CROSS BORDER TRANFERS OF THE COMPANIES WITHIN THE EU

INTRODUCTION

Freedom of establishment presents a significant principle of the European Union as a requirement for forming a single market. Article 48 of the EC Treaty confirms that the EU companies shall be treated as a natural member state's citizens to apply the right of freedom of the establishment.[1] However, the mobility of the companies within the EU still constitutes difficulties when performing the cross border transfers.[2] The interpretation of the Court of Justice enlightens the scope of the right through its decisions on the significant cases in the absence of the harmonised codification within the EU. In this paper, firstly the extent of the right of freedom of establishment will be examined in the context of approach taken by Court of Justice to demonstrate its respond to conflicts between national laws and EU principles. Secondly, the opportunities supplied by the Statue for European Companies (SE) and the proposed Statue for European Private Companies (SPE) to freedom of establishment right will be argued.

A) The Conflicting Theories

There has been two conflicting theories defined as the incorporation theory and the real seat theory followed by the Member States to determine the nationality and applicable law governs the establishment and the activity of the EU companies which involve cross border transfers.[3] 'The incorporation theory came into being in Common Law States, namely the UK, in the 18th century - earlier than the real seat theory. According to this theory a company is governed by the State where it was incorporated.'[4] Companies could transfer their central administration while continuing to be governed by the state of its incorporation. In the context of this theory, it is not required the correlation between place of central administration and registration.[5] Hence, companies formed in a state follows the incorporation theory could change place of the central administration without facing liquidation.

The real seat theory emerged later than the incorporation one - in the 19th century in Belgium, France and Germany which represents the idea that sovereign states have the right to control companies within their boundaries.[6] Although both of the theories presume that the governing law relies on the place in where the company is incorporated , the different point

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[1] Article 48 EC

[2] Antonio Frade de Sousa, 'Company's Cross-border Transfer of Seat in the EU after Cartesio' (2009) Jean Monnet Working Paper 07/09 3 http://www.jeanmonnetprogram.org/papers/09/090701.html > accessed 10 December 2014

[3] Ulvi Altinisik , ' Free Movement of Companies within the EU' (2012) 1 Ankara Bar Review 101, 105 http://www.ankarabarosu.org.tr/siteler/AnkaraBarReview/tekmakale/2012-1/7.pdf > accessed 10 December 2014

[4] Sousa (n 2) 4d

[5] Petra Vargova, ' The Cross Border Transfer of a Company's Registered Office Within The European Union' (LLM thesis , Central European Union University 2010) www.etd.ceu.hu/2010/**vargova**_petra.pdf > accessed 15 December 2014

[6] Sousa (n2) 6

of the real seat theory is that the centre administration place must be located in the incorporated state; hence, the company seeking to transfer its central administration has to face liquidation first and reincorporate in the host state which it plans to move in.[7] The reason behind the real seat theory is the prevention of circumvention of the compulsory mandatory rules governs in the host state which provides preservation for interested parties as competitors, creditors, shareholders, workers.[8]

The incorporation theory could be seen as more advantageous one for the movement of the companies based upon lack of necessity to reincorporate in the another Member State to transfer the central administration.[9] On the contrary, the context of the real seat theory contradicts with the principles of the single market under the EU. This is because, the real state theory basically requires the change in the legal existence of companies to execute the main trade activity out of their origin state as a consequences of compulsory reincorporation element.

The incorporation theory encourages the cross border movement by saving the companies who want to transfer the head office from costly and time consuming liquidation process. Besides that aspect, the applicable law under the incorporation theory which remains to be law of the state of its incorporation provides legal predictability for the companies who seek to move their main trade activity.

B) How did The Court of Justice handle with the confliction of laws?

1) Centros Case[10]

In the facts based upon this case, two Danish nationals set up a limited company known as Centros in the UK. Centros Ltd. has never traded in the UK and the shareholders of the company applied to register a branch of the company in Denmark. The board rejected to register the branch by claiming that the aim of the company is to make a primary establishment (principle office), not a branch. The authorities of Denmark alleged that the company circumvents the national company rules upon paying minimum capital for establishment in Denmark indicating the UK does not require minimum starting capital different from Denmark, that is why Centros incorporated itself in the UK.[11] Centros Ltd. brought action against the rejection of the registration of the branch invoking the freedom of the establishment right supplied by article 49 and 54 TFEU.[12]

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[7] Sausa (n 2) 7

[8] Vargova (n 5) 7

[9] Altinisik (n 3) 106

[10] Case C-212/97 *Centros vs Erhvervs- og Selskabsstyrelsen*, [1999] ECR I -1459

[11] Ibid para 1-7

[12] Ibid para 12-14

The Court of Justice stated that companies have right to carry on business in another Member State by forming an agency, branch and subsidiary. Refusal of a company having its registered office in another Member State causes to prevention of freedom of establishment conferred by Article 49 and 58 of TEFU and the Court concluded that this policy is against the exercise of freedoms.[13] After, the CJ evaluated the Danish Authorities' claim about circumvention of the law. The Court affirmed 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 circumvent their national legislation.'[14] However, according to the CJ opinion such measures must be taken in the light of the rights conferred by the treaty, as not to be obstacle to exercise the freedom of establishment right.[15] The Court stated that 'a citizen who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and set up branches in other Member States cannot, in itself, constitute abuse of the right of establishment.'[16] The Court repeated that four criteria were put forward in previous cases for the measures restricts the right as follows: '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'[17] and the Court rejected the arguments of the Danish Authorities.

In this case, the Court dealt with immigration of the companies (inbound transfer) in context of secondary establishment 18. In other saying, the freedom of establishment right was argued in the perspective of the host state. This case firstly clarifies the companies' right to make secondary establishment in another Member State, out of the state where it is incorporated, without host state's prevention. Secondly, it is affirms the right of the companies to set up in the Member State whose law is more favourable irrespective of exercising trade in the registered office place. Although, the decision is about the secondary establishment (a branch in the case) and did not obviously point primary establishment, it could be interpreted as not excluding primary establishment. Because its affirmation to choose the incorporation place to only take benefit from more advantageous law, in other words, to just stay passively in the registration document for the legal aims to cover lack of central administration in the state of incorporation. That could mean that the central administration, main trade can take place in another state as well.

2) Uberseering Case [19]

'The background to this case is that a company incorporated in the Netherlands, Uberseering, owned a property in Germany. The company then commissioned a construction company to do some repairs on the property. The repairs were done but Uberseering claimed that the work

[13] Ibid para 20-22
[14] Ibid para 24
[15] Ibid para 25
[16] Ibid para 27
[17] Ibid para 34
[18] Sousa (n 2)
[19] Case C-208/00 Überseering *BV vs Nordic Construction Company Baumanagement GmgH* [2002] ECR I-9919.

was defective.'[20] The German nationals bought the shares of the company.[21] Two years later, the company brought action against the construction company to compensate defective works before German Court.[22] However, the German Court dismissed the demand on ground that Uberseering transferred its centre administration when it had been owned by German nationals despite it is incorporated in Netherlands, for this reason, it has not got any legal capacity to bring action before German Courts.[23] The questions of whether the real seat theory conflicts with provisions of the Treaty to determine the recognition of foreign company and the legal capacity of foreign company should be determined through the incorporation theory refereed the CJ.[24]

In this case differently from Centros Case, the CJ examined the right of primary establishment. The Court concluded that as long as a company is validly incorporated in a member state and the moving of the central administration is allowed by the law of the state of incorporation, the host state's rejection to recognise of legal identity of foreign company is against the provisions of the Treaty. Consequently, Germany must recognise the legal capacity of the Uberseering to bring legal proceeding before its national courts.[25]

According to the Court, in perspective of inbound transfers (immigration of companies), the host states requirement for reincorporation to get recognised is not compatible with freedom of establishment. The CJ's decision could be seen as closer to incorporation theory. On the other hand, it is difficult to conclude that the CJ abolishes the real seat theory. The CJ did not respond the German Court's questions mentioned above. Any theory was not pointed out 'In essence, the German Federal Court of Justice sought guidance on the ECJ's preference for the real seat doctrine or state –of- incorporation theory.'[26] The applicable law is still not certain for other legal matters after recognition of legal identity. Therefore, the question arises whether if the ruling in the Uberseering Case preserving real seat theory as long as not to cause rejection of legal capacity or abolish the real seat theory related to immigration of the companies.[27]

Despite the uncertain points in the decision, the CJ's approach significantly impoverish the real seat theory by breaking the principle of real seat theory based on that the central administration and the registered office must be located in the same state. Decision contributes to the mobility of the companies within the EU eliminating the imposition of the host states to reincorporate in their jurisdiction.

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[20] Alex Weddin, ' Corporate Mobility in the EU' (LLB thesis , Jonkoping University 2010) 12 http://www.diva-portal.org/smash/get/diva2:377800/FULLTEXT01.pdf > accessed 15 December 2014

[21] Case C-208/00 Überseering BV vs Nordic Construction Company Baumanagement GmgH [2002] ECR I-9919 para 7

[22] Ibid para 8

[23] Ibid para 9

[24] Nicole Rothe , ' Freedom of Establishment of Persons within the European Unıon:an Analysıs of the European Court of Justıce Decısıon ın the *Uberseerıng* Case' (2004) 53 American Law Review 1103

[25] Case C-208/00 *Überseering BV vs Nordic Construction Company Baumanagement GmgH* [2002] ECR I-9919 last judgement

[26] Rothe (n 24) 1132

[27] Rothe (n 24) 1134

3) Inspire Art [28]

The facts based on this case are: a company, Inspire Art, was established in the UK. On the other hand, no business was ever executed in the UK. The company had a branch in the Netherlands, however, the authorities required Inspire Art to register as a foreign company and comply the requirements for foreign companies regulated by national legislation. Inspire Art claimed that the regulations for foreign companies are not compatible with the provisions regulated by Articles 49 and 54 TFEU in related to freedom of establishment right. Different from Centros Case, in this case Netherlands did not object to establishment of a branch.[29] The Dutch authorities wanted Inspire Art to obey some prevention measures under Dutch Law as fulfilment of minimum capital, production and publication of annual documents, jointly and severally liability of directors.[30] The Netherlands brought forward that 'the purpose of those conditions which must be satisfied by Netherlands companies as well as by formally foreign companies, is to safeguard non economic interests recognised at Community level concerning the protection of consumers and creditors.'[31]

In this case, the Court supported the freedom of secondary establishment for inbound transfers by relying on its interpretation which was put forward in Centros Case. The court referred its interpretation in Centros Case pointing that it is immaterial that company formation in a member state with the only purpose of executing business in other member state [32] and stated that national legislation 'relating to capital (both at the time of formation and the life of company) and to directors liability constitutes restriction on freedom of establishment as guaranteed by Articles 43 EC and 48 EC.'[33] Then , the Court questioned whether if there is any justification for the measures taken by the Netherlands.[34] The Court determined that these disclosure measures are against the 11th directive, hence focused on examining the national legislation based on minimum capital and directors liability in frame of The Treaty provisions.[35] The Court referred the four criteria mentioned in the previous cases[36] and concluded that ' on the ground of protection of fairness in business dealings and the efficiency of tax inspections, it is clear that neither the Chamber of Commerce nor the Netherlands Government has introduced any evidence to prove that the measures in question satisfies the criteria of efficacy, proportionality and non-discrimination.'[37] However, the Court did not provide adequate information about the matters related to interests of shareholder, employees and tax authorities by giving short opinion. Therefore, the problem of to what extent the restrictions should be put into effect by national governments in pursuant of public interests

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

[29] Weddin (n 20) 14

[30] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd*, [2003] ECR I-10155. para: 22-25

[31] Ibid para : 82

[32] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd*, [2003] ECR I-10155. para 95

[33] Ibid para 104

[34] Ibid para 106

[35] Ibid para 106

[36] n (17)

[37] Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam vs Inspire Art Ltd*, [2003] ECR I-10155 para 140

had not been clarified by the Inspire Art decision to be of sufficient guidance for the states practise.[38]

4) Daily Mail [39]

Daily Mail represents one of the earliest cases. Daily Mail Case concerns different side of freedom of establishment right in comparison to the content of the previous cases mentioned above. In this case, the CJ argued the freedom of establishment right in the perspective of the state of incorporation's authority on the prevention of emigration of the real seat. In the background of this case, Daily Mail as a company incorporated in the UK wanted to transfer its central administration to the Netherlands in pursuit to benefit of the lower taxes in the Netherlands.[40] As the UK is a state following the incorporation theory, a company is able to establish its central management in a second Member State[41], however, the Treasury's consent is required to transfer central administration if the company wants to protect its legal identity under the UK law.[42] 'It is need to be point out at the outset, Daily Mail was not meant to be case on trans border seat transfer. It is factual content rather dealt with tax-relating problems. However, the CJ rephrased the question.'[43] The Court assessed the content as a companies' conflicts of law case.[44]

The Court pointed 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.'[45] Consequently, the CJ assigned the absolute discretionary power to the Member States of incorporation to decide the liquidation of the companies which seeks to transfer its central administration to another state. As a result of this decision, the companies would face to lose their legal personality in the case that the state of its incorporation law does not allow transfer of central administration separately from registered office. This approach of the Court vitiated to exercise of the establishment right relation to emigration of the companies by facilitating protectionist state conducts contradiction with the principle of the single matter. That could have been more proper of if the Court had handled the case in a narrower manner (tax problem in this case) to set the framework of the justifications to prevent emigration of the companies as an exemption rather than generating a decision which may legitimate the protectionist aims.

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[38] Christian Kersting, Clemens Philipp Schindler, 'The CJS's Inspire Art Decision of 30 September 2003 and its Effets on Practise' (2003) 4 (12) German Law Journal 1277

[39] Case C- 81/87 *The Queen v H.M. Treasury and Commissioners of Inland. Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483.

[40] Ibid para 6-8

[41] Ibid para 3

[42] Ibid para 18

[43] Vargova (n 5) 15

[44] Sousa (n 2) 14

[45] Case C- 81/87 *The Queen v H.M. Treasury and Commissioners of Inland. Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483 para 19

The Daily Mail Case had decided before the Centros, Uberseering, Inspire Art cases, however these cases were found immaterial by the CJ to follow or overrule rule the Daily Mail Case as it indicated in these decisions.[46] The CJ's interpretation makes a distinction between immigration and emigration of the companies. With regard to immigration of the companies CJ's approach can be evaluated as favour of incorporation theory by weakening the real seat theory on the ground that of the interpretation generated in the Centros, Uberseering, and Inspire Art Cases. On the other hand, the interpretation in respect to emigration of the companies do not have any negative impact on the real seat theory and also could cause to promote the application of the real seat theory related to unbound transfers. Although the attitude of the Court taken for immigration of the companies contribute to mobility of the companies within the EU, the distinction made between immigration and emigration is open to criticism. Arguably, the protectionism can appear in larger extent in case of emigration because "moving to competing jurisdictions causes tax loses" [47] as well as a business activity provides capital to national income and employment facility, to the contrary, immigration of main activity could bring capital and tax revenue, employment opportunity to the host state which might facilitate more liberal attitude than first one.

5) Cartesio Case[48]

Cartesio is a company whose registered office and central administration take place in Hungary. Cartesio applied to transfer its central administration to Italy with the intention of continuing to be govern by Hungarian Law at the same time.[49] Hungarian authorities (court) refused the demand of Cartesio based on the fact that under the Hungarian Law 'such a transfer would require first, that the company cease to exist and, then, that the company reincorporate itself in compliance with the law of the country where it wishes to establish its new seat.'[50] 'Cartesio would have to be dissolved in Hungary first and then reincorporate in Italy'[51] The facts behind the Cartesio Case are similar to the Daily Mail Case. Both cases concerns with the emigration (moving out) of the companies. The Cartesio Case facilitated the CJ to reconsider its judgement in Daily Mail Case twenty years after.[52]

The Advocate General, in his opinion refused the Daily Mail judgement and indicated that 'the distinctions based on the aspect of primary and as opposed to secondary establishment and inbound versus outbound establishment were never entirely persuasive.'[53] According to the Advocate General, the legislation prevents the transfer of central administration restricting the right of establishment due to the costs and administrative burdens deriving from the winding up and reincorporating. This restriction just must rely on legitimate public interests,

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[46] Rothe (n 24)

[47] Sousa (2) 8

[48] Case C-210/06 *Cartesio Oktató Szoláltató bt*, [2008] ECR I- I-09641

[49] Judgment of the Court of Justice in Case C-210/06 press release no 89/08

[50] Judgment of the Court of Justice in Case C-210/06 press release no 89/08

[51] Gerner-Beuerle, Carsten and Schillig, Michael , ' The mysteries of freedom of establishment after Cartesio' (2010) 59 (2)ICLQ 303

[52] Sousa (n 2) 32

[53] Beurle (n 51) 309

but Hungary completely forbid Hungarian Companies to move their central administration to second member state.[54]

The CJ did not follow Advocate General's opinion in its judgment. The Court repeated its reasoning in the Daily Mail Case stating that 'companies are creatures of national law and exist only by virtue of national legislation which determines incorporation and functioning.'[55] The Court conclude that the state of incorporation could restrict the right of companies to preserve their legal identity in the case of its central administration transferred to another member state.[56] On the other side, the Court proclaimed another condition which enable to transfer the seat without winding up in the state of incorporation. The Court made distinction between two situations: transferring the seat while preserving its legal regime under the state of its origin and moving to another member state to convert into a company form supplied by another Member State.[57] 'In second situation, the Court considers that the Member State cannot prevent the company by requiring its liquidation, to transfer its seat to another Member State since the company is converted into a form of company which is governed by the law of Member State to which it has moved *(to the extent that it is permitted under that law to do).'*[58] The condition of central administration transfer was connected to change in the applicable law (with conversion) by the Court to deactivate the law of origin state preventing such transactions.

In this decision, the Court continue to preserve real seat theory as in the Daily Mail Case, however, within narrower scope owing to that it provides opportunity to change the central administration place by converting its form without facing liquidation. On the other hand, it fails to properly respond the needs of the companies seeking to transfer. Firstly, the concept of conversion presents uncertainty. The question of whether it is meant that "functional equivalent in another legal system" or "change of the form of business association" is not obvious in the decision. The conversion of another type of company in the second state might cause disadvantageous results for the companies owing to considerable change in companies structure and responsibility regime.[59] Also in both case, requirement of compliance conversion provisions taken by the second state could make it harder for the companies to move in terms of meeting the standards of new legal regime.

A) The SE and The SPE

Although the Court of Justice produced a considerable case law, it has not completely solved the problems arising from conflicts of law of the different legal systems within the EU to guide the Member States. In the judgements the Court indicated the necessity for harmonisation saying that 'problems which are not resolved by the freedom of establishment

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[54] Beurle (n 51) 309
[55] Case C-210/06 *Cartesio Oktató Szoláltató bt*, [2008] ECR I- I-09641 para 104
[56] Ibid para 107
[57] Beurle (n 51) 312
[58] Sousa (n2) 47
[59] Beurle (n 51) 319

but must be dealt with by future legislation or conventions.'[60] The Court has transferred the solution to the legislators.

It is needed to point that to only make convenient choice between conflicts of law problems in favour of the establishment right would not be sufficient to promote the single market as long as there are significant differences between different legal regimes. 'The essence of the single market is the possibility of undertakings to compete on equal terms on the market of all Member States.'[61] To enable to more fair competition to promote the single market, it is important to provide equal legal advantage to all companies located different member states in their territory. It could not happen in practice that all companies establish itself in or transfer the registered office to the Member State has the most advantage. Also, increasing movement traffic could make it harder for the Member States to struggle with prevention of shell companies. Therefore, beside the determination of company law theory to support the mobility, it is also important to take steps toward harmonisation as possible as within the EU.

As a harmonisation attempt, Statue for the European Company was put into force in 2004. The SE provides the companies to 'establish in more than one country within the EEA to merge or form a company or subsidiary, thereby operating throughout the EEA on the basis of a single set of rules unified management and reporting system.'[62] Under the Statue, the EU companies could expand their cross border operations without establishing subsidiaries governed by different Member States law.[63] On the other hand, main stipulations of the SE to form EU company as "the requirement that real seat and the statutory seat of the SE in the same Member State , the minimal capital required for establishment set at € 120 000, the companies that constitute one SE have to be in different Member States" restricts its application area.[64] Moreover, the requirement of the statue that real seat and statuary seat have to be in same state falls behind the judgment of the CJ produced in Centros-Uberseering and Inspire Art Cases. The positive side of SE is that it constitutes unified legal regime on the matters of management and reporting system which are not suitable to be formed by the CJ 's case law.

The proposed Statue for the European Private Company has been formed to introduces the concept of European companies. The SPE was purposed by the aim of supporting the movement of small and medium size companies. As the commission indicated that 'despite the key role of SMEs in the European economy, only 8% of the SMEs engage in cross – border trade and only about 5% have set up subsidiaries or joint ventures abroad.'[65] With this

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[60] Weddin (n 20) 11

[61] Nicholas Moussies , ' *Access to European Union: law economics , polices* ' (19th Rixensart 2011) http://www.europedia.moussis.eu/books/Book_2/5/15/?all=1 accessed 27 December 2014

[62] London Chamber of Commerce and Industry, 'The European Company Statue '(Enterprise Europe Network 2006) http://www.londonchamber.co.uk/docimages/7034.pdf accessed 27 December 2014

[63] London Chamber of Commerce and Industry, 'The European Company Statue ' (Enterprise Europe Network 2006) http://www.londonchamber.co.uk/docimages/7034.pdf accessed 27 December 2014

[64] Maria Pandova, ' The European Private Company Statue SMEs vs Big Companies' (2010) Working Paper 12 http://www.europeanprivatecompany.eu/working_papers/download/SPE-Pandova.pdf > accessed 29 December 2014

[65] Comission, Staff Working Document accompanying the proposal for a Counsel Regulation on the Statue for European Private Company Summary of the Impact Assessment COM(2008) 396

regard, the SPE tries to form provisions which is more suitable for medium or small size companies.[66] 'More attention is paid that : applicable law almost entirely communitarian , the real seat can differ from statutory one, capital is set at € 1 (*at most* € *8.000*), the SPE can be incorporated ex nihilo and no cross border element is required'[67]

Different from the SE, the application area of the SPE is larger on the ground that there is no cross border element stipulation under the SPE. It means that 'purely national economic activities and entrepreneurs may establish an SPE'[68] regardless the cross border business activity. Secondly, the SPE provides more favourable system due to standardization of minimum capital requirement which constitutes high amounts in some Member States as Germany and the Netherlands.[69] Therefore, it encourages to establish in any Member State passing over high minimum capital requirements of national company statutes which also causes problems to recognition of companies legal capacity for the companies who transfer their seats to the Member States that have higher minimum capital requirement as seen in the disputes mentioned above. The opportunity of standard minimum capital supplies equivalence to entrepreneurs all over the EU for company formation.

Another issue regulated by the SPE is in the matters of location of real seat and registered office within the EU. Article 7 of the SPE clearly states that "An SPE shall not be under any obligation to have its central administration or principal place of business in the Member State in which it has registered office.'[70] In related to transfer conditions, Article 35 confers the right to the SPEs to transfer their registered office to another Member State without winding up or losing its legal capacity.[71] Consequently, SPEs will be able to transfer their registered office to second member state separately from their central administration. If the proposal gets adopted, the SPEs will enable to have take benefit from another member states' company regulations while continue to conducting business in their existing place without facing liquidation.

The statue introduces new tool to companies that has not been clarified by the CJ' s case law. In the Cartesio Case, the Court indicated conversion of companies to transfer the central administration 'which can happen when a company decides to transfer both its statutory seat and its real seat in another Member State.'[72] Under the SPE it is possible to only transfer the registered office. On the other hand, the matter of transfer of central administration without change in applicable law has not been point out neither the SPE or the CJ's case law. It is open the question why the Statue refrain from providing rules on transfer of real seat when it states registered office and central administration could be located in different Member

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66 Pandova (n 64) 12

67 Pandova (n 64) 12

68 Sandra Van de Brack ' The European Private Company its Share Holders and Creditors' (2010) 6(1) Utrecth Law Review

69 Pandova (n 64) 23

70 Article 7 Proposal for as on the Statue For European Private Company COM (2008) 396/3

71 Article 35 Proposal for as on the Statue For European Private Company COM (2008) 396/3

72 Pandova (n 64)51

States.[73] Should the article 35 be interpreted including the real seat transfer? Otherwise, it would cause technically possible but unreasonable proceeding for the companies who seeks to only transfer its real seat without changing its applicable law. So under this uncertainty, a company who wants to transfer just its real seat can move both real seat and registered office with conversion referring to the Casterio's judgement (and also the SPE), after than move its registered office back to its first its state of incorporation relying on the right conferred by the article 35 of the SPE.

CONCLUSION

The EC Treaty conferred movement right to the legal entities equal to natural persons, however, there has been conflict between the law of Member States and the EU principle on freedom of establishment. The Court of Justice handled the issue in frame of two distinctions. While the approach taken by the Court supports the freedom of establishment in related to inbound transfers for both secondary and primary establishment, the Court prioritised the choice of national laws for unbound transfers. On the other hand, the Court narrowed effect of national laws exempting the condition of company conversions by the Casterio Case. Any company law theory was not explicitly decided in the case law and the solution of the problem transferred to legislators.

The SE fails to be successful because of its narrow extent and high minimum capital requirement. On the contrary, the SPE was formed to respond the needs of SMEs, therefore provides more inclusive application area. Besides, it contributes to the mobility of companies facilitating that registered office and central administration can be located in different states. It provides opportunity to transfer the registered office separately from central administration. The SPE introduces more communitarian law regime under the label of the EU company and promotes company law harmonisation.

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