Cross-border Mobility of Companies

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I. Introduction
What do we mean by „corporate mobility“?

 „primary establishment“

 ▪ Registered Office
 ▪ Head Quarter

 „secondary establishment“

 ▪ Agency
 ▪ Branch
 ▪ Subsidiary
II. Freedom of establishment as the starting point
Treaty on the Functioning of the European Union (TFEU):

**Article 49**: „Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.“

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

Article 49: „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.“

Article 54: Companies or firms formed in accordance with the law of a Member State shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
What is an „establishment“?

ECJ C-221/89 (*Factortame*):
no. 20: “the concept of establishment … involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”.

No. 21: “Consequently, the registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the State concerned.”

Confirmed by ECJ, C 378/10 (*Vale*) no. 34. “the concept of establishment … involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”.

What do we mean by „corporate mobility“?

- Agency
- Branch
- Subsidiary

„primary establishment“

- Registered Office
- Head Quarter

„secondary establishment“

→ actual pursuit of an economic activity through a fixed establishment for an indefinite period

S.A.
III. What has been achieved so far
General interpretation of EU-freedoms

(1) **non-discrimination**: A Member State shall grant to foreign nationals the same rights as to its own nationals.

(2) **restriction** = national measures liable to hinder or make less attractive the exercise of fundamental freedoms.

subject to **proportionality test** (*Gebhard*):

- measure to be applied in a non-discriminatory manner
- to be justified by imperative requirements in the general interest (e.g. creditor protection)
- suitable for securing the attainment of this objective
- not going beyond what is necessary
Freedom of establishment for companies

C-208/00 (Überseering)

- Where a company has been formed in accordance with the law of a Member State (A) and has moved its head quarter to another Member State (B), Articles Art. 49 and 54 TFEU preclude Member State B from denying the company legal capacity.

C-212/97 (Centros), C-167/01 (Inspire Art)

- Restrictions need to be justified. There is no justification for imposing a minimum capital requirement: Creditors are on notice that the company is not governed by the law of the host state, they are protected sufficiently by information rules governed by Community law (disclosure directive, directive on annual accounts).
Freedom of establishment (like other fundamental freedoms in TFEU) guarantees free access to the market.

C-411/03 (Sevic Systems): „the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State…”

C-565/08 (COM/Italy): „the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for economic operators from other Member States.”

Centros, Überseering and Inspire Art: The respective host Member States did not even allow the foreign operator to start any activity at all within their territory (denial to register a branch or denial of legal capacity). These measures affected their access to the market.

Once market access has been allowed without any restrictions, Member States have more leeway to restrict the activity of foreign operators as long as they do not discriminate against them.
Restrictions and their justification

C 594/14 (Kornhaas)

GmbH-Gesetz: Rule on personal liability of a director making payments after the company became insolvent.

Applying this rule to a company incorporated in another Member State does not affect freedom of establishment.

ECJ: The legal capacity of the company is not called into question (Überseering) and the liability is not related to the fact that the capital of the company does not reach the minimum amount laid down by German legislation (Inspire Art).

But: Minimum capital would have amounted to 25,000 Euros, personal liability in the case at hand amounted to more than 100,000 Euros.

What is the real reason?

→ The requirement of minimum capital affects access to the market.
→ The liability rule is applicable at a later stage when the company had already done business in Germany for a long time and the rule is related to behaviour that is effectively damaging creditors.
Company Transformations

C 411/03 (Sevic Systems): Cross-border merger

„Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation within companies ... They constitute particular methods of exercise of freedom of establishment…“

„Whilst Community harmonisation rules are useful for facilitating cross-border mergers, the existence of such harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment…“

To refuse generally the registration of a cross-border merger goes beyond what is necessary to protect the public interest.
Company Transformations

C 378/10 (Vale): **Cross-border conversion**

„…national legislation which enables national companies to **convert**, but does not allow companies governed by the law of another Member State to do so, falls within the **scope** of Articles 49 TFEU and 54 TFEU.“

„… cross-border conversions … presuppose the **consecutive application** of two national laws.

„… differences in treatment depending on whether a domestic or cross-border conversion is at issue cannot be justified by the absence of rules laid down in **secondary European Union law**.“

„… Member States‘ law which „**precludes**, in a general manner, cross-border conversions“ … „goes beyond what is necessary to protect those interests“ [creditors, minority shareholders, employees, effectiveness of fiscal supervision etc.]
STUDY ON THE APPLICATION OF THE CROSS-BORDER MERGERS DIRECTIVE

BECH-BRUUN

Lexidale
International Policy Consulting

FOR THE DIRECTORATE GENERAL FOR THE INTERNAL MARKET AND SERVICES, THE EUROPEAN UNION

SEPTEMBER 2013
Figure 1 – The Number of Transactions in Europe Decreased between 2008 to 2012, while the Number of CBMs Increased

Mergers and cross-border mergers in EU and EEA from 2008 to 2012.
Figure 14 – Almost Half of the Member States Did Not Transpose the Directive by 2007

Transposition of the CBMD in the EU/EEA Member States. Data: Lexidale.

Transposition of the CBMD

<table>
<thead>
<tr>
<th>Year</th>
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<tr>
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<td>2008</td>
<td>10</td>
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<td>2009</td>
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Figure 7 – Member States Are Evenly Divided Between the Ex-Ante and Ex-Post Period for Creditor Protection

Grouping of Member States based on whether they provide for ‘Ex-Post’ or ‘Ex-Ante’ protection and whether creditors can block the CBM. Data: Lexidale.
Figure 8 – Large Variation in Duration Periods Causes Uncertainty and Complexity

Length (in months) of the duration of creditor protection. (Cyprus, Iceland, Ireland, Lithuania, Sweden and United Kingdom are not included due to different mechanisms or because option is not used) Data: Lexidale.
Cross-border Merger

There seems to be a case for full harmonisation:

- Protection of Creditors
  - Ex ante or ex post protection
  - Providing securities
  - Veto right of creditors
  - EMCA: Declaration in the expert’s report whether the financial situation of the merging companies requires particular safeguards.

- Protection of Minority Shareholders
  - Requirement of a qualified majority
  - Right to challenge the merger resolution
  - Appraisal right (cash compensation)
  - ECMA: The company being acquired has to offer dissenting shareholders to acquire their shares in return for appropriate cash compensation
IV. What has not been achieved
Branches

Becht/Enriques/Korom, „Centros and the cost of branching“: out of ten experiments to register a branch abroad five faced considerable obstacles.

- **Austria** required (1) a prove that the branch was actually and factually established in Austria and (2) a change of the objects clause.
- In **Germany**, the signature requires notarial authentification. The notary then, however, refused to submit the application (due to the low fee), so the applicant had to do this himself.
- In **Italy** the registrar asked for a notarial deed. Out of twenty notaries only six replied and only very few accepted to help registering the branch. The overall cost amounted to 5,000 € and the procedure took 52 days.
- **Sweden** first required the appointment of a certified auditor for the branch. The experiment was broken off.
- In **Poland** the registrar several times required additional documentation. Due to the increase in costs, the branching experiment was broken off (after 9 weeks).
Subsidiaries

**Article 49**: Freedom of Establishment

- the setting-up of agencies, *branches* or *subsidiaries*.
- the right to *set up and manage* undertakings, in particular companies or firms.

Nationals or companies from other Member States *acquiring the capital* of such a company giving them definite influence on the company’s decisions and allowing them to determine its activities fall within the substantive scope of the provisions of the Treaty on *freedom of establishment* (C-251/98 *Baars*; C-196/04 *Cadbury Schweppes*).

Article 49 TFEU expressly leaves traders *free to chose* the appropriate legal form in which to pursue their activities in another Member State (C-270/83 *COM/France*).

BUT: Attempts to facilitate the setting up and managing of subsidiaries have so far not been successful: Societas Privata Europaea (SPE) and Societas Unius Personae (SUP).
The European Court of Justice does not acknowledge the concept of subsidiary when holding the parent jointly and severally liable for infringements against competition law committed by the subsidiary.

- It is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company adduces sufficient evidence to show that its subsidiary acts independently on the market (C-97/08, Akzo Nobel).

- To rebut the presumption, the parent has to show that the subsidiary could act with complete autonomy not only at the operational level but also at the financial level (C-508/11, Eni).

- While the subsidiary enjoyed a large measure of autonomy, the parent had regularly monitored the management of its subsidiary. Therefore liability could be attributed (C-58/12 Groupe Gascogne).
Freedom of Establishment

Branch: no legal personality (owner is directly liable)

Subsidiary: own legal personality and own assets (liability of owner has to be justified)

- acquiring the capital giving definite influence on the company’s decisions falls within the scope of freedom of establishment (C-251/98 Baars; C-196/04 Cadbury Schweppes).
- freedom of establishment offers a free choice between branch (no separate legal personality) and subsidiary (separate legal personality) (C-270/83 COM/France).

→ Lack of consistency: Art. 101 TFEU is interpreted in a way that renders Art. 49 TFEU partly meaningless.
Protecting stakeholder interests

Restrictions may be justified by imperative requirements in the general interest (e.g. creditor protection, employee rights, tax evasion).

National measures liable to make establishment less attractive?

market access (Centros, Überseering, Inspire Art)  

insolvency (Kornhaas)
Company Transformations

Consecutive application of two national laws:
1. Filing for application at German register
2. Filing for application at Italian register
1. **German** register: formal requirements are not duly fulfilled.

2. **Italian** register: cross-border conversion is registered without waiting for certificate to be issued by German register.
3. Company appeals to Oberlandesgericht Frankfurt arguing that registration in Italy renders cross-border conversion effective.

4. The appeal is successful. OLG Frankfurt: Based on the European principle of equivalence the Italian decision has to be accepted as if it was a German register.

5. The decision, however, does not take into account the consecutive application of two national laws: The German register has to check the formalities of German law, the Italian register checks the Italian requirements. The latter has to wait for a confirmation attesting that the German requirements have been duly fulfilled.
UK Companies House (letter to Notary Heribert Heckschen in Dresden)

„The UK does not have procedures in place to allow transfers of companies out of England ... without the company dissolving, and therefore Companies House will not be able to act on your request. Yours faithfully, ....“

Source: http://www.heckschen-vandeloo.de/Aktuelles/Rechtsprechung.html
Co-determination of employees

Employees participate in nominating and supervising the management.

Management Board

Supervisory Board

The German Model of Board Level Representation of Employees

General Meeting

Employees

500

1/3
Co-determination of employees

Employees participate in nominating and supervising the management.

The German Model of Board Level Representation of Employees

Employees
Circumvention of Employee Co-determination

This result can be achieved by different means:

- Incorporation of a new company
- Cross-border conversion into foreign company type
- Cross-border merger with a foreign company
- Cross-border division splitting up the German company
Foreign legal entities with more than 500 employees in Germany, not subject to co-determination

Source: Hans-Böckler-Stiftung: Mitbestimmungsreport Nr. 8 February 2015
Negotiations on employee participation rights

- Applicable to cross-border mergers and to the formation of a European Company (SE).
- Special Negotiation Body of employees is negotiating with the management of the companies involved.
- Possibility to conclude an agreement on participation rights.
- Fall back-solution: Principle “before and after”.

→ Company starts negotiations before it passes the relevant thresholds.
→ No co-determination “before” the transaction, consequently, there will be no co-determination “after” the transaction.
→ The resulting company is no longer subject to German co-determination rules and can continue growing without having to introduce co-determination.
Conclusion: Future Agenda of EU Company Law

- Full harmonisation of the procedure and the documentation required for registering branches.
- Full harmonisation of cross-border mergers with respect to creditor and minority protection.
- Harmonisation of cross-border conversions and cross-border divisions.
- Harmonisation of rules determining the applicable company law, taking into account interest of Member States to protect stakeholders within their territory.
- Improving negotiation procedure on employee participation.
Further reading ..

- European Model Company Act (see SSRN)
- Gebauer/Teichmann, Enzyklopädie Europarecht, Band 6, Europäisches Privat- und Unternehmensrecht, 2016, p. 487 (§ 6 Europäisches Gesellschaftsrecht)
- Teichmann, Grenzüberschreitender Formwechsel kraft vorauseilender Eintragung im Aufnahmestaat?, Zeitschrift für Wirtschaftsrecht (ZIP) 2017, 1190