establishment is upheld.

Then the CJ discussed the Danish authorities’ claim that it is just a circumvention of the national laws and constituted an abuse of the freedom of establishment.\(^{44}\) There are measures that the Member States can take in order to prevent fraud and abuse, however, such restrictions must be made in accordance with the objects of the freedom of establishment.\(^{45}\) One object is to enable freedom of secondary establishment and if a national creates a company just to enjoy the best legislation that cannot be seen as abuse of the freedom of establishment.\(^{46}\) In order for a Member State to be able to restrict or hinder a company’s freedom of establishment four requirements have to be fulfilled in accor-

\(^{40}\)Ibid. paras. 3-7.
\(^{41}\) Ibid. paras. 12-14.
\(^{42}\) Ibid. para. 17.
\(^{43}\) Ibid. paras 19-22.
\(^{44}\) Ibid. paras 23-24.
\(^{45}\) Ibid. paras. 24-25.
\(^{46}\) Ibid. para. 27.
dance with the in Kraus and Gebhard cases. The allowed restrictions have to fulfil four requirements: “they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it”. The CJ came to the conclusion that these requirements were not fulfilled in this case.

It is also of interest to point out that the CJ in its judgement held that: “the fact that company law is not completely harmonised in the Community is of little consequence”. This must be seen in relation to the previously discussed case Daily Mail were the judgement was based on the fact that there were differences in national legislations and the problems must be resolved by future legislation.

To summarise, a host state cannot refuse a company registration of a branch simple because it wanted to circumvent the national legislation. This means that a company can be created anywhere in the EU and open up a secondary establishment in any Member State. The fact that this was done only to enjoy better legislation did not constitute an abuse. This case was essentially about secondary establishment since it concerned the recognition of a branch.

### 3.3 Überseering

The background to this case is that a company incorporated in the Netherlands, Überseering, owned a property in Germany. The company then commissioned a construction-company to do some repairs on the property. The repairs were done but Überseering claimed that the work was defective. Two years later two German nationals acquired

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49 Ibid.

50 Case C-212/97 Centros vs Erhvervs- og Selskabsstyrelsen, [1999] ECRI-1495, para. 35.

51 Ibid. para. 28.


the company and they brought action against the construction-company in a German court because of the defective repairs. The German court, however, dismissed the claim because Überseering did not have legal capacity of according to German law and therefore could not bring legal proceedings there. The reason according to German law is that: “a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established” , in other words Germany apply the real seat theory. The German court found that once the two German nationals bought the company the actual centre of administration have changed and since it was still incorporated in the Netherlands Überseering did not have legal capacity in Germany. The questions refereed to the CJ was whether or not Article 49 and 54 TFEU was the interpreted as giving a Member State the right to decide a company’s legal capacity if it had transferred its central administration there from another Member State.

At a first glance the situation is similar to that in the Daily Mail case since it deals with the Member States right deny a company legal capacity. The CJ however said that are a difference since the Daily Mail case concerned the right of the incorporation state to place restriction on a company’s transfer of central administration while retaining their legal capacity. The Überseering case however concerned if the Member State that a company had transferred its central administration to, the host state, had the right to decide the legal capacity of the company. Here the court makes a distinction between the incorporation state and the host states rights. The differences have also in literature been said that the CJ made a distinction between inbound and outbound establishment cases. The CJ confirms that it is up to the incorporation state to determine if a company can transfer its seat. The CJ stated that Articles 49 and 54 TFEU gave a company right to be recognised and have legal capacity in the Member State to which it transfers

54 Ibid. paras. 6-8.
55 Ibid. para. 4.
56 Ibid. para. 9.
57 Ibid. para 21.
58 Ibid. para 62.
its seat to, the host state. Überseering therefore had the right to exercise their right to a secondary establishment in Germany.\textsuperscript{60}

To summarise, the CJ stipulated that a company that has been validly formed in an incorporation state cannot be refused recognition as a legal person in the host state after transferring its seat.

3.4 Inspire Art\textsuperscript{61}

This case was about a company, Inspire art, which was formed in accordance with the laws in the United Kingdom. The company then had opened a branch in the Netherlands and conducted its main economic activity there. This case bears at first glance resemblance with the Centros case but in this case the Netherlands authorities did not want to deny the company right to establish themselves in the state. However the authorities wanted the company to register and follow certain rules regarding foreign companies. Inspire Art now claimed that the requirements set out by the Netherlands were prohibited according to the freedom of establishment set out in Articles 49 and 54 TFEU.\textsuperscript{62}

The CJ started off by confirming some of its previous statements in Centros. It is to be regarded as irrelevant if a company is in formed one Member State only to establish itself in another Member State. The reason why a company chooses to incorporate in a particular state is irrelevant, except in cases of fraud. If the only reason for incorporation is to enjoy the more favourable legislation is not seen as abuse.\textsuperscript{63} The CJ also confirmed the difference from the scenario in the Daily Mail case, by referring to the difference in the Überseering case.\textsuperscript{64} Basically the CJ distinguished that this was a case regarding the relations between a company and a host state, not an incorporation state.

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\textsuperscript{60} Case C-208/00 Überseering BV vs Nordic Construction Company Baumanagement GmgH [2002] ECR I-9919, para. 80.

\textsuperscript{61} Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd, [2003] ECR I-10155.

\textsuperscript{62} Ibid. paras. 34-37.

\textsuperscript{63} Ibid. para. 95.

\textsuperscript{64} Ibid., paras. 102-103.
Thereafter the CJ concluded that the requirements set out by the Netherlands were not precluded by Articles 49 and 54 TFEU when a company formed in accordance with another Member State wished to exercise their freedom of secondary establishment.\textsuperscript{65}

The CJ now continue to investigate if the requirement in the Dutch legislation could be justified. The Dutch authorities claimed that the rules were for the protection of private and public creditors and are justified through Article 52 TFEU or by overriding reasons in the public interest.\textsuperscript{66} The CJ found that Article 52 TEFU could not be applied and only justifications of the overriding reasons in public interest were of concern. These fulfil four requirements that have been set out in the previous cases, \textit{Kraus}\textsuperscript{67}, \textit{Gebhard}\textsuperscript{68} and \textit{Centros}.\textsuperscript{69} In this case the requirements were not justified, but these requirements have to be tested in a case-to-case basis\textsuperscript{70}

To summarise, the CJ confirmed much of its statements in the \textit{Centros} case that it is irrelevant if a company is formed one Member State only to establish itself in another Member State. The most important part of this case is that even restrictions that not directly hinder a company to exercise their right to freedom of establishment cannot be justified.

\subsection*{3.5 Sevic Systems\textsuperscript{71}}

This case primarily concerned cross-border mergers but it also relates to corporate mobility in EU. A German company, SEVIC, wanted to register a merger between itself and a company from Luxembourg, Security Vision. The registration in the national commercial register was denied by the German court because the national law only provided for mergers between companies established in Germany.\textsuperscript{72}

\begin{itemize}
  \item \textsuperscript{65} Ibid. para. 105.
  \item \textsuperscript{66} Ibid. para. 107-110.
  \item \textsuperscript{67} Case C-19/92, Kraus v Land Baden-Württemberg [1993] ECR I-1663.
  \item \textsuperscript{68} Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.
  \item \textsuperscript{69} Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd, [2003] ECR I-10155, para. 133.
  \item \textsuperscript{70} Ibid. para. 143.
  \item \textsuperscript{71} Case C-411/03, SEVIC Systems AG [2005] ECR I-10805.
  \item \textsuperscript{72} Ibid. para. 2.
\end{itemize}
The CJ observed that there were differences in how Germany treated internal mergers between two national companies and cross-border mergers between a national company and a company established in another Member State. The question referred by the national court was if this were allowed according to Articles 49 and 52 TFEU.\textsuperscript{73}

Different treatment of internal and cross-border merger was held to be a violation of the freedom of establishment. According to Articles 49 and 52 TFEU a company from one Member State should be treated the same way as national companies in the Member State the company wishes to establish itself. The right of establishment conferred to companies cover all measures which grant access to a Member State and allowing them to pursue economic activity in that state. This means that measures that give a company access another Member State should never fall outside the scope of freedom of establishment. Cross-border mergers and other company transformation operations constitute a particular method of exercising the freedom of establishment and are of great importance for the function of the internal market. Member States must therefore allow this form of pursuit of economic activity in accordance with Articles 49 and 52 TFEU.\textsuperscript{74}

After concluding that the situation at hand fell inside the scope of the freedom of establishment the CJ moved on to discuss if the German law were to be considered a restriction of that very same freedom. The way that German law treated national companies different from companies from other Member States were held to be a restriction and could only be justified by imperative reasons in the public interest. Some examples were given by referring back to the previous cases Überseering and Inspire Art. But the restriction at hand was too great and could not be justified.\textsuperscript{75}

### 3.6 Summary on case law pre Cartesio

The right to open up a primary establishment is covered by the scope of freedom of establishment. But the right to transfer that establishment is not covered by Articles 49 and 54 TFEU. Member States have the right to prohibit the transfer if the company want

\textsuperscript{73} Ibid. paras. 11-15.

\textsuperscript{74} Ibid paras. 16-19

\textsuperscript{75} Ibid paras. 20-23 and 28.
to retain its legal personality in the state. The freedom of establishment is not applicable when a company want to transfer its seat, meaning central administration or registered office. This was stipulated in the Daily Mail case. But if the incorporation state allows the transfer the host state cannot deny a company its legal personality, according to the Überseering case.

When it comes to the secondary establishment companies are entitled to open up agencies, branches or subsidiaries in any other Member State. That can already be concluded by reading Article 49 TFEU, but the CJ have clarified the scope of that article. A company doesn’t even have to conduct any activity in the incorporation state to be recognised and have the right to conduct activity in a host state. This was concluded in the Centros and Inspire Art cases. Furthermore, a Member State cannot impose special restrictions or requirements on a foreign company compared to its own national companies. This was the most important conclusion of the Inspire Art case.

The Sevic case where concerned mergers and did in fact increases the corporate mobility by granting companies the right to conduct mergers under the protection of the freedom of establishment. Most of the Sevic case was later superseded by the Directive concerning cross-border merger but the CJ made some general statements regarding the freedom of establishment. A company formed in one Member State should always be subject to the same treatment and conditions that companies in a host state enjoy. The right of establishment cover all measures that grant access to a host state and the right to pursue economic activity.

Member States are granted the right to impose restrictions on companies’ freedom of establishment in Article 52 TEFU on ground of public policy, public security and public health. The CJ have also confirmed that Member States are allowed to justify restriction on overriding requirements in the public interest in accordance with the test set out in Kraus and Gebhard. This must be done on a case-to-case basis.

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76 Directive 2005/56/EC on cross-border mergers of limited liability companies.
4 The Cartesio Case

4.1 Background to the National Dispute

This case was about a Hungarian company, Cartesio, which had been formed in accordance and with the laws of Hungary and had its seat there. The company now wanted to transfer its seat to Italy and applied for a change in the Hungarian company register. The intent of Cartesio was to have its seat in Italy and still be a company governed by the laws of Hungary. The application for change was however rejected on the grounds that an incorporated company cannot transfer its seat abroad and still have the Hungarian laws as it “personal” law. Cartesio had to be dissolved in Hungary and then re-incorporated under Italian law. Cartesio appealed the decision to the court in Hungary, which referred a number of questions to the CJ.77

As the different use of conflict rules was important in previous cases, the theory used in Hungary must be determined. The CJ here referenced to a number of paragraphs in the Hungarian national legislation, which seem to use a mix of incorporation and real seat theory.78 But for the companies the real seat theory should be applied, and this is the situation in the case.79 So the case at hand concerned a company that wanted to move its seat out of a Member State in accordance with the real seat theory.

4.2 Comparisons with Previous Cases

The issue at hand here have strong resemblance with the one in Daily Mail. The core question is essentially the same, whether or not a company can transfer its seat from an incorporation state to a host state and still remain a legal person governed by the laws of the incorporation state. However, in Daily Mail there was not a complete restriction since a move would have been allowed if certain requirement were fulfilled. In Cartesio there was a total restriction. In the Daily Mail case the CJ said that Articles 49 and 54 TFEU gave a company no such right. This was done for a number of reasons including the differences in the Member States use of conflict rules and absence of harmonization.

78 Ibid. para. 11-22.
Despite the similarities the questions must be seen as justified for a number of reasons. One being that the *Daily Mail* case was delivered over twenty years ago. Over time the internal market has developed and been much more integrated than when the *Daily Mail* case was delivered. The need for more flexible rules regarding a company’s freedom to move has increased. Another reason is that the case law in the area of freedom of establishment has developed since the *Daily Mail* ruling.  

There are a number of distinctions that can be made in previous case law that are of importance before discussing the *Cartesio* case. This is the first case since the *Daily Mail* case that deals with primary establishment, the transfer of seat in particular. This was not allowed in the previous case because companies are creatures of national law which determines the existence of the company, the primary establishment. If the company now wants to break all connecting factors with that but still exist under its law, the incorporation state should be allowed to place restrictions on that transfer.

The CJ also seem to make a distinction between moving in cases and moving out cases, also referred to as inbound and outbound establishment. On the one hand there was the *Daily Mail* case which concerned a company and its relation with the incorporation state. An incorporation state was found to be allowed to place restrictions on a company’s transfer abroad. As mentioned in the previous chapter the CJ confirmed that there is a difference between this relationship and that between the host state and a company. This was done in the wording in the *Überseering* and *Inspire Art* cases and can also apply to the *Centros* case. Those cases dealt with the relationship between a host state and a company validly formed in an incorporation state. This was also the situation in the *Sevic* case which concerned the restrictions made by a host state in an inbound merger situation.

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The underlying general distinction that can be made is that in Daily Mail, since the connecting factor used is different in the Member States, the applications of the conflict rules fall outside the scope of freedom of establishment. In the following cases Centros, Überseering and Inspire Art the application of conflict rules were inside the scope of freedom of establishment and prevented Member States from applying their conflict rules. The CJ now had the opportunity again to consider if the transfer of seat, registered office or central administration, while retaining the legal status and still be governed by the incorporation state’s law should be allowed. Would the CJ make any new distinctions and perhaps overturn its previous judgments and institute some new precedence?

4.3 Proposal by the Advocate General\textsuperscript{84} 

In order to try to clarify and give a different point of view of the case the proposal of the Advocate General will be discussed.

The Advocate General started by clarifying that Hungary applies the real seat theory and concluded that the theory demands that the nationality and seat of a company must be the same. The right to open up branches and subsidiary is allowed as long as the operational headquarters, seat, remain in Hungary.\textsuperscript{85}

Then the Advocate General discusses the previous case law in the area. Through the Daily Mail case it can be interpreted that the CJ have given the incorporation state the sole right to exercise the “life and death” of a company. This means that Member States can grant companies “life” by allowing them to start up and establish themselves. The fact that the Member States controls the “death” of a company means that they are allowed to force the companies to wind-up and liquidate if they want to leave the state.\textsuperscript{86}


\textsuperscript{84} Case C-210/06 Opinion of Mr Advocate General Poiares Maduro delivered on 22 May 2008, [2008] ECR I-09641.

\textsuperscript{85} Ibid. para. 23.

\textsuperscript{86} Ibid. para 26.
This because as previously mentioned in *Daily Mail* because companies only come into existence by virtue of their national laws, they should also be allowed do “kill” them.\(^\text{87}\)

The Advocate General then criticizes the previous case law claiming it was full of contradictory signals. This was based on one hand that in the *Daily Mail* case national rules fell outside the scope of freedom of establishment, while on the other hand in *Centros, Überseering* and *Inspire Art* they fell inside. The distinctions made by focusing on primary versus secondary establishment and between inbound versus outbound situations were never entirely persuasive. No distinction between entering and leaving a Member State should be done when in accordance with Articles 49 and 54 TEFU, this was done partially by referring to the *Sevic* case.\(^\text{88}\) This can be seen as a clear indication that the Advocate General is not in total agreement with the earlier cases.

The Advocate General is of the opinion that the CJ’s reasoning in the previous case seems to be inspired by two concerns. The fact that Member States can use both the real seat and the incorporation theory as their conflict rule is the first concern. Secondly, the practical use of these theories must have some sort of mutual recognition, meaning that Member States have to respect use of both theories. The conclusion is that neither theory can be applied to its full extent.\(^\text{89}\)

To sum up the Advocate General believes it is impossible to argue that Member States should have the absolute right to control the “life and death” of company constituted under its laws when it wants to exercise the freedom of establishment. If a company is forced to wind up and re-incorporate when it wants to transfer its seat must be seen as a restriction. Justifications can however be made on ground of public interest, such as the protection of creditors, shareholders and employees. To protect these stakeholders a Member State in should be allowed to set some conditions on a transfer since it will not be able to maintain an effective control over the company. But the complete denial of possibility of transfer of seat by Hungary could hardly be justified.\(^\text{90}\)

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\(^\text{88}\) Case C-210/06 Opinion of Mr Advocate General Poiares Maduro delivered on 22 May 2008, [2008]. ECR I-09641, paras. 27-28.

\(^\text{89}\) Ibid. para. 30.

\(^\text{90}\) Ibid. paras. 31-34.
The final recommendation was that Articles 49 and 54 TFEU preclude national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another Member State.

Some interesting observations can be made here. First that the distinctions between primary and secondary establishment and also between inbound and outbound establishment should not be relevant anymore, since the Advocate General found previous cases contradictory. Also the fact that the proposal goes in the complete opposite way of the *Daily Mail* case is interesting.

### 4.4 Cartesio Judgement

#### 4.4.1 Decision by the Court of Justice

The CJ did not follow the proposal made by the Advocate General when it delivered the judgment in the case. In fact the judgment confirmed much of its previous cases and did not move away from it as the Advocate General had proposed.

The CJ started by reformulating the questions asked by the Hungarian court, there were in fact four questions referred to the court. The original question were essentially whether or not Articles 49 and 54 TFEU were to be interpreted as meaning that national rules that prevent a Hungarian company to transfer its seat to another Member State are incompatible with Community law.\(^\text{91}\) The CJ, however, reformulated the question to whether Articles 49 and 54 TFEU are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State while retaining its status as a company governed by the law of the Member State of incorporation.\(^\text{92}\) The key issue according to the CJ is not if a company can transfer its seat, but if it can do that while keeping its legal status in the incorporation state. This aspect involves the different connecting factors that Member States use in order to determine if the company can been seen as their national, meaning the use of the different national conflict rules.

The CJ clarified that according to the Hungarian laws Cartesio would have to cease to exist and re-incorporate itself in Italy when the company wanted to transfer its seat. On

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\(^{91}\) Case C-210/06 Cartesio Oktató Szoláltató bt. [2008] ECR I- I-09641, para 40.

\(^{92}\) Ibid. para 99.
that note the CJ acknowledged their previous statement in *Daily Mail* that “companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning”. The CJ continued and recognised the differences in the national legislation regarding the connecting factor used and the possibility to change that factor, meaning the transfer of the registered office or real seat from one Member State to another. This means that the CJ still takes into account the use of both the real seat- and the incorporation theory and that this is for future legislation to harmonize.

Then the CJ confirms that Member States have the right to restrict a company’s transfer of seat while retaining to be governed by its laws. Also that Article 49 TFEU does not contain a single connecting factor and the change of it is a matter that is not resolved by the freedom of establishment but must be dealt with in future legislation. This basically means that the use of different theories when a company transfer its seat is not within the scope of freedom of establishment. Consequently, the CJ concluded that in the absence of a uniform definition of a single connecting factor the relevant national legislation should determine if a company can enjoy the freedom of establishment. The CJ concluded that the question if a company’s freedom is restricted can only be determined if the company has the right to freedom of establishment.

The Member States therefore have the power to determine the connecting factor for a company if it is to be regarded as incorporated and what is required of a company if it wants to be maintaining its status. That power includes the right to prohibit a transfer of seat if the move means the required connecting factor breaks away from the incorporation state.

With that reasoning in mind the CJ judged that as Community law now stands Article 49 and 54 TFEU are not to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not trans-

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93 Ibid. paras. 104-106.
94 Ibid. paras. 107-108.
95 Ibid. para 109.
96 Ibid. para 110.
fer its seat to another Member State whilst retaining its status as a company governed by the law of that Member State.97

4.4.2 New Distinction of Transfer

Even if the judgment by the CJ gives Member States the right to restrict a company’s transfer of seat out of the state, it does not give the incorporation state an absolute power. The CJ made a clear distinction between different situations of transfer of seat:

“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 falls to 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”.98

To clarify, the situation when a company wants to move and retain its status as a company in the incorporation state should be treated different from the situation where a company moves with the intent to change into a company form of the host state.

In this situation national legislation about the formation and winding-up of companies are not outside the scope of freedom of establishment, in particular the requirement of liquidation and winding up of a company in order to prevent a move cannot be justified. In fact such barrier, liquidation and winding-up, to the actual conversion constitute a restriction by the incorporation state under Article 49 TFEU. This can only be justified by overriding requirements in the public interest.99

The differences in national legislation regarding the different connecting factors used and how they may be transferred were, as mentioned above, not resolved by the freedom of establishment and must be solved by future legislation. Since the CJ says that it’s for future legislation to solve these problems it can be seen as a indication that future case law will not solve the problems. The Commission however claims that the

97 Ibid. para 124.
98 Ibid. para 111.
99 Ibid. paras. 112-113.
rules governing the supranational EU company forms such as the EEIG\textsuperscript{100} and the SE\textsuperscript{101} have erased that lack of legislation. Those rules should be applied mutatis mutandis on the cross-border transfer of the real seat for national companies incorporated in a Member State. This means that rules governing supranational company forms seat transfer should be applied to national companies since they are similar and there are no rules for national companies seat transfer.\textsuperscript{102}

The CJ acknowledged the fact that those regulations contained rules regarding the transfer of seat between Member States without the need to wind-up and reincorporate. This at the same entails a change of the applicable law of the company. In Cartesio the company in the case wished to still be governed by Hungarian law, meaning no change of the applicable law and the company still wished to be governed by Hungarian law. The CJ could therefore not apply the Community regulations mutatis mutandis on the situation in the Cartesio case.\textsuperscript{103}

4.4.3 Comparison with the Sevic System Case

The CJ did however complicate things a bit by stating that an incorporation state cannot prohibit a conversion into a company form under the host state, “to the extent that it is permitted under that law to do so.”\textsuperscript{104} So a company can only convert without fear of liquidation and winding up if the host state allows it. This situation bares similar resemblance to the Sevic case since it concerned the restrictions of a host state in an inbound merger situation. The new distinction of transfer involves a transformation of a company into a new company form of the host state. From the wording of the Sevic cross-border mergers, like other company transformation operations, constitute a particular way for companies to exercise their freedom of establishment and are an important part of the function of the internal market.\textsuperscript{105} The main principle established in the Sevic


\textsuperscript{102} Case C-210/06 Cartesio Oktató Szoláltató bt, [2008] ECR I- I-09641, paras 114-116.

\textsuperscript{103} Ibid. paras. 117-120.

\textsuperscript{104} Ibid. para 112.

were that a host state cannot deny a company an opportunity that are provided for national companies. As the new distinction of transfer also, like cross-border mergers, involves a transformation of a company the main principle in Sevic should be able to be used analogically. Meaning that if a host state allows for national companies to convert themselves they should give the same opportunity to companies of other Member States. This is in line with the conclusion that many legal scholars have drawn, it would be hard to see how different treatment of nationals should be allowed in cross-border transfer of seat while not permitted in relation to cross-border mergers.  

The CJ did in its judgements mention the Sevic case. This however was not done in relation to the new distinction of transfer, but instead as a confirmation that there still is a different in inbound and outbound establishment. The CJ did state the Sevic case, which concerned an inbound merger restriction, where different from the situation in Daily Mail but similar to the circumstances in Centros, Überseering and Inspire Art.  

### 4.4.4 Reception in the Academic Community

The decision in the Cartesio was anticipated by many legal scholars throughout the European Union as a further clarification of the previous decisions in the area of freedom of establishment. Some were disappointed that the CJ didn’t further clarify and provide uniformity by giving the application of freedom a broader scope. These articles where found through searching the major European Law publications.

Others think that the decision is positive because it gives the incorporation states the power to regulate the movement of companies out of their territory. The fact that restrictions can be made on companies that wants to retain their status as a legal person gives the incorporation states the same power as before. On the other hand as the power of the Member States can seem to be smaller since it cannot prevent a company’s move

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with the intent to convert into a company form of the host state. 109 The overall reception is that the CJ maintained the status quo on the freedom of establishment. The fact that Member States use different connecting factors, registered office or real seat, and the way that those connecting factors can be transferred did not change after the Cartesio judgement. 110 I obviously have to agree with this statement as the CJ choose to base its reasoning on the previous cases in the area and not drastically changed the freedom of establishment, the CJ did however provide a new distinction of transfer without going against its earlier judgements.

The CJ have both in the Daily Mail and in the Cartesio case stated the lack of uniform use of a single connecting factor as the main factor why the transfer of seat did not fall within the scope of freedom of establishment, but instead must be determined by national laws. The problem that occurs by the use of the different theories regarding the connecting factor is still recognised by the CJ and is for future legislation to solve. Legal scholars have presented some proposals to solve that difference have been presented in the academic community. Now the connecting factors that are used the central administration and registered office. One suggestion that have been proposed is not the introduction of not a single connecting factor but instead multiple factors. These connecting factors could be applied in different situations regarding the formation and transfer of seat. Certain matters would be governed by the law of the incorporation while other been determined by the laws of the real seat. After the transfer of seat the incorporation state would govern some aspects while the host state would govern the others.111

Another possible solution could be to introduce a new connecting factor that would be the place where the company is registered. Unlike the registered office which in linked to incorporation theory the place of registration would take into account a change in the applicable law. The registered office cannot be moved without the winding-up, liquidation and change of applicable law. But the place of registration can be changed by sim-

109 Ibid.


ply register the company in another state without liquidation and all the additional cost which follows thereof.\footnote{Wisniewski, Andrzej and Opalski, Adam, Companies' Freedom of Establishment after the ECJ Cartesio Judgment, European Business Organization Law Review, Cambridge Dec 2009 p. 625.}

### 4.5 Conclusions

Unlike the Advocate General the CJ did not step away from its previous judgments. In fact the reasoning in the previous case was confirmed. The *Daily Mail* case was left unchanged and the Member States still have the power to determine the “life and death” of the companies formed in the state. An incorporation state can therefore still prohibit a company to transfer its real seat or registered office outside the state. This situation falls outside the scope of freedom of establishment and companies cannot rely on Articles 49 and 54 TFEU. The reason for this is still the fact that the Member States uses different conflict rules theories to determine the connecting factor.

The CJ did not address the Advocate Generals points that it was contradictory that previous judgments were made on the distinction by focusing on primary versus secondary establishment situations were never entirely persuasive. On this point I agree with the Advocate General and I do think it is hard to make a distinction. This since according to the *Centros* case a company can have no intentions on actually doing business in the incorporation state and can open up a branch and conduct all its activity from there. This seems like an actual primary establishment to me. The CJ did, however, not comment on these remarks, so if there still is a distinction between primary and secondary establishment is unclear.

The Advocate General’s point that there should not be any distinction between inbound and outbound establishment where however addressed. The CJ did state the *Sevic* case, which concerned an inbound merger restriction, where different from the situation in *Daily Mail* but similar to the circumstances in *Centros, Überseering* and *Inspire Art*. The distinction between inbound and outbound still seems to exist.

The CJ confirmed that the use of both the real seat and incorporation theory and the problems that occur when a company wants to transfer the connecting factor, real seat or registered office, is not resolved by the freedom of establishment.
The most important part of the judgment is not the conformation of the previous case; it was the addition of a company’s right to transfer its seat with the intent change the applicable law and to convert into a company form of the host state. Before the incorporation state could force a company to be wind-up and liquidated but now that is not allowed. This, however, can only been done if the host state allows it. But if the Sevic case could be used analogically the host state must allow the conversion if it allows national companies to convert. This new distinction of transfer seems to be dependent on both the conflict rules and the national company laws of the incorporation state and the host state. This makes a transfer of that kind quit hard to predict.

Furthermore the judgement does not specify how the actual conversion should be made. Should the company be seen as starting up a brand new company in the host state, or as a national company transforming from on company form to another? And what Member States laws should govern the company during the transformation period, and when should the company be seen as transferred? Should it be the application for transformation, actual registration of the company in the national register, by grant of the host state, or after the actual establishment in the host state? There are several practical questions that need to be clarified. The Commission argued that the situation in Cartesio could be solved by applying the rules governing the EEIG and the SE-company mutatis mutandis. But since those rules concerned a transfer of seat with a change of applicable law that argument were discarded by the CJ. Maybe those rules could be applied to the new distinction of transfer the CJ introduced since it entails a change of the applicable law.

In Cartesio the CJ also stated that a restriction of transfer of seat with the intent of conversion only could be justified by overriding requirements in the public interest.113 This was done with reference to the Caxia-Bank114 case and that case the CJ referred back to the Gebhard case. This must be seen as a confirmation of the previous cases Centros and Inspire Art were restrictions could be justified according to the test set out in Kraus and Gebhard.

The CJ did in its decision uphold its previous cases, not making any drastic overturns of the prior judgements. The problems lies in the differences in the national law are to be solved by future legislation and cannot be solved by the current Community law. In my opinion if the CJ had allowed the transfer of seat without a change of applicable law the decision would have been a huge change in the corporate climate in the EU. As the Advocate General pointed a restriction could be justified on ground of protection of creditors, shareholders and employees. These stakeholders would be effected a great deal if the CJ had allowed transfers without a change of applicable law. Perhaps the CJ did not want to make these big changes but instead want the legislators of the EU to make such immense decisions. The citation of the problems as something that must be dealt with by future legislation might be seen as an appeal to the European legislators to solve the current problems within the corporate mobility field. The CJ did, however, increase the corporate mobility by introducing a new distinction of transfer, but how this transfer is actually to be executed is still unclear.
5 Different Situations of Transfer

5.1 General Remarks

In order to illustrate some of the problems that can occur when a company wants to transfer its seat a few examples will be shown. In light of Cartesio not just the conflict rules must be applied but also the national company laws of the Member States. The transfer of the registered office will not be dealt with since it is not allowed by either the incorporation or the real seat theory and would require winding-up, liquidation and re-incorporation in the host state. The transfer of the registered office could in the future be allowed if the proposal for the 14th company law directive would be adopted, but the work on the directive were suspended in wait for the decision in Cartesio. After the judgement the European Parliament requested that the Commission would submit a reformed proposal for the 14th company directive. Such a proposal has not been submitted as of September 2010, so the possibility of an adoption in the near future seems low.

Only if a company wanted to transfer with intent of conversion would it be allowed to do so if the host state permits it. This conclusion is drawn from the information on the two theories presented in chapter 2. The following situations deal with the transfer of the real seat out of the incorporation state and into the host state. The situation when a company wants to transfer its seat (real seat or registered office) have been dealt with in both Daily Mail and Cartesio. The CJ recognised the use of both the real seat and incorporation theory and the problems that occur when a company wants to transfer the connecting factor, real seat or registered office, is not within the scope of the freedom of establishment. This means when a company wants to transfer its seat the national legislation of the Member States involved have to be taken into consideration as well as the conflict rules.


117 European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company.
5.2 Between Real Seat Theory States

In this situation both the incorporation state and the host state will agree that the connecting factor have changed and also the applicable law have changed. The incorporation would require the company to wind-up and liquidated and the host state would require re-incorporation. Here there are no conflicts between the Member States but the company is affected negatively since it must be liquidated. The situation is however different if the company transfers its real seat with the intent to change into a company form of the host state. According to the Cartesio case the company cannot be forced to be wound up and liquidated if the host state allows such a transfer.

5.3 From Real Seat Theory State to Incorporation Theory State

In this particular situation neither the incorporation state nor the host state would claim to govern the company. From the incorporation state’s point of view the connecting factor has been moved out of the state and the company would need wind-up and liquidate. From the host state of view the connecting factor has not moved and is still in the incorporation state and re-incorporation is necessary. In this situation the Cartesio case can be applied on the incorporation states restrictions if the company intends to convert into a national company form of the host state, if the host state allows it. But since an incorporation state generally wants the registered office to be located in the state it hard to see why such a transfer should be allowed.

5.4 Between Incorporation Theory States

When a company want to transfer its real seat in this situation no large problem will occur. The incorporation state will not think the connecting factor have been transferred and will continue to recognize the company as their own. The host state will also think the laws of the incorporation state should apply since the real seat is not the connecting factor and still is in the incorporation state. The company would continue to exist and carry on its business in the host state without interruption.
5.5 From Incorporation Theory State to Real Seat Theory State

In this scenario a conflict between the two theories occurs. The incorporation state will continue to recognize the company and claim that its laws should be applied. From the host states point of view the company should be governed by its laws. The host state would claim that the company have to wind-up and re-incorporate under its laws. However, this is similar to the situation in Überseering case described above in section 3.3. The host state cannot force the company to re-incorporate in order to be recognized when it has been formed in accordance with the laws of the incorporation state.

5.6 Consequences

These situations are merely theoretical and the actual practical application of these different theories varies from state to state. But as shown the theoretical application of the two theories gives a company different consequence when it wants to transfer its seat, the practical application must be even harder to predict. The conclusions that have been drawn are similar to those of legal scholars. The Cartesio case did not have a huge impact on the conflicts that occur between these theories and a company still faces different outcomes when transferring their seat. In some cases a company is forced to wind-up, liquidate and re-incorporate, while in other cases a company can continue to exist.

These situations show that not only the conflicts rules have to be taken into account but also the national company legislation in both the Member States involved. These situations are also in line with the statement the CJ did in the Cartesio case with reference back to Daily Mail:

"the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation

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of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real seat (siège réel) – that is to say, the central administration of the company – should be situated in their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails under company law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them make that right subject to certain restrictions, and the legal consequences of a transfer vary from one Member State to another\textsuperscript{120}.

\textsuperscript{120} Case C-210/06 Cartesio Oktató Szoláltató bt, [2008] ECR I-1-09641, para 105.
6 Conclusions and Outlook

6.1 Present Status of Freedom Establishment

The freedom of establishment is considered to be one of the essential freedoms within the European Union. Articles 49 and 54 TFEU regulates the companies’ right to exercise the freedom of establishment, but the articles are problematic. Over the years the CJ have been called upon to interpret the scope of these articles and when companies’ should be able to rely on them for protection.

A company can establish itself in any Member State and have to be treated in the same way as the nationals of that state and as long as the company only wants to conduct economic activity in that state no problems will occur. However, when a company wishes to pursue business in several Member States the differences in legislation can cause some trouble.

When a company has established itself through a primary establishment in one Member State it can open up an agency, branch or subsidiary in any other Member State. A company can choose the legislation that suits them best and then open up a secondary establishment in a host state. This can be done regardless if it was done just to circumvent the legislation of the host state and the company had no intention to conduct any activity in the incorporation state. Furthermore, a Member State cannot set up any unnecessary restrictions for companies that want to exercise their right to secondary establishment. The right to secondary establishment were primarily sanctioned in the Centros and Inspire Art cases. When a company have been formed in accordance with the laws of a Member State it cannot be refused to be recognised as a legal person in any other Member State, this accordance with the Überseering.

The right to open up a primary establishment is not a problem, but to transfer that establishment is not unproblematic. This means the companies right to transfer their seat, both the registered office and central administration. The CJ stated in the Daily Mail case that this right is not covered by the scope of freedom of establishment and it falls outside Articles 49 and 54 TFEU. This was confirmed once again in the Cartesio case and it is still up to the incorporation state if they want to allow a transfer of a company´s seat out of its territory. The right to prohibit a company´s exit only applies if the com-
pany wants to retain its legal personality and still be governed by the law of the incorporation state.

The incorporation state cannot prohibit the transfer of a company’s seat if it wants to convert into a company form of the host state; this was stated in the *Cartesio* case. The incorporation state cannot force the company to wind-up and liquidate in this scenario. However, this is only allowed if the host state gives permission to the company to convert. But if the *Sevic* case is used analogically the host state must provide the opportunity to companies from other Member States if such a conversion possibility is granted to national companies.

The Member States are still allowed to make certain restrictions on the companies’ freedom of establishment. These restrictions can be justified by Article 52 TFEU or in case overriding requirements in the public interest. These justifications were introduced in the *Centros* and *Inspire Art* cases and later confirmed in the *Cartesio* case. In most of these cases the justifications, however, were not fulfilled and the CJ did not provide an actual motivation why it came to the conclusion that justification grounds were fulfilled. This makes it hard to predict when a Member State can use these justifications and I think the CJ need to clarify that in the future.

### 6.2 Need for Harmonisation?

As shown above the *Cartesio* case did not change the situation that much for companies’ right to freedom of establishment. The problems that occur still come from the fact that Member States use of the different theories on what the connecting factor should be when determining the applicable law.

On one hand there is the incorporation theory that states that a company should be governed by the state where it was incorporated and registered office is situated in.

On the other hand some Member States use the real seat theory and claim that a company should be governed by the state in which the real seat is located. The fact that these theories use different connecting factors to determine the applicable law is causing problems for the companies in the EU. In the *Cartesio* case the CJ once again stated that there is not one single connecting factor used unanimously throughout the EU. The use of the different theories fall outside the scope of freedom of establishment, thus are
Member States still free choose which one to use theory to use. The problems that occur when a company wants to transfer its seat are not resolved by the freedom of establishment and must be dealt with by future legislation according to the CJ.

If the CJ had followed the Advocate General’s opinion the problem with the use of different connecting factor would have disappeared. Since then companies would have been able to transfer both the registered office and the central administration out of an incorporation state without restriction. The real seat theory uses the central administration as the connecting factor and then the theory must have been rendered useless since companies could transfer that factor any way they wanted. The incorporation theory uses the place where the company was formed as the connecting factor, so the move of the central administration was allowed before so no real effect would be noticed. The registered office cannot as a rule be moved out according to either theory so there would have been a significant change there as well.

When a company wants to transfer primary establishment the outcome varies from state to state. In some case the company will be forced to wind-up and be liquidated while in other cases the company can move without the need to do so. The clash between the theories determining the connecting factor falls outside the scope of freedom of establishment because of lack of harmonization. My opinion is that the easiest way to eradicate the problems is to adopt one single theory and apply it all Member States.

One suggestion that been put forward is to divide the application and apply the real seat theory in some situation and the incorporation theory in other situation.

Another suggestion that been proposed is that the connecting factor should be the place of registration; this would take into account a change of the applicable law unlike the current theories used. This seems to be the best option since the CJ introduced a new distinction of transfer which entails a change of the applicable law.

The new distinction of transfer introduced by the CJ allows companies can transfer their seat without the need to wind-up and liquidate, if the company wants to convert into a company form of the host state. This can, however, just be done if the host state allows such a conversion. Some legal scholars have argued that the host state has to allow the conversion if it grants it to its own nationals. I do agree that the principle established in the Sevic case should be able to be used in the sense that it gives foreign companies the
same rights, in a host state, as national companies. But whether or not hosts states actually are forced to grant the same rights for companies to convert is still uncertain, this since there is no legislation stipulating this. Furthermore *Cartesio* did not specify how this transfer with intent to convert actually should be done in practice. Should the converting company be treated as a company starting up from scratch or as an existing company transforming into another kind of company form? There is also the questions which Member States law should be applicable during the conversion period and when the incorporation state should “hand over” responsibility to the host state. Will the company be governed by two laws at the same time or will the company don’t be governed by any law, thus creating a situation of “legal vacuum” for the company? In *Cartesio* it was argued that the rules governing the transfer of seat for supranational EU company forms should be applied mutatis mutandis to national companies. That couldn’t be done in the case where a company wished to still be governed by the incorporation state and if it could be done when a company wants a change of the applicable law was not answered by the CJ.

In my mind there are a number of issues that needs to be addressed after the *Cartesio* judgement. First, this must be done in order for national companies to know when to take advantage of this new kind of transfer. Secondly, the Member States need to know how to regulate this situation in order to avoid conflicts and create legal certainty for the companies. My opinion is this could be best done by adopting a directive that regulates that the transfer should be allowed and how Member States should handle it. The directive should only regulate the essentials in order to facilitate the transfer with intent to convert, this since the company will be governed by the new states national laws. The actual national requirements and standards should not be regulated in the directive since after the conversion the company will be a national company and is not a supranational EU company.

In conclusion, yes there is a need for harmonization as the freedom of establishment stands today. When a company transfer its seat between Member States the company is forced to wind up, liquidate and re-incorporate in some case. In other case the company is allowed to carry out its activity unaffected. First I believe the different theories Member States use for determining the connecting factor could be harmonized into one theory in all Member States in order to solve the problems that occur. Then there is also a
need to create a unified way that the Member States treats companies that wants to convert into a company form of a host state according to the new distinction of transfer the Cartesio case introduced.
Appendix

List of references

1: Case law from the Court of Justice

Case C-19/92, Kraus v Land Baden-Württemberg [1993] ECR I-01663
Case C-212/97 Centros vs Erhvervs- og Selskabsstyrelsen, [1999] ECR I-1495
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Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd, [2003] ECR I-10155
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Case C-210/06 Opinion of Mr Advocate General Poiares Maduro delivered on 22 May 2008, [2008] ECR I-09641
Case C-210/06 Cartesio Oktató Szoláltató bt, [2008] ECR I-09641

2: Bibliography

2.1 Official publications

EU Legislation

Treaty on the Functioning of the European Union, consolidated text, OJ C 83, 30.3.2010
Treaty on European Union, consolidated text, OJ C 83, 30.3.2010

EU Regulations


Appendix


**European Parliament resolutions**

European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company

**EU Directives**

Directive 2005/56/EC on cross-border mergers of limited liability companies

Proposal for the Directive on Cross-border transfers of registered office of a company

### 2.2 Other publications

**Books**


**Articles**


Appendix
