Cross-border movement of companies in the European Union*.

1 – *Lex societatis europae*: essay's main cues. 2 – The principle of freedom of establishment and the ECJ case-law milestone on cross-border movement of companies. 3 – *Cartesio* Case: a turning point. 4 – Conclusion.

1 – *Lex societatis europae*: essay's main cues.

However the internal market is one of the crucial elements of EU economic vision, and entrepreneurs, companies, firms, business partnerships and corporations are the main actors of the above mentioned market, till now it isn't possible to argue on the existence of a common (or really harmonized) *lex societatis europae*[1].
One market and several different regulations on company incorporation, governance, grouping, (holding, agency, branch and subsidiary) taxation and Intra-market business-partnerships (M&A, Joint-ventures, takeovers or simply transfer of seat): this condition has lasted for decades after the entry into force of the Treaty of Rome, due to strong national jurisprudence traditions and to a restrictive interpretation of art. 43 EC Tr. and 48 EC Tr. – Freedom of Establishment – done by the European Court of Justice (hereinafter ECJ)[2].
In fact only on 8 October 2001, after thirty years from the presentation of the first project on the Statute of European Company (*societas europae*, hereinafter SE)[3], the Council of the European

* Essay written by Alberto Russo in occasion of the course of "FDI LAW" held by Prof. M. Kìraly (Professor of Community Law and Law of International Economic Relations at the School of Law of the Eötvös Loránd University, Budapest) – ASERI International Relations Management Master (2009).

1 For the debate on this crucial issue, see *Diritto Commerciale Comunitario,* by A. Santa Maria, Giuffré, Milan, 3rd Edition, 1995, chp. I-II; *Corporate and financial issues, mergers, joint ventures and takeovers*, by J.P. Griffin (chp. 12) and *European Union Company Law*, by H.W. Gordon (chp. 15), in *European Union Law after Maastricht. A practical guide for lawyers outside the common market*, edited by R.H. Folsom, R,B. Lake, V.P. Nanda, Kluwert Law International, London, 1996; *EU Law. Text, cases and materials*, edited by P. Craig, G. De Burca, Oxford University Press, 2003; *Diritto Comunitario*, by A. Tesauro, CEDAM, 2008.

2 Some scholars argue that EC company law directives and regulations appear to have had thus far very little impact on national company laws and, more to the point, on EU businesses' governance and management. First, EC corporate law does not cover core corporate law areas such as e.g. fiduciary duties and shareholder remedies. Second, EC corporate law rules are under-enforced. Third, in the presence of very sporadic judiciary interpretation by the European Court of Justice, EC corporate law tends to be implemented and construed differently in each Member State, i.e. according to local legal culture and consistently with prior corporate law provisions. Fourth, when it has introduced new rules, it has done so with respect to issues on which Member States would have most probably legislated even in the absence of an EC mandate. Last but not least, most EC corporate law rules can be categorized as optional, market mimicking, unimportant or avoidable. To the contrary, national corporate laws contain core corporate law rules, which do have an impact upon EU companies' governance and management. "There are, of course, due qualifications to the triviality thesis. First of all, a few rules or sets of rules indeed have had or are bound to have a meaningful impact upon companies and their operations. Second, EC corporate law has increased the regulatory burden of corporate laws across the EU, correspondingly securing higher rents for certain interest groups. Third, secondary EC corporate law has had and will continue to have an impact on the evolution of European corporate laws and the dynamics of regulatory competition. Finally, its production has become an industry itself, employing many EC and national functionaries and lobbyists, and creating occasions for rent extraction by politicians". See: *EC Company Law Directives and Regulations: How Trivial are They?,* by L. Enriques, in ECGI - Law Working Paper No. 53/2005; *Comparative Company Law*, by Klaus J. Hopt, in ECGI - Law Working Paper No. 77/2006; *Corporate Governance Reforms in Continental Europe*, by L. Enriques and P.F. Volpin in ECGI - Law Working Paper No. 39/2005.

3 The reasons for such a long process are varied and complex, due mainly the numerous differences between the States regulations and – as I said above – corporate and international private jurisprudence traditions. In fact, yet in 1965 the European Commission was asked to study the possibility of a single European Company in accordance with some fundamental principles that have their origin in the Treaty establishing the EC freedom of establishment, free movement

Union has finally approved the Regulation on the Statute of the European Company and adopted the Directive supplementing the Regulation with regard to participation and the involvement of workers[4].

After a reawakening of ECJ case-law on freedom of establishment principle related to companies cross-border movement (which it's going to be treated in this essay), the above mentioned SE regulation step forward and the one related to the European Economic Interest Group (hereinafter EEIG)[5], I can assume that the European company law finally is assuming its natural shape: today, perhaps, a common *lex societatis europae* isn't still a chimera.

In this essay I briefly deal with the evolution of European company law through the ECJ case-law and the principal international private law theories, as they are applied in the EU countries.

First I would focus on the freedom of establishment principle's, and I would discuss the reasons of assessing if and how a company incorporated in a Member State (hereinafter MS) could be recognized as well in another MS: the so-called cross-border seat movement. To do so, I would briefly analyze the milestone of ECJ case-law on the issue: *Daily Mail* case[6], *Sevic* case[7], *Uberseering* case[8], *Centros* case[9] and *Inspire Art* case[10].

Finally I would conclude this paper dealing with the recent ECJ case-law turning point: the *Cartesio* case[11] and his consequences.

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of capital, mutual recognition of the company, retention of legal personality also when they move from one country to another possibility of mergers between companies subject to different laws. Aware on the relevance of such an issue and about the obstacles put by national States, European legislator has led this "harmonization campaign" trough the Directive instrument. The most relevant ones – related to cross-border business – are: the First Council Directive 68/151/EEC of 9 March 1968 about limited liability company incorporation procedure; the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies OJ L 295, 20.10.1978, p. 36–43; the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378 of 31.12.1982) and the Proposal for a Directive of the European Parliament and of the Council of 24 September 2008 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of merger and divisions (COM(2008) 576 Final – Not published in the Official Journal); the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, 20.8.1990, p. 1–5; the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 225, 20.8.1990, p. 6–9; the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ L 395, 30.12.1989, p. 36–39; the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (O J L 310 of 25.11.2005, p. 1).

4 Ref. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)*, OJ L 294, 10.11.2001, p. 1–21;* Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22–32.

5 Ref. Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199, 31.7.1985, p. 1–9.

6See C-81/87, R. v. HM Treasury and Commissioners of Inland Revenue v. ex p. Daily Mail and General Trust PLC (1988) ECR 5483.

7 See Case C-411/03, The Landgericht Koblenz v. SEVIC Systems AG ,OJ C 36, 11.02.2006, p. 5.

8 See Case C-208/00,Uberseering BV v. Nordic Construction Company Baumanagement GmbH (NCC) (2002) ECR I-09919.

9 See C-212/97, Centros Ltd v. Erhvervs- og Selskabsstyrelsen (1999), ECR I-1459.

10 See C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam, v Inspire Art Ltd , OJ C 275, 15.11.2003, p. 10.

11 See C-210/96, OJ C 44 of 21.02.2009, p. 3.

2 – The principle of freedom of establishment and the ECJ case-law milestones on cross-border movement of companies.

The principle of freedom of establishment for companies is set up either in art. 43 EC Treaty[12] and specifically in art. 48 of the Treaty[13]: basically it allows free movement of MSs companies across EU internal market, granting exception to MSs only if there is a violation of the general principle of national public interest (public order), such as the prevention of abuse or fraudulent conduct, or protection of the interests of creditors, minority shareholders, employees or the tax authorities.
Relating to company matter, this principle has been interpreted and implemented by ECJ in much more limited way than in the of free establishment of individuals (art. 43 EC Treaty).
The very existence of a company depends on the law of the State incorporation and this is the major obstacle that can stand in the way to full implementation of freedom of establishment of companies. In order to be incorporated in the State of origin, a company must be also recognized by the State of establishment. In the absence of recognition, this migrant company cannot enjoy the host State legal personality and thus, the benefit of limited liability.
But the rules of private international law of the MS do not provide the connecting standard to determine the nationality of a company, then what is the law applicable to the companies?
Some MS have adopted more flexible and liberal criterion of incorporation under which the *lex societatis* is identified in the national legislation of the company's place of incorporation; while in others is applied the more rigid and protective criterion of real seat, which implies that the *lex societatis* is the law of the place where the company has placed the actual seat. This policy generally requires that the actual seat of the company coincides with the place of incorporation. A company incorporated in a MS that adopts the principle of real seat could not relocate abroad without running the risk of extinction.
The freedom of establishment may be exercised in two different ways: the freedom to primary establishment and the freedom of secondary establishment.
The former includes the right of society to choose the place where the seat.
The latter gives the company the right to open in a MS other than that of the primary establishment or of a subsidiary or of a branch.
The ECJ has considered freedom of secondary establishment with some favor, especially with regard to intra-movement of "pseudo-foreign companies"[14].
As it was said, the ECJ has recognized the full legitimacy of this situation because it will assure the freedom of establishment. This approach was first expressed in famous *Centros* case[15].

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12 Art. 43 EC Treaty says that "*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. (2) 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 48, 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*".

13 Art. 48 EC Treaty says that "*companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. (2) 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making*".

14 A "pseudo-foreign company" is a company formed by nationals of a MS in a given different MS for the sole purpose of benefiting the national law of that MS, which is considered more advantageous than that of MS where the company put up its full activities.

15 See *supra* ref. note n. 9. The case refers to the creation of a company governed by English law from some Danish citizens, followed by the opening of a branch in Denmark where the company carries out the bulk of economic. This situation is not considered an attempt on the part of the founding members to escape the stricter Danish company law, but an exercise of freedom of establishment.

In this case ECJ upheld that the host MS not prohibit *tout court* the secondary establishment of the company in its own territory[16]. Instead of, it can take restrictive measures to prevent fraudulent conduct of its citizens, which means freedom of recognized by the EC law could avoid application of the national law. A similar favorable interpretation – supporting "pseudo-foreign companies" – was given by ECJ also in the *Inspire Art* case[17].

Here the Court has banned the Dutch authorities to apply to English law company the strictest national company law relating to minimum share capital and company information. In this way the Court has significantly limited the scope of the host MS of its own national law to such corporate entities.

Conversely, the traditional orientation of the ECJ concerning freedom of primary establishment is less favorable to the movement of companies. In the famous case *Daily Mail*[18], the ECJ has ruled that MS has the sole power to determine the conditions under which a national company may transfer its registered office in another MS. The freedom of primary establishment cannot be interpreted in the meaning that a company has the right to transfer the headquarters abroad[19].

In *Überseering* case[20] ECJ has ruled that the company, despite the transfer of the headquarters in Germany, had maintained its capacity and ability to be sued.

Despite appearances, *Überseering* case was not a *revirement* of what the Court has decided in *Daily Mail* one. In fact, it was stated that *Daily Mail* covers a case where a company exercises the freedom of primary establishment in order to emigrate – transferring the seat in another MS. It was also specified that only MS of origin has exclusive power to determine the conditions under which a particular law must allow a company to be transferred abroad, without being subject to dissolution and liquidation proceedings.

It must wait for the next *Sevic* sentence[21] to see the overcoming of the distinction in the concept of freedom of primary establishment between the case it's exercised in order to emigrate and when to immigrate.

In this case, the Court of Justice has been established that a MS may not lawfully, in accordance with EC law, prohibit a cross-border merger between a national law company and a company incorporated in another MS.

The ruling marks an important step towards the full realization of freedom of primary establishment

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16 See following parag. 19 and 20, *Centros* case. In particular it's said that "the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which it has its registered office constitutes an obstacle to *freedom of establishment*, it must be borne in mind that that freedom, conferred by ex Article 52 (now 43) of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under ex Article 58 of the Treaty companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States" […] "The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person *(see, to that effect, Segers, paragraph 13, Case 270/83 Commission v France [1986] ECR 273, paragraph 18, Case C-330/91 Commerzbank [1993] ECR I-4017, paragraph 13, and Case C-264/96 ICI [1998] I-4695, paragraph 20)".*

17 See *supra* ref. note n. 10. Also this case refers to the incorporation of a company in a MS (England) different from the one in which it exercise almost all its activities (The Nederland).

18 See *supra* ref. note n. 6.

19 EC Treaty norms "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" – *Daily Mail* Case parag. 24.

20 See *supra* note n. 8. The case refers to the transfer of Dutch incorporated company seat from The Nederland to Germany, due to the acquisition of company capital asset by two German citizens.

21 See *supra* note n. 7.

because it stipulates that the freedom of establishment applies to cross-border mergers. More specifically, the law seems to apply to all mergers between companies incorporated in different MS, regardless of whether the merger is implemented through the incorporation of the foreign company in national one or if the national company is to be incorporated in the foreign.
As correctly explained AG. Mengozzi in his opinion[22], the decision of the national authorities to prohibit a merger limited primarily the national company possibility to exercise the right of establishment in "exit" by merging with companies incorporated in the State in which the companies intend to undertake or to expand an economic activity. The national authorities negative decision also limits the ability of companies incorporated in other MS to exercise freedom of establishment in "entry" by merging with a company of a different MS legal system, in order to carry out an economic activity in the Member State which has opposed the merger.
In short, the importance of *Sevic* ruling is the fact that, for the first time, the freedom of primary establishment has been interpreted to include not only the right of a company formed in a MS to immigrate to another MS, but also, and contrary to what had been already decided in Daily Mail case, the right a MS to emigrate in another MS.

3 – *Cartesio* Case: a turning point.

The last, but not least milestone, is the *Cartesio* case[23].
The case refers to an Hungarian law company which decided to transfer its headquarter from the mother country to Italy. At same time it wanted to maintain its legal personality in Hungary and to continue applying Hungarian law to company governance. The Hungarian Court appointed to hold company registry refused to register the Cartesio's decision to transfer the seat. Hungary adopts the real seat doctrine in order to determine which is the law that regulates the company establishment and operation. The real seat doctrine requires that the registered office of society does not differ from the actual seat. A company under Hungarian law cannot move the seat abroad because the transfer would lead to the extinction of the company. You must first arrange for the dissolution or liquidation of the company and then rebuild it according to law the state where you intend to transfer the headquarters. The Court of second instance, before whom the sentence above was appealed, requested the intervention of the Court of Justice art. 234 EC in order to clarify whether the decision not to include the act was incompatible with EC law, in particular the freedom of establishment recognized to companies.
According to the AG Maduro opinion[24], the protested Hungarian law[25] discriminated between the transfer of the seat within of the national territory – permitted – and the transfer abroad, rather as it would be precluded, because it implies the dissolution of society, with the result that the transfer would result in the extinction of society.
For these reasons, the AG believes that the above-mentioned legislation constituted a restriction of freedom of establishment.
The AG then tends to the broad interpretation of freedom of primary establishment of companies.
The Opinion of AG in *Cartesio* case is perfectly on line with the recent guidelines of the ECJ supporting the full implementation of freedom of movement of companies in the market, which has already expressed in the judgments *Centros*, *Überseering*, *Inspire Art* and *Sevic*.
Referring to earlier judgments, including the case *Sevic*, the AG Maduro made it clear that freedom of establishment must be understood in the sense that this includes any cross-border movement of

22 See AG Mengozzi opinion in *Sevic* case.
23 See *supra* note n. 11.
24 See AG Maduro opinion in *Cartesio* Case.
25 See *supra*, note 22.

company incorporated under the national law of a MS and related to the EC, according to the criteria of art. 48 EC Treaty.
It is no longer necessary to distinguish between freedom of establishment carried on by a company in order to emigrate or immigrate: a standard national norm limiting the right to entry in a given MS for a company incorporated in another MS appears to be incompatible with the EC law to the same extent that the rule that prohibits the "exit" of the national law company.
The new wave of case-law, of which *Cartesio* case is its most recent episode, marks the abandonment the *Daily Mail* doctrine[26].
This is not to oblige MS to choose the criterion of real seat rather than the incorporation one in order to determine the nationality of the company. It is necessary that the MS consider the impact that the national company law has on the named principle. To this end, the AG stated that the enjoyment of company freedom of establishment requires the mutual recognition and international cooperation. It follows that, according to the current state of development of Community law, MS need not have more absolute power to determine the life and death of companies with national law, but must consider the effects that their choices in terms of national law may have on the European law[27]. Moreover, the absolute prohibition of headquarters transfer is also questionable on grounds of commercial practice.
The freedom to transfer the seat in another country is of significant importance, particularly for small and medium-sized businesses as the Cartesio company. The transfer of the seat is an efficient tool to starting a business in another MS without having to go through the costly and complex process of company dissolution and new company rebuilding in the MS of establishment. Furthermore, it should be noted that the freedom of establishment recognized to the company is not absolute. The right does not prevent some MS to adopt restrictive measures to prevent that the exercise of such a principle can affect certain interests protected by the public order national rules[28]. According to the consolidated ECJ guidelines these restrictive measures can be justified under EC law only if provided in the interests of overriding reasons of general interest and if they conform to the principle of proportionality[29].
In accordance with these requirements, a MS may establish certain conditions that allow a national law company to transfer the head office abroad. As already stated by the Court in *Sevic* case what is prohibited by EC law is a restriction absolute and unconditional of freedom of establishment. A total ban on transfer of headquarters abroad required by Hungarian law cannot be justified by the law, as set out above. Indeed, the Hungarian government hasn't shown reason of public interest to justify the absolute prohibition of such a transfer. The restrictive measure, as prepared, has the only effect that the national law company may not transfer the operational headquarters abroad without the transfer is due to dissolution of the company.
Hence the conclusion reached by the AG and the ECJ is that the absolute prohibition of company headquarter transfer required by the law of the State of incorporation in another MS violates the art. 43 and 48 EC.

4 – Conclusion.

In conclusion, even though we cannot dealt with a common *lex societatatis europae*, we must be satisfied by the great effort done by the ECJ: after the Cartesio case, the cross-border movement of companies encounter less obstacles.

26 See *supra*, note 19.
27On this issue see *Freedom of establishment after Cartesio,* by Petra Novotna, pg. 6 on www.law.muni.cz/edicni/dp08/files/pdf/mezinaro/novotna.pdf.
28 To deeper deal with this issue see Futura & Singer case, C-290/95, (1997) ECR I-2471.
29 See *supra* ref. note 27.

Now the dispute between the international private law principle of State of incorporation and the real seat one seems to be solved by the *acquis* of *Cartesio* case. As consequences of this ruling the cooperation between companies inside the internal market is become easier, and also legal instruments such as EEIG and the new SE, could became strong factors for the creation of a real *lex societatis europae*.