Third Pillar: Interpretation

What's a company's nationality?

- Or: how can we say that a company is an Italian, French, Spanish, Polish one?
- It depends on the **domestic law**: each Country (and each MS) has sovereignty over this issue
- The issue is specially important when it comes to **conflicts of laws** (do you remember CBMD?)

So…

- If we have a company which is incorporated in Spain, by shareholders coming in their majority from France, but the control shareholder comes from Malta, the directors from Lithuania, and the board gathers usually in Greece, with all the company's activities carried out in Denmark… which is this company's nationality?

The key issue

- Each MS is free to set its own rules (there are preferences of the ECJ…)
- And these rules (private international law) create a set establishing the «connecting factor»
- We have seen that there are at least two main connecting factors

As far as transfer is concerned

- We have at least three specific issues to deal with

1. To determine a company's nationality
2. To find out the type of freedom of establishment in the concrete case
3. To assess the possibility of the transfer according to the national rules (freedom to leave and freedom to enter)

1. The main connecting factors

- The "seat of incorporation" (registered office) -> *Gründungstheorie*
  - (basically) Italy, UK, Ireland, Switzerland, Denmark, The Netherlands, Hungary

and

- The "Real seat" -> *Sitztheorie*
  - France, Germany, Austria, Belgium, Greece, Poland, Spain, Portugal…

Incorporation doctrine

- The MS recognises as regulated by its own rules all the companies whose registered office according to the articles is set in their borders (and are for this reason registered in that MS' registers)
- No matter about where the company carries out its activities, nor where its central administration is placed

Real seat doctrine

- In addition to the registered office also the central administration of the company has to be placed in the same MS
- If not, the company is not recognised as «domestic» by the MS of incorporation
- Problems in identifying the concept of «central administration»: not necessarily the place where the decision has been taken (problems in particular with groups), but, according to German BGH «the place where the fundamental decision by the board are actually transposed into individual management decisions»

Possible also…

- Intermediate solutions (for instance: Italy, where there are different rules for EU and non-EU companies)
- Center of main interest – COMI (insolvency law)

According to Art. 54 TFEU…

- …freedom of establishment applies to companies validly established according a MS' rules
- i.e., everywhere in EU, when a company is registered, and such a registration has been disclosed according to First directive
- But such a criterion has to be applied also for the eventual amendments: the company, also during its running phase has to comply with the «existence rules» set by the MS where it is registered.

2. Freedom to establish... what?

- Primary establishment
  - To set up a company wherever the founders want in the Union
  - To move the registered oggice (and the central adimnistration) wherever the shareholders want in the Union
- Secondary establishment
  - To set up branches, subsidiaries, agencies abroad in the EU, no matter of the entity of the activity carried out in the secondary seat, where compared with the primary one

3. A unrestricted freedom?

- Freedom to leave (origin MS)
- Freedom to enter (destination/host MS)

- Conditions for the operation itself
  - See after: Gebhard
- Conditions for restrictions
  - See after: compliance with domestic rules for connecting factor

The combination…

- …of these three issues is very clear in a series of decisions by the ECJ, all of them dealing with the freedom of establishment
- Analisys according to a chronological order, by highlighting the impacto of each decision over these three criteria

A. Segers

- C.79/85 [1986] ECR I-02375

- Mr Segers (Dutch) is director of a company (*Slenderose Ltd*) established in the UK (London)
- He sets-up a subsidiary (*Free Promotion Int'l*, sole business) in The Netherlands. All the *Slenderose*'s activities are now carried out by the Dutch subsidiary

- Mr Segers applies for sickness insurance (*Ziektewet*) given by a Dutch association of professionals and traders. The association denies it, as it only should be recognised to companies whose registered office is in The Netherlands and not abroad (the fact that Mr Segers is a director of the company is not relevant, as according to the Dutch courts such a position allows to apply for the *Ziektewet*.

- The Dutch court stayed the proceedings in order to ask the ECJ for an interpretation (§6):

(1) Do the principles of freedom of establishment within the EEC and freedom to provide services within the EEC — in particular the last sentence of Article 52 read with Article 58 of the EEC Treaty and the last sentence of Article 60 read with Article 66 of that Treaty — mean that, when deciding whether there is an insurance obligation under Netherlands social security legislation, Netherlands courts may not make any distinction between the director/major shareholder of a private company incorporated under Netherlands law and a director/major shareholder of a private company incorporated under the laws of another Member State, even if the foreign company clearly does not carry out any actual business in the other Member State concerned but carries on business only in the Netherlands?

(2) If that question must be answered in the negative, does Community social security law (in particular, Article 3 (1) of Regulation No 1408/71) or any other provision of Community law prohibit such a distinction?

ECJ's solution (§19):

In the light of all the foregoing considerations, the reply to the first question referred to the Court by the Centrale Raad van Beroep should be that the provisions of Articles 52 and 58 of the EEC Treaty must be interpreted ***as prohibiting the competent authorities of a Member State from excluding*** *the director of a company from a national sickness insurance scheme solely on the ground that the company in question was formed in accordance with the law of another Member State, where it also has its registered office, even though it does not conduct any business there.*

Key issues

1. Substance over form: the UK parent company is considered instead of the Dutch subsidiary, by the Dutch Court
2. Substance over form also by the ECJ:

Discrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another Member State to establish themselves through an agency, branch or subsidiary in the Member State concerned (§15)

3. Substantial restrictions in establishing subsidiaries are not allowed. The decision concerns restictions in access (**«freedom to enter»**)
4. **Both of the countries** follow the **incorporation doctrine**, but the existence of any of the companies is under scrutiny
5. Here **secondary freedom of establishment** is under discussion.

B. Daily Mail

- C-81/87 [1988] ECR I-5483

- Daily Mail, PLC, in 1984, **applied for consent of UK Treasury**, required (just for tax law purposes) under the relevant national provision in order to **transfer its central management and control to the Netherlands**, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices for its management in the Netherlands. Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties.

- The principal reason for the proposed transfer of central management and control was to enable Daily Mail, after establishing its residence for tax purposes in the Netherlands, **to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell**. After establishing its central management and control in the Netherlands **Daily Mail would be subject to Netherlands corporation tax**, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes.
- After a long period of negotiations with the Treasury, Daily Mail initiated proceedings before the High Court of Justice, Queen's Bench Division, in 1986. Before that court, it claimed that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally.

- In order to resolve that dispute, the national court stayed the proceedings and referred the following questions to the Court of Justice (§9):

(1) Do Articles 52 and 58 of the EEC Treaty ***preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances****, namely where: (a) payment of tax upon profits or gains which have already arisen may be avoided; (b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?*

(2) Does Council Directive 73/148/EEC give a ***right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State*** *in the conditions set out in Question 1 ? If so, are the relevant provisions directly applicable in this case?*

(3) ***If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1****?*

(4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

- ECJ's decision

*the **Treaty regards the differences in national legislation concerning the required connecting factor and the question whether** — and if so how — **the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another** as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions.*

*Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State **while retaining their status as companies incorporated under the legislation of the first Member State**.*

The answer to the first part of the first question must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State (§§23-25)

As of question 2:

*the **title and provisions of that directive refer solely to the movement and residence of natural persons** and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons.*

The answer to the second question must therefore be that Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State (§§ 28-29)

Summary

- The key point of the Daily Mail decision is that (§19):

it should be borne in mind 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*

- As it is so, the rules of domestic law are to be applied
- A right to the unrestricted transfer of seat of a company governed by a given national law, thus, might exist, but just as far as the domestic law grants it. If it doesn't there is no right under ECL
- So, for our pattern: we are here dealing with **primary freedom of establishment**
- It's a case related to a **lawful restriction to the freedom to leave**
- Both of the involved MS (UK & The Netherlands) apply the **incorporation theory**

C. Gebhard

- C-55/94 [1995] ECR I-04186
- The case is not dealing directly with company law: Mr Gebhard is a German lawyer forbidden to exercise as an avvocato in Milan
- Free circulation of services

The case is important for ECL...

...because the decision (§39) sets the four conditions for the lawful restriction of the freedom of establishment by a MS (so called: «Gebhard test»):

national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

1. *they must be applied in a **non-discriminatory** manner;*
2. *they must be **justified by imperative requirements** in the general interest;*
3. *they must be **suitable for securing the attainment of the objective** which they pursue;*
4. *and they **must not go beyond what is necessary** in order to attain it*

D. Centros

- C-212/97 [1999] ECR I-01459
- Cornerstone of the ECJ decisions regarding the freedom of establishment
- Marks the birth of regulatory competition in the EU
- Centros Ltd is a UK based company registered by a Danish couple, residing in Denmark, Mr and Mrs Bryde, which wants to set-up a branch in Denmark

- The Danish Board for Trade and Companies, entitled under the Danish law to accept or deny the registration of a branch, refuses to register, arguing that Centros does not carry out any actual business in the UK, so the establishment of the Danish branch was just intended to use such a branch as the principal activity, in the meanwhile benefitting the UK's less strict rules regarding a company's establishment, in particular as of legal capital

- Mr Bride brings an action against the refusal before the Østre Landsret. The first instance Court upholds the arguments of the Board; Centros appeals to the Højesteret, which stays the proceedings and refers a question to the ECJ:

By its question, the national court is in substance asking ***whether it is contrary to*** *Articles 52 and 58 of* ***the Treaty*** *for a Member State to* ***refuse to register a branch*** *of a company formed in accordance with the legislation of* ***another Member State in which it has its registered office but where it does not carry on any business*** *when the* ***purpose of the branch*** *is to* ***enable the company concerned to carry on its entire business in the State in which that branch is to be set up****, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned* (§14)

- EUCJ's decision:

*it is **contrary to Articles 52 and 58 of the Treaty** for a Member State to **refuse to register a branch of a company formed in accordance with the law of another Member State** in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. **That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud**, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, **where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned*** (§39)

- In addition:

It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR1-1663, paragraph 32, and Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR 1-4165, paragraph 37) (§34)

In other words: restrictions have to pass the «Gebhard test»

Summary

- No matter where the activity is carried out, the establishment of a branch is always lawful
- Limit: as far as it is not intended to damage creditors
- This situation entails the possibility to establish a company wherever it is the cheapest in the Union, and the setting-up a branch in the Country where the activity is to be carried out
- **Secondary freedom of establishment**
- **Freedom to enter**: recognised as lawful
- Both of the MS follow the **incorporation doctrine**

E. Überseering

- C-208/00 [2002] ECR I-09919
- Überseering BV is a Dutch company which owns some real estate in Düsseldorf, Germany. Überseering asks a German company (NCC GmbH) to refurbish a garage and a motel there. The NCC's work was claimed as defective by Überseering, which brought an action against NCC before a German Regional Court.

- In the meanwhile, all the shares of Überseering had been acquired by two German citizens, residing in Germany.
- For this reason, the Regional Court before, and the *Oberlandesgericht* later decided to dismiss the action, due to the incapacity of Überseering.
- As Germany adopts the *Sitztheorie*, the fact that the shareholders and directors are German entails a change in Überseering place of central administration

- As such a substantial change is not supported by a formal change of the registered office in the articles of Überseering, the company cannot be recognised as a German company by the Court.
- In the meanwhile, as ist real seat is in Germany, it is not recognised neither as a Dutch company. For this reason, the German courts are in accord in denying legal capacity to Überseering

- At this point, Überseering appeals to Bundesgerichtshof against Oberlandesgericht's decision. The BGH stays the proceedings and refers a question to the ECJ:

1 . Are Articles 43 EC and 48 EC to be interpreted as meaning that the ***freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration****, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?*

2. If the Court's answer to that question is affirmative: Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a ***company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?*** (§21)

- ECJ's decision:

the answer to the first question must be that, where a company formed in accordance with the law of a Member State ('A') in which it has its registered office is deemed, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.

(...) where a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A') (§94-95)

Summary

- ECJ clear preference for incorporation doctrine
- Principle of recognition of foreign validly established companies
- As to our pattern… claimed (by the German court) **primary freedom of establishment**
- It deals with a **freedom to enter**
- But, more important, it deals with a **clash between a real seat doctrine MS and an incorporation doctrine MS**

F. Inspire Art

- C-167/01 [2003] ECR I-10155
- Inspire Art Ltd is a company governed by UK law
- The company establishes a branch in The Netherlands; all the activities of Instpire Art Ltd are de facto traded by the branch in The Netherlands. Even the sole director is a Dutch
- According to a Dutch law (*Wet op de Formeel Buitenlandse Vennootschappen* – Law on Formally Foreign Companies), the branches of foreign companies in such a situation are to be registered in a special section of the Trade Registry, and are subject to additional obligations

- Inspire Art doesn't want to register its branch in the special section
- The *Kantongerecht* te Amsterdam confirms that it is a formally foreign company according to WFBV's art 1, but stays the proceedings due to a preliminary ruling about the compatibility of such a law with the ECL.
- The *Kantogerecht* refers thus to ECJ for solving the issue:

1. Are Articles 43 EC and 48 EC to be interpreted as ***precluding the Netherlands****, pursuant to the Wet op de formeel buitenlandse vennootschappen of 17 December 1997,* ***from attaching additional conditions, such as those laid down in Articles 2 to 5 of that law, to the establishment in the Netherlands of a branch of a company which has been set up in the United Kingdom with the sole aim of securing the advantages which that offers compared to incorporation under Netherlands law****, given that Netherlands law imposes stricter rules than those applying in the United Kingdom with regard to the setting-up of companies and payment for shares, and given that the Netherlands law infers that aim from the fact that the company carries on its activities entirely or almost entirely in the Netherlands and, furthermore, does not have any real connection with the State in which the law under which it was formed applies?*

2. If, on a proper construction of those articles, it is held that the provisions of the Wet op de formeel buitenlandse vennootschappen are incompatible with them, must Article 46 EC be interpreted as meaning that the said Articles 43 EC and 48 EC do not affect the applicability of the Netherlands rules laid down in that law, on the ground that the provisions in question are justified for the reasons stated by the Netherlands legislature? (§39)

- ECJ's decision

(§§62-64) *The Court has consistently held that where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised in conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.*

It is for the national court, which alone has jurisdiction to interpret domestic law, to establish whether the penalty provided for by Article 4(4) of the WFBV satisfies those conditions and, in particular, whether it does not put formally foreign companies at a disadvantage in comparison with Netherlands companies where there is an infringement of the disclosure requirements referred to in paragraph 56 above.

If the national court reaches the conclusion that Article 4(4) of the WFBV treats formally foreign companies differently from national companies, it must be concluded that that provision is contrary to Community law.

«(§§65-70) On the other hand, the **list set out in Article 2 of the Eleventh Directive does not include the other disclosure obligations provided for by the WFBV**, namely, recording in the commercial register the fact that the company is formally foreign (Articles 1 and 2(1) of the WFBV), recording in the business register of the host Member State the date of first registration in the foreign business register and information relating to sole members (Article 2(1) of the WFBV), and the compulsory filing of an auditor's certificate to the effect that the company satisfies the conditions as to minimum capital, subscribed capital and paid-up share capital (Article 4(3) of the WFBV). Similarly, mention of the company's status of a formally foreign company on all documents it produces (Article 3 of the WFBV) is not included in Article 6 of the Eleventh Directive.

It is therefore **necessary to consider, with regard to those obligations, whether the harmonisation brought about by the Eleventh Directive, and more particularly Articles 2 and 6 thereof, is exhaustive**.

The Eleventh Directive was adopted on the basis of Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC) which provides that the Council and Commission are to carry out the duties devolving on them under that article 'by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 with a view to making such safeguards equivalent throughout the Community'.

Furthermore, it follows from the fourth and fifth recitals in the preamble to the Directive that the **differences in respect of branches between the laws of the Member States, especially as regards disclosure, may interfere with the exercise of the right of establishment and must therefore be eliminated**.

It follows that, **without affecting the information obligations imposed on branches under social or tax law, or in the field of statistics, harmonisation of the disclosure to be made by branches, as brought about by the Eleventh Directive, is exhaustive**, for only in that case can it attain the objective it pursues.

It must likewise be pointed out that Article 2(1) of the Eleventh Directive is exhaustive in formulation. Moreover, **Article 2(2) contains a list of optional measures imposing disclosure requirements on branches, a measure which can have no *raison d'être* unless the Member States are unable to provide for disclosure measures for branches other than those laid down in the text of that directive**.

In consequence, the various disclosure measures provided for by the WFBV and referred to in paragraph *65* above are contrary to the Eleventh Directive.»

«§105) It must therefore be concluded that Articles 43 EC and 48 EC **preclude national legislation such as the WFBV which imposes on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors' liability**. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the Treaty, save where abuse is established on a case-by-case basis.

(§§136-139) (…) with regard to **combating improper recourse to freedom of establishment**, it must be borne in mind that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law *(Centros,* paragraph 24, and the decisions cited therein).

However, while in this case **Inspire Art was formed under the company law of a Member State, in the case in point the United Kingdom, for the purpose in particular of evading the application of Netherlands company law, which was considered to be more severe, the fact remains that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary** *(Centros,* paragraph 26).

That being so, as the Court confirmed in paragraph 27 of *Centros,* the fact that a national of a Member State who wishes to set up a company can choose to do so in the Member State the company-law rules of which seem to him the least restrictive and then set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

Thus...

In addition, it is clear from settled case-law *(Segers,* paragraph 16, and *Centros,* paragraph 29) that **the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct** which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

(§143) In light of all the foregoing considerations, the answers to be given to the questions referred for a preliminary ruling must be:

— It is **contrary to Article 2 of the Eleventh Directive** for national legislation such as the WFBV to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive.

— It is **contrary to Articles 43 EC and 48 EC for national legislation such as the WFBV to impose on the exercise of freedom of secondary establishment in that State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability**. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis.»

And again, in addition…

«It must be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public 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 (see, in particular, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Centros,* paragraph 34)» (§133)

Restrictions are lawful only in the case they pass the «Gebhard test»

Summary

- Pseudo-foreign companies… are just EU companies!
- Both of the MS follow the **incorporation doctrine**
- This case deals with **secondary freedom of establishment**
- Another case where the **freedom to enter** is under discussion

G. Sevic

- C-411/03 [2005] ECR I-10805
- Sevic is a German AG intending to merge with a SA (Security Vision Concept) from Luxembourg. The deed of merger is not registered by the German *Amtsgerict* due to being not regulated the cross-border merger under German law (before the 10° directive)

- Such a situation origins a difference of treatment between domestic and cross-border mergers.
- Sevic brings an action agains the denial of registration before Langeright Koblenz. The Landgericht stays the proceedings referring a question to the ECJ for a preliminary ruling:

«Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that Paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?»

- ECJ's decision:

«(§19) Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. **They constitute particular methods of exercise of the freedom of establishment**, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.

(§23) Such a **difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 48 EC**, which is contrary to the right of establishment and **can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest**. It is further necessary, in such a case, that **its application must be appropriate** to ensuring the attainment of the objective thus pursued and **must not go beyond what is necessary to attain it.**

(§31) In those circumstances, the answer to the question referred must be that Articles 43 EC and 48 EC **preclude registration** in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company **from being refused in general in a Member State where one of the two companies is established in another Member State**, **whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State**.»

Summary

- Principle of equal treatment of domestic and cross-border operations
- The whole issue is interesting from a systematic point of view, but has been overcome by the directive 2005/56/EC
- Sevic deals with **primary freedom of establishment**
- It is a case where both of the MS follow the **real seat doctrine** (even if it does not matter as to the decision)
- It deals with the **freedom to enter** (if we look at it with the glasses of the Luxembourg company)

H. Cadbury Schweppes (*et al*)

- Treated together a series of decisions dealing with taxes and freedom of establishment linked to tax reasons
- Cadbury Schweppes is just the last of the decisions we are referring to

1. Imperial Chemical Industries: C-264/96 [1998] ECR I-04711
2. Marks & Spencer: C-446/03 [2005] ECR I-10866
3. Cadbury Schweppes: C-196/04 [2006] I-08031

All of them…

- Are governed by UK law
- Are dealing with tax law issues
  - Namely trying to include in the consolidated area of a group, not only the controlled companies under the UK law, but also those established abroad in the EU:
    - For tax relief the holding is granted in respect of trading losses incurred by foreign subsidiaries. The relief was granted just when the group had its main business in the UK, and this violates the freedom of establishment (ICI);
    - For tax relief for losses incurred by foreign subsidiaries (same of ICI; more detailed as it comes to tax law – Marks and Spencer)
    - For lower tax rates (Cadbury Schweppes)

In all the cases…

- It has been recognised by the ECJ that (always the same wording):

«the provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation» (ICI, §21)

«the provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation» (Marks & Spencer, §31)

«the provisions of the Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation» (Cadbury Schweppes, §42)

Actually, *Cadbury Schweppes*...

- ...teaches us also something more: it is (should be?) necessary a genuine economic activity by the controlled company abroad for it being not fictitious:

«(§§68 *seqq*) If checking those factors leads to the finding that the CFC is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement. That could be so in particular in the case of a 'letterbox' or 'front' subsidiary (see Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraphs 34 and 35).

On the other hand, as pointed out by the Advocate General in point 103 of his Opinion, the fact that the activities which correspond to the profits of the CFC could just as well have been carried out by a company established in the territory of the Member State in which the resident company is established does not warrant the conclusion that there is a wholly artificial arrangement.

The resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine»

Is there a contradiction…

- Between Centros (where the holding did not carry out any activity) and Cadbury Schweppes (where the subsidiary is said to have to carry out some activities, so preventing to be considered fictitious?
- Perhaps no: Centros, as an holding, actually carries out the holding activity of its branches (and even more: branches' activities are directly said to be parent company's ones)
- But the question is not that easy to be answered…

Summary

- In any case, we are here facing a case where the **secondary freedom of estrablishment** is dealt with
- Together with issues that can be seen as «**freedom to leave**»
- In these cases the doctrine related to the connecting factor are not material

I. Cartesio

- C-210/06 [2008] ECR I-09641
- Cartesio is a Hungarian limited partnership, registered in Hungary
- In 2005 files an application for the transfer of registered office from Hungary to Italy
- Application rejected because according to Hungarian law it is not possible to transfer the seat abroad, while continuing to be subject to Hungarian law

Cartesio appeals such a decision

- The Court of Appeal decides to stay the proceedings and refers a (series of) question(s) to ECJ:

«(1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration [of a company] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is *inter partes*? **[PROCEDURE]**

(2) In so far as an appeal court is included in the concept of a "court or tribunal which is entitled to make a reference for a preliminary ruling" under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities? **[PROCEDURE]**

(3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended? **[PROCEDURE]**

(4)

(a) **If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable**?

(b) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, **may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State**?

(c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?

[(d)] May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?'»

- ECJ's decision:

«(§§109-124) in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, **the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article** – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – **is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law**. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Thus **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 that required if the company is to be able subsequently to maintain that status**. **That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter**, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Nevertheless, 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.

In fact, **in that latter case, the power referred to in paragraph 110 above**, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, **cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that 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**.

Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC (see to that effect, inter alia, *CaixaBank France*, paragraphs 11 and 17).

It should also be noted that, following the judgments in *Daily Mail and General Trust* and *Uberseering*, the developments in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC, respectively, as pursued by means of legislation and agreements, have not as yet addressed the differences, referred to in those judgments, between the legislation of the various Member States and, accordingly, have not yet eradicated those differences.

The Commission maintains, however, that the absence of Community legislation in this field – noted by the Court in paragraph 23 of *Daily Mail and General Trust* – was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European cooperative society (SCE) (OJ 2003 L 207, p. 1), as well as by the Hungarian legislation adopted subsequent to those regulations.

The Commission argues that those rules may – and should – be applied mutatis mutandis to the cross-border transfer of the real seat of a company incorporated under the law of a Member State.

In that regard, it should be noted that although those regulations, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.

That is clear, for example, in the case of a European company, from Articles 7 to 9(1)(c)(ii) of Regulation No 2157/2001.

As it is, **in the case before the referring court, Cartesio merely wishes to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable**.

Accordingly, the application mutatis mutandis of the Community legislation to which the Commission refers – even if it were to govern the cross-border transfer of the seat of a company governed by the law of a Member State – cannot in any event lead to the predicted result in circumstances such as those of the case before the referring court.

Further, as regards the implications of *SEVIC Systems* for the principle established in *Daily Mail and General Trust* and *Uberseering*, it should be pointed out that those judgments do not relate to the same problem and that, consequently, *SEVIC Systems* cannot be said to have qualified the scope of *Daily Mail and General Trust* or *Uberseering*.

The case which gave rise to the judgment in *SEVIC Systems* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross-border merger, which is a situation fundamentally different from the circumstances at issue in the case which gave rise to the judgment in *Daily Mail and General Trust*, but similar to the situations considered in other judgments of the Court (see Case C-212/97 *Centros* [1999] ECR I-1459; *Uberseering*; and Case C-167/01 *InspireArt* [2003] ECR I-10155).

In such situations, the issue which must first be decided is not the question, referred to in paragraph 109 above, whether the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated but, rather**, the question whether or not that company – which, it is common ground, is a company governed by the law of a Member State – is faced with a restriction in the exercise of its right of establishment in another Member State**.

In the light of all the foregoing, **the answer to the fourth question must be that, as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation**»

Summary

- No news under the sun: Daily Mail reloaded, in its results
- The most important is the *obiter dictum*
- For our pattern: here we have two countries following the **incorporation doctrine**
- There is under discussion a **primary freedom of establishment**
- And the issue is the **freedom to leave** the country of origin, that can be restricted as far as the company is willing to continue being governed by origin MS' laws

J. National Grid Indus

- C-371/10 [2011] ECR I-12273

Confirms once again that

In the absence of a uniform definition in European Union law *of the* ***companies which may enjoy the right of establishment on the basis of a single connecting factor*** *determining the national law applicable to a company,* ***the question whether Article 49 TFEU applies to a company which seeks to rely on the fundamental freedom enshrined in that article*** *– like the question whether a natural person is a national of a Member State and hence entitled to enjoy that freedom* ***– is a preliminary matter which, as European Union law now stands, can only be resolved by the applicable national law****. Consequently, the question whether the company is faced with a restriction on the freedom of establishment within the meaning of Article 49 TFEU can arise only if it has been established, in the light of the conditions laid down in Article 54 TFEU, that the company actually has a right to… that freedom (see Daily Mail and General Trust, paragraphs 19 to 23; Case C-208/00 Uberseering [2002] ECR I-9919, paragraphs 67 to 70; and Cartesio, paragraph 109)* (§26)

K. Vale

- C-378/10 [2012]
- Vale s.r.l. is an Italian company, registered in Rome and governed by Italian law
- Vale is willing to transfer its seat to Hungary, and to operate there as an Hungarian company
- To this end, Vale asked to be removed by the Italian Registry; in the meanwhile, the director of Vale s.r.l. and another person undersigned the articles of Vale Épitési kft (limited company under Hungarian law), in order to be registered in the Hungarian Registry

- The conditions for the constitution of the company required by the Hungarian law had been complied with. In the request for registration it was mentioned that Vale s.r.l. was the predecessor in law to Vale Építési
- The application was rejected, alleging that Hungarian law did not allow a foreign company to be a predecessor in law of an Hungarian company; Vale appealed, but also the Regional Court of Appeal of Budapest confirmed the rejection

Vale brought an appeal to the Supreme Court, claiming that the Hungarian law would be contrary to the freedom of establishment; the Supreme Court stayed the proceedings and referred a question to the ECJ:

«(1) Must the host Member State pay due regard to Articles [49 TFEU and 54 TFEU] when a company established in another Member State (the Member State of origin**) transfers its seat to that host Member State and, at the same time and for this purpose, deletes the entry regarding it in the commercial register in the Member State of origin, and the company's owners adopt a new instrument of constitution under the laws of the host Member State, and the company applies for registration in the commercial register of the host Member State under the laws of the host Member State**?

(2) If the answer to the first question is yes, must Articles [49 TFEU and 54 TFEU] be interpreted in such a case as **meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State**?

(3) With regard to the response to the second question, **is the basis on which the host Member State prohibits the company from registration of any relevance**, specifically:

– if, in its instrument of constitution adopted in the host Member State, the company designates as its predecessor the company established and deleted from the commercial register in the Member State of origin, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host Member State?

– in the event of international conversion within the Community, when deciding on the company's application for registration, must the host Member State take into consideration the instrument recording the fact of the transfer of company seat in the commercial register of the Member State of origin, and, if so, to what extent?

(4) **Is the host Member State entitled to decide on the application for company registration lodged in the host Member State by the company carrying out international conversion within the Community in accordance with the rules of company law of the host Member State as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions** (e.g. drawing up lists of assets and liabilities and property inventories) laid down by the company law of the host Member State in respect of domestic conversion, or is the host Member State obliged under Articles [49 TFEU and 54 TFEU] to distinguish international conversion within the Community from domestic conversion and, if so, to what extent?»

ECJ's decision

«(§41) the answer to the first two questions is that Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another Member State to convert to companies governed by national law by incorporating such a company.»

«(§62) the answer to the third and fourth questions referred is that Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, as meaning that **the host Member State is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies**, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the **principles of equivalence and effectiveness, respectively, preclude the host Member State from**

– **refusing, in relation to cross-border conversions, to record the company** which has applied to convert as the 'predecessor in law', if such a record is made of the predecessor company in the commercial register for domestic conversions, and

– **refusing to take due account, when examining a company's application for registration, of documents obtained from the authorities of the Member State of origin**.»

Summary

- Here there is the mirror case of *Cartesio*
- Vale decision deals with **primary freedom of establishment**
- …with two MS applying the **incorporation doctrine**
- …and with a case of **freedom to enter**

L. Polbud

- C-106/16 [2017]
- Polbud is a Polish company aiming at transferring its seat in Luxembourg
- By this mean the company converts itself into a Luxemburg SARL from Polish Sp. Z. o.o.
- Not clear scope of transfer (just registered office or real seat too)
- Polish law does not agree to the transfer (refuses to cancel the filing) as Polbud did non complete its liquidation before, as required by the law

Polbud is registered with its new name in Luxembourg, and appeals against the Registrar's decision to the Polish Supreme Court, which stays the proceedings and refers the questions to the EUCJ

«(1) Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

if the answer to that question is in the negative:

(2) Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out — including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted — which precedes the winding-up of the company, that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?

(3) Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which — for the purpose of its conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?»

EUCJ's Decision

- Third question to be treated first
- No matter on the actual scope of transfer; what matters is what's written in the question referred by the Polish Supreme Court
- No matter neither the connection factor under Luxembourg law (not considered in the decision)

«1. Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.

2. Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.»

Summary

- The long journey is (or seems to be) over!
- No matter on the «genuine link»
- Again incorporation theory prevails, even without incorporation connecting factors
- Perhaps it won't work always this way
- Here we have **primary** freedom of establishment
- And again we have a case dealing with **freedom to leave**

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BUSINESS LAW IN THE EUROPEAN UNION
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CATTEDRA JEAN MONNET