

Cross-border Mobility of Companies

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Freedom of establishment as the starting point:

- Companies or firms “formed in accordance with the law of a Member State” enjoy freedom of establishment (Articles 49 and 54 TFEU).
- Establishment means the “actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period” (*Vale*).
- Restrictions on the freedom of establishment shall be prohibited. This also applies to “restrictions on the setting-up agencies, branches or subsidiaries”.

What has been achieved so far:

- Companies formed in accordance with the law of another Member State are acknowledged even if they have no activity in the Member State of origin (*Überseering*).
- Restrictions on the activity of companies incorporated in other Member States are to be justified in the light of the proportionality test of the *Gebhard* decision (*Centros, Inspire Art*).
- Freedom of establishment protects access to the market, Member States have leeway to apply domestic law insofar as it does not directly affect market access (*Kornhaas*).
- Company transformation operations (mergers, divisions, conversions) are part of freedom of establishment (*Sevic, Vale*).
- The cross-border merger is regulated by secondary law.

What has not been achieved:

- The establishment of branches is burdensome and not sufficiently harmonised.
- The right granted by Article 49 to set up and manage subsidiaries is not accompanied by EU secondary law and has *de facto* been denied by EU case law based on Article 101 TFEU.
- The actual scope of application for legal provisions which protect domestic stakeholder interests remains unclear.
- The cross-border conversion of a company incorporated in one Member State into a company incorporated in another Member State is possible (*Vale*) but burdensome.
- Cross-border divisions are practically impossible due to lack of secondary law.
- Board level representation of employees remains the major stumbling block for EU secondary law on corporate mobility.