“Make men work together show them that beyond their differences and geographical boundaries there lies a common interest.”
Jean Monnet 1888-1979
FOREWORD

This thesis is the result of my graduation project for the master program International Business Law at Tilburg University. This program combines theory and practice offering a good image of working in International legal practice as a business lawyer.

The subject of this thesis originated from my interest in, specifically the course, International Company Law. Since all states have different company laws and apply different rules of Private International Law, I found it interesting to explore how these differences relate to the foundations of the Treaty on the Functioning of the European Union and more specifically to the right of freedom of establishment.

As a member of an entrepreneurial family that is very internationally oriented my interest lies in the possibilities of companies to move cross-borders. As I discussed these interests and my consideration to make this the subject of my thesis, with Professors and fellow students the content of my thesis took shape.

In the course of my studies I took a path that is unlike other students. My two sons were born during my studies which eventually required me to start working fulltime. This responsibility combined with certain setbacks forced me to divide my time which led to a Thesis project of over two years. Even though this delay frustrated me occasionally I found the research and writing of my thesis fascinating and instructive.

I would like to express my particular gratitude to my family. Their trust and motivation stimulated me during the writing of my thesis. Furthermore I would like to thank miss J. Li for her input, patience and her understanding throughout this period.

Eventually I have come to an result I am satisfied with and I’m convinced this thesis will enable me to duly complete the master Program International Business Law. I look very much forward to start my professional career in the field of my interest.

Rumiko Mommersteeg

‘s-Hertogenbosch, March 2014
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SECTION 1. INTRODUCTION

1.1. Preface

In today’s dynamic world characterised by globalisation and constant modernisation corporations are easily tempted to extend their business beyond the borders of the country in which they are founded. The continuing development in telecommunications enables corporations to detach business from headquarters, in order to establish wherever the means of production are best on hand. As a result the market can be expanded and the competitiveness on the global market will be strengthened. Cross-border trade can take many forms, and it will get more complicated if the business activities are included in foreign judicial entities. For instance, corporations can choose to abide by the laws of a different country to simplify participation in that country’s economy. In this contribution the possibilities of moving (parts of) a company cross-border in Europe will be viewed and the judicial consequences of such movements will be discussed. Also, several options to improve the climate of establishment within Europe will be explored.

Cross-border trade within Europe is guaranteed by one of the foundations of the internal market (also known as the common market). This free movement of persons (including legal entities), services and capital1, is one of the main principles of “The Treaty on the Functioning of the European Union” (in short: TFEU). Corporations within the borders of the European Union (in short EU)2 benefit greatly from the advantages of the internal market since several years and one would assume that, especially since primary European governance is set to overrule national governance, companies experience little problems in exercising their right of freedom of establishment. This contribution, however, will prove that while exercising this right corporations experience several barriers. An important factor in these is the immense difference in private international law (in short: PIL) of the member states and elaborated by the highly complicated administration of justice of the European Court of Justice (in short: the Court)3 concerning this matter.

1.2. Main question

The main question of this contribution is comprised of two questions. The main question leads to a follow-up question. The main question is:

*Does the current European climate of establishment sufficiently guarantee the right of free movement of corporations and does it sufficiently enable seat transfers within the internal market, without having to liquidate and dissolve?*

After the analysis of the current status quo of the European climate of establishment and a comparison with the American laws concerning the mobility of corporations, the follow up question, in addition to the main question, will be:

*What changes could be implemented in the European climate of establishment in order to optimise the possibilities of cross border seat transfers for European corporations?*

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1 Within the short time span of this contribution there was no possibility for a detailed analysis of the fundamental freedoms. For more information on this subject see W.T. Eijsbouts, *Europese Recht. Algemeen deel*, Groningen: Europa Law Publisher 2004, p.p. 69-127.
2 The *naissance* of the European Union was initiated by the French civil servant Jean Monnet. His views about the necessity to cooperate lead to the signing of the Treaty of Paris on April 18th 1951 by Belgium, France, Italy, Luxemburg, the Netherlands and Germany. The European Community of Coal and Steel was founded on July 23rd 1952 as a result of the aforementioned treaty.
3 Before 2009 the ECJ was called the Court of Justice of the European Community (in short: CJEC).
1.3. Approach

In order to answer these questions, as accurately as possible, the current status quo needs to be assessed. In the second section of this contribution therefore, the current European climate of establishment will be assessed by looking into the three sources of Union law and the private international law of the member states. The three sources of Union law are: primary community law; treaties such as the TFEU, secondary European legislation, and the jurisprudence of the European Court of Justice. Subsequently, the judicial possibilities on how to move (parts of) a corporation within the EU will be analysed in section 3. Thus, section 2 and 3 are relevant in forming the answer to the main question.

From section 4 onwards, the main goal will be to answer the follow up question. The starting point for this analysis will be a comparison with the American judicial system. Therefore the laws of the state of Delaware will be highlighted.

The comparison of the judiciary apparatus will be followed by an analysis of the contemporary and future developments concerning company seat transfers in section 5.

In the concluding section some recommendations will be made to optimise the European climate of establishment. Since this contribution is confined to a limited number of pages, the fiscal consequences of cross-border movement will be left out of consideration.
SECTION 2. THE CURRENT EUROPEAN CLIMATE OF ESTABLISHMENT FOR CORPORATIONS

2.1. Primary European law: freedom of establishment

The foundations of the common market within the member states of the EU are laid down in the TFEU. One of these foundations, the freedom of establishment of natural and legal persons incorporated in article 49 of the TFEU,\(^4\) is a key element in the subject of this contribution.

The four freedoms\(^5\) of the EU are integrated into national legislation in different ways. A distinction is made between positive and negative integration. Threw positive integration European legislation creates uniformity by complementing national legislation. Negative integration is the overruling of national legislation by European legislation.

The right of freedom of establishment as implemented in the TFEU is part of negative integration, because article 49 contains a prohibition order. On account of this prohibition order, member states are not allowed to restrict the freedom of establishment, and discrimination based on nationality is unlawful.\(^6\)

Article 49 of the TFEU:

"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 Section relating to capital."

Article 54 of the TFEU defines specifically that article 49 of the TFEU shall apply mutatis mutandis to corporations. This means that corporations\(^7\) have the right to establish an office anywhere in the EU. In order to determine the freedom of establishment of corporations article 49 TFEU must always be read in coherence with article 54 TFEU.

Article 54 of the TFEU:

"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 Union shall, for the purposes of this Section, be treated in the same way as natural persons who are nationals of Member States.

‘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."

\(^4\)Former articles 52 en 58 EEC treaty (ex) are replaced by articles art. 43 and 48 EC treaty, which in turn have changed numbers with art. 49 and 54 of the TFEU with the implementation of the Lisbon Treaty on December first 2009. So far, there are no substantive changes applied to these articles.

\(^5\)The freedom, of goods, persons, services and capital.


\(^7\)Article 54 TFEU defines ‘corporation’.
Article 54 of the TFEU ties two conditions to the freedom of establishment for corporations. In the first place, a corporation has to be established in accordance with the law of the member state, in which it is founded. Secondly, the corporation has to have at least one connecting factor within the territory of the European Union. These connecting factors are: registered office, central administration and principal place of business. In order to comply with article 54 of the TFEU there has to be a long term engagement. For instance, an office, branch or agency established in a different member state. Article 49 Jo. 54 of the TFEU forces all member states to recognise corporations which have been established in compliance with the rule of law of every other member state, and are therefore legal. This concept though, can bring about contradiction with private international law of a member state, because national laws of the member states dictate other demands concerning the connecting factor for corporations. In section 3 this problem of conflict of law will be discussed further.

The right of freedom of establishment makes a distinction between the primary right of establishment and the secondary right of establishment. Corporations are granted the secondary right of establishment when they are allowed to explore business activity and set up branches in other member states. The primary right of establishment means that a corporation is allowed to move its registered office from one member state to another without losing its incorporation rights.

There is an overall demand for a specification of the scope of judicial provisions, to be used in practice. The four freedoms of the European Union are at the heart vague and undefined. This is why the four freedoms are often the subject of cases brought before the European Court of Justice. The most important jurisprudence of the Court concerning the mobility of corporations will be discussed in the following section.

### 2.2. Jurisprudence of the ECJ on the right of establishment

The jurisprudence of the Court serves to help ascertain the scope of the four freedoms. In this paragraph the most relevant cases will be analysed on the subject of the right of freedom of establishment. These are the following cases: Centros, Überseering, Inspire Art, Sevic, en Cartesio. two of the most recent cases ‘Vale’ and ‘National Grid Indus’ will be discussed in section 5 as examples of the current developments on the subject in question.

#### 2.2.1. THE CENTROS CASE

In the Centros case a corporation founded in England Centros Ltd. (Centros for short) was refused to register a branch office in the commercial register of Denmark. The reason for his refusal was that they assumed that Centros was not trying to establish a branch office in Denmark, but its central administration, in order to override the rigid enterprise act, inter alia, the minimum capital requirement. This presumption was based on the fact that Centros since its foundation a few months earlier had never initiated any business activities in its country of origin.

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8The registered office is the statutory seat of a corporation. The central administration is the head office, where the central place of administration and the board of directors are situated. In this contribution the aforementioned terms are used variously.
13ECJ EG 30 September 2003, case C-167/01 (Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art Ltd.), ECR 2003 I-10155.
Centros was convinced that on the base of article 52 jo. article 58 of the EC-Treaty, it was allowed to open a branch office in Denmark. The Danish authorities believed that the refusal of the registry was justified by virtue of the necessity to protect the creditors and to dispute the misuse of bankruptcy, commonly known as ‘general interest reservation’. The case was referred to the Court of Justice for a preliminary ruling. The main question in this case was if the refusal of registration of a Centros office is incompatible with the relevant provisions of the TFEU, assuming that Centros tried to override the more rigid Danish enterprise act.

The judgment of the European Court was that the refusal of the registry of a branch office of a corporation founded in a different member state, was indeed incompatible with article 52 jo. article 58 of the EC-Treaty. The Court referred to a previous judgment in the Segers case, thereby considering that the establishment of a branch office of Centros in Denmark with the goal to exercise its business activities is on itself an act of the right of freedom of establishment. Furthermore, the goal of the receiving country to prevent fraudulent activities was not deemed sufficient to allow surpassing the right of freedom of establishment because the fraudulent intention of Centros was not at all proven. However, an important remark was made by the Court on fraudulent activities: "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."

Regarding the argument of protection of the general interest the court strengthened its point by quoting from the earlier Gebhard case, “However, 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.” The Court considered that in this case the above requirements were not met.

### 2.2.1.1. INFLUENCE ON LEGAL PRACTICE

The judgment in the Centros case was a breakthrough for the immigration of corporations in the European Union and started a legal discussion about two major components of this judgment.

Firstly the applicability of the so-called “real seat theory” was questioned. To determine what law is applicable to a certain corporation the receiving countries roughly look into the law of the country of

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16 In the cases before 2009 article 52 and 58 of the EC-treaty are mentioned instead of article 49 and 54 TFEU.
18 Centros § 13.
20 The same sentence is mentioned in Segers § 16.
21 Centros § 27-29 en Segers § 16.
22 Centros § 39.
24 Gebhard, § 39.
25 For an extensive disquisition on the real seat and the incorporation theory see e.g.: Werner F. Ebke, "Real seat doctrine in the conflict of corporate laws", The International Lawyer, Vol. 36, no. 3., F.J.G. Alférez, "Derecho de sociedades y conflicto de leyes: una aproximación contractual", Editorales de Derecho.
origin or the location of its real seat.\textsuperscript{26} As a result of the judgment in the Centros case lawfully established companies which have their real seat outside of the receiving member state can no longer be refused registration in European context.

The Centros case however deals solely with the freedom of establishment and does not require any adjustment of national legislation of a member state concerning the applicability of legislature on corporations. So, In European context it is not at all relevant which connecting factor the member state uses to apply its legislation.\textsuperscript{27} On member state level the real seat theory could continue to apply to internal and ‘extra-European’ cases and outside the confines of the company law.

Secondly, there were worries that this judgment of the Court would cause a ‘race to the bottom’.\textsuperscript{28} This fear was grounded on the fact that now corporations could exploit the inequalities between national law and European law and this would cause Delaware-like competition between legislators. These worries can be easily contested, as will be proven in section 4, where amongst others company law of Delaware will be discussed.

\subsection{ÜBERSEERING CASE}

The Überseering case arose from a contractual dispute between a corporation founded according to Dutch legislation, Überseering BV, and a German corporation called Nordic Construction GMBH. Überseering BV demanded compensation from Nordic Construction because of breach of contract and took the matter to German court. This case was declared a non-suit by the ‘Landgericht’, because according to legislation of the ‘Bundesgerichtshof’, the legal right of a corporation to bring an action before national court has to be judged on grounds of legislation of the receiving country, (the so called ‘Sitztheorie’), and not on grounds of legislation of the country of origin (the so called ‘Gründungstheorie’). According to German legislation Überseering BV lacked the capacity to go to trial in Germany.

Eventually, the Bundesgerichtshof posed preliminary questions to the European Court of Justice. Above all, the Bundesgerichtshof wanted to know if its decision to deny Überseering BV legal capacity and legal capacity to be a party to legal proceedings was a breach of the freedom of establishment.

The Court decided that Überseering BV has the right to take matters up in German court, that this right should be recognised by the German court, and that by not doing so the German court was acting in a manner which was incompatible with the right of freedom of establishment. If a corporation is founded in compliance with the legislation of a member state and is supposed to have transferred its central administration to a different member state, then articles 43 and 48 of the EC treaty\textsuperscript{29} resist the receiving country to refuse corporations the legal capacity to be a party in legal proceedings. Corporations cannot be denied legal capacity to go to national court and bring an action based on a breach of contract.\textsuperscript{30} The justification of this restriction by the national court, the protection of ‘general interest’, was again not sufficient enough to overrule articles 43 and 48 of the EC-treaty.\textsuperscript{31}

\begin{thebibliography}{99}
\bibitem{26} A certain reservation is paramount; Countries are labelled as general management or incorporation countries, yet in practice this is not easy. Countries are often influenced by another theory to a certain degree.
\bibitem{28} the “race to the bottom” and “race to the top” will be further discussed in section 4, § 2.
\bibitem{29} Now articles 49 and 54 of the TFEU.
\bibitem{30} Überseering § 82.
\bibitem{31} Überseering § 93.
\end{thebibliography}
2.2.2.1. INFLUENCE ON LEGAL PRACTICE

As a result of the judgment of the Court in the Überseering case, the private international law of several members states which used the Sitztheorie needed to be adjusted. These member states demanded re-incorporation of corporations if the head office was moved to their territory.

Although this judgment has most definitely weakened the Sitztheorie, there are still two contradicting interpretations possible. Assuming that a broad interpretation of this judgment is possible, this case can be viewed as a restriction of the Sitztheorie and therefore the adoption of the incorporation theory. The narrow interpretation, though, implies that the Sitztheorie only guarantees the amendment of jurisdiction of corporations which have been established in accordance with foreign legislation.  

The judgment in the Überseering case demands that the receiving country recognises the legal capacity of a foreign corporation, but the Court does not elaborate on which legislation (receiving country or country of origin) should be applied after the recognition. This way the interpretation of the judgment in this case could be the following: the Sitztheorie is compatible with the freedom of establishment as long as the legal capacity of a foreign legal corporation is recognised.

2.2.3. INSPIRE ART CASE

Inspire Art Ltd. was a corporation with limited liability founded in Great Britain. Ever since its foundation it solely exploited business activities in the Netherlands. As it happened, both the director and the sole shareholder lived in the Netherlands. There was never any intention to do business in Great Britain. The only reason to found the corporation in Great Britain was to benefit from the advantages of less rigid legislation of the British enterprise act. A branch office of the corporation was registered at the Amsterdam Chamber of Commerce, without mentioning that Inspire Art was a pseudo foreign corporation according to article 1 of the “Wet op de formeel buitenlandse vennootschappen” (WFBV).

The Chamber of Commerce requested the District Court to register Inspire Art in compliance with article 1 of the WFBV. This addition in the Commercial Register meant that Inspire Art Ltd. would have to comply with more rigid legislation, such as a minimum capital requirement and the disclosure of documents.

The Amsterdam District Court decided that Inspire Art Ltd. was a pseudo foreign corporation (“formeel buitenlandse vennootschap”) and submitted two preliminary questions to the Court. The first question was if the articles 43 and 48 of the EC-treaty prohibit a member state from imposing additional requirements on a branch office of a corporation on its territory. While knowing that the only reason this corporation was founded in another member state was to purposefully bypass the legislation of the receiving country. In the Inspire Art case there were no records of business activities in the country of origin. The second question consisted of the interpretation of article 46 of the EC-treaty and read: could additional requirements on the basis of national legislation be justified by reasons brought by the national legislator, or would this mean an infringement of the right of freedom of establishment?

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33 See also footnote 34.
34 “Wet op de formeel buitenlandse vennootschappen of December 17th 1997” (Stb. 1997, 697).
35 Now article 52 of the TFEU.
At first, the Court judged that the additional requirements of the WFBV for *formeel buitenlandse vennootschappen* were contradictory to the Eleventh Directive.³⁶ The Directive holds a limitative enumeration which means requirements that depart from this Directive are not justified.³⁷ Furthermore the articles 43 and 48 of the EC oppose to national legislation which limits the freedom of establishment of a branch office of a legally founded corporation by demanding its compliance with additional regulation such as a minimum capital requirement and accountability which are inherent to national corporations.

While answering to the second preliminary question concerning the *general interest reservation*, the Court expressed its views by quoting earlier judgments and emphasized:

> "The impediment to the freedom of establishment guaranteed by the Treaty constituted by provisions of national law, such as those at issue, relating to minimum capital and the personal joint and several liability of directors cannot be justified under Article 46 EC, or on grounds of protecting creditors, or combating improper recourse to freedom of establishment or safeguarding fairness in business dealings or the efficiency of tax inspections."³⁸

Specifically concerning the protection of creditors, the Court explained that Inspire Art Ltd. presented itself as a foreign corporation, so as to inform creditors sufficiently that Inspire Art Ltd. is subject to other legislation then corporations founded in accordance to Dutch law which are subject to limited accountability.³⁹

### 2.2.3.1. INFLUENCE ON LEGAL PRACTICE

After having read this verdict one can conclude that it is irrelevant, for the applicability of the freedom of establishment, whether or not a corporation practices its business activities in the country of origin. The applicability of the freedom of establishment lies therefore solely in the fact that the corporation has to be lawfully founded in a member state.⁴⁰

Because of the similarities with the facts of the Centros case, the main question in the Inspire Art case can be formulated as followed: Do the facts from this case justify the different decision taken in the Centros case? The facts in both cases differ in respect that in the Inspire Art case additional conditions were applied for registration while in the Centros case the registry of a branch office was simply refused.

The Advocate General saw no reason to deviate from an earlier judgment and emphasized that the unsatisfying results for some were simply the consequences of the current developments in the communal legislation.⁴¹ The Court agreed and did not deviate from its earlier judgment in the Centros case. Business activities are not mentioned in the treaty as a condition to open a branch office in another member state. Moreover, the Court has ruled several times that the reason to establish in a certain member state is irrelevant to the freedom of establishment. It is striking though that the Court, in this case, considers that there is sufficient protection for the creditors by Inspire Art Ltd. presenting itself as an English corporation, while in practice it is general knowledge that non contractual creditors are often ill informed of the legal form of its debtor.⁴²

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³⁶ Eleventh Directive of the Council 89/666/EEC 22 December 1989 whereas for these branches it is necessary to apply certain provisions different from those that apply to the branches of companies governed by the law of other Member States since the Directives referred to above do not apply to companies from non-member countries (*Pb.* L 395/36).

³⁷ *Inspire Art* § 2.

³⁸ *Inspire Art* § 142.

³⁹ *Inspire Art* § 135.


⁴¹ Conclusion ECJ EC 30 January 2003 in case C-167/01 (*Kamer van Koophandel en Fabriken voor Amsterdam v Inspire Art*), § 104.

2.2.4. SEVIC CASE

In this case the intended merger of the corporations SEVIC Systems AG (from now on: SEVIC), a German corporation, and Security Vision Concept SA, a Luxemburg corporation, was cause for conflict. The merger agreement was one without the liquidations of the latter, followed by the transfer of capital under universal title to SEVIC, with SEVIC keeping its corporation name. The appointed court rejected registration of the merger agreement, claiming that German legislation only allows mergers between legal person with the central place of administration on German territory. Therefore, registration of a merger with a corporation from Luxemburg was legally not possible.

SEVIC appealed this judgment at the “Landgericht Koblenz”, which in turn proposed a preliminary question at the European Court of Justice. The gist of the question was: Is German legislation, by refusing merger agreements between national and international corporations, breaching the freedom of establishment as is intended in article 43 and 48 of the EC?

The Court in a pioneering judgment ruled that there had been a breach of the aforementioned articles, because cross-border mergers are part of the freedom of establishment. German legislation, which only allows mergers between national corporations, was therefore breaching the right of establishment. The Court emphasized that mergers can play an important part in the business activities of a corporation. Since the freedom of establishment was ratified in order to make economic activity more effective, a refusal of cross-border merger agreements would mean a limitation of the right of freedom of establishment.

The German justification of protecting the general interest was viewed by the Court as a failure of the Gebhard test. Because of the generic prohibition of cross-border mergers with foreign corporations in German legislation, this prohibition also applies in cases in which the interests of creditors, minority shareholders and employees, the warrantee to hold fiscal audits and the protection of fairness of business transactions, are not at risk. Such a measure far exceeds the necessity to reach its goals.

The conclusion of Advocate-General Tizzano can therefore be viewed as redundant, because the Court could suffice by referring to communal law, which makes a clear distinction as for the exceptions to the fundamental freedoms, between discriminatory and non-discriminatory measures. The first, only concerning the freedom of establishment, are exclusively acceptable when they are specifically mentioned as exceptions in the Treaty, article 46 of the EC.

2.2.4.1. INFLUENCE ON LEGAL PRACTICE

The judgment of the Court in this case seems sound. However, it does leave some questions unanswered. First of all, can the freedom of establishment be applied to both ‘inbound’ (immigrating) mergers (such as the SEVIC case) as well as ‘outbound’ (emigrating) mergers? This would be the case if the legislation of the party that got taken over was to resist the merger.

Advocate-General Tizzano seems to assume an affirmative answer. He points to the fact that jurisprudence proves that article 43 of the EC resists legislation which restricts ‘upon arrival’ on

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44 § 1 lid 1 point 1 of the Umwandlungsgesetz (German law on company law) of 28 October 1994 (BGBl. 1994 I, p.p. 3210).
45 SEVIC § 19.
46 See the earlier mentioned quote in § 39 of the Gebhard case.
47 SEVIC § 28 directed to Überseering (§ 92) and Inspire Art (§ 132).
48 Conclusion of 7 July 2007 in case C-411/03 (SEVIC Systems AG), § 55.
national territory as well as when it ‘departs’. However, the Court is not unambiguous in its judgment on this matter, because in some parts the subject is inbound mergers whereas in other parts mergers in general are the subject matter. Also, the judgment points only to the registration of a merger, leaving out the matter of how a merger should be executed, which in practice leaves the execution of a merger unclear.

The SEVIC case was made less relevant with arrival of the Merger directive. In section 3 the Merger directive will be looked into more closely.

2.2.5. THE CARTESIO CASE

Cartesio, a limited partnership in accordance with Hungarian legislation, served in an appeal in court in November 2005 with the request to change its entry in the registry of the commercial chamber of the court of Hungary to an address in Italy, because of the movement of its head office. However, the head office would move, the corporation wanted to keep its status in compliance with Hungarian legislation. This request was denied on the basis that Hungarian legislation could not allow such a movement with the preservation of its judicial status. In order to move its central administration to Italy Cartesio would first have to be dissolved, followed by a re-incorporation in accordance with Italian legislation. On account of the appeal of Cartesio, the Supreme Court posed several preliminary questions to the European Court of Justice. With respect to the right of freedom of establishment the questions were basically about how to interpret articles 42 and 48 of the EC in a way that it would be clear that legislation of the member state in question prevents corporations to move their head office to a different member state with the preservation of its legal status in accordance with the legislation of the former member state.

In its preliminary ruling the Court continued in the same way as it had approached an earlier case; the Daily Mail case, dating back to 1988. Both cases appear quite similar. However, the main difference lies in the fact that the movement of the head office of the Daily Mail was from the United Kingdom to the Netherlands. Both countries are supporters of the incorporation theory. That way, the connecting factor remained unchanged, in contrary to the Cartesio case. In short, the Court replied in the Daily mail case as follows: Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company in 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.

Before answering the aforementioned preliminary question the Court initially asks a pre-question, whether or not the corporation can lay claim to the freedom of establishment on the base of article 43. According to the Court, 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, 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

49 Conclusion Sevič r.o 45. and P.P. Vlas in Rechtspersonen, praktijkreeks IPR deel 9, Antwerpen-Apeldoorn: Maklu 2009, p.p.83.
50 SEVIC, § 18, 20, 22.
51 SEVIC, § 19, 21, 30.
54 Cartesio § 99.
55 ECJ EC 27 September 1988, case C-81/87 (Daily Mail), ECR 5483.
56 Daily Mail § 19, 23 en 24.
57 Cartesio para. 109.
light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom. On the grounds of the context of article 48 the Court concludes that 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. So, the Court argues that the right of freedom of establishment is not allowed, because there is no longer question of a corporation based on the context of Article 48 EC, since national legislation does not anticipate in the movement of the seat.

2.2.5.1. INFLUENCE ON LEGAL PRACTICE

Especially the legal substantiating of this judgment was met by some resistance in literature, because logically a corporation would, in practice, appeal to the right of freedom of establishment before actually moving its seat. And if the seat would already have been moved, as was the case in the Cartesio matter, it would still mean that the corporation existed, even if a Member State would demand its dissolution. Cartesio was still registered in the commercial register. One could even assume that a legal person can exist as long it is necessary to settlement, even in the case of automatic dissolution as a result of a transfer. With this in mind, one can conclude that in cases such as these the demand of article 48 EC (the establishment of the corporation in accordance with the legislation of a Member State, and a statutory seat, central place of administration or its head office within the community) is fulfilled. This rationalisation of the Court therefore seems to be a wrong interpretation of article 48 EC.

Apart from the explanation, this judgment of the Court fits well into the previous ones. Next to the fact that there is reference to considerations in the Daily Mail and Überseering cases, there is also a connection to the previously discussed cases Centros and Inspire Art. In these cases the Court also decided the legislation of the Member State of establishment should be respected.

If the Court had judged that such a national agreement would be in conflict with the right of establishment, it would definitely have been the end of the real seat theory, while article 48 EC does take the varying connecting factors of the Member into account. The authority of the Member States to prescribe the requirement of the connecting factor would, in that matter, only be an empty shell, because an appeal on article 43 would always succeed to take it down.

The interest in the judgment of the Court in the Cartesio case was immense for at least two reasons. First of all, the Court had to give its opinion upon the right of primary establishment, after having favoured the right of secondary establishment in several important previous cases. Besides that, the European Commission had stopped the proceedings on the Fourteenth directive (Merger directive) based on the fact that the Court would have to decide on the Cartesio case, on this matter. However, the case is not exactly ground-breaking because its motivation is predominantly based on considerations taken from previous cases, thereby subtly passing the ball to the court of the European Commission. The judgment in the Cartesio case was, nevertheless, remarkable in several ways. For one, the judgment of the Court did differ quite a bit from the reasoning of Advocate-General Maduro.

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58 Cartesio para. 105-106.
59 Cartesio § 112 en 113.
60 Based on the considerations in Cartesio § 110.
63 Daily Mail (ECJ EC 27 September 1988, case C-81/87) and Überseering. In Daily Mail it was a similar case, with a note that it was about an English corporation, and the UK is a supporter of the incorporation theory, so the real seat was not a matter. The discussion here was about the refusal of the Chancellor of the Exchequer to grant permission to the central seat.
in his conclusion. Also, the most important judicial part, asking the pre-question whether or not this case was within the jurisdiction of articles 43 and 48 EC and the distinction made between the movement of the seat without changing the applicable legislation and the movement of the seat including a change in the applicable legislation had nothing to do with the facts in this case. The Court, in its judgment, paves way for cross-border movement of seats with the change of the applicable legislation (conversion). The Court basically decided that refusing a corporation to move its seat to a different Member State and keeping its legal personality in the former Member State, is in conflict with article 48 EC and can only be justified if the general interest is at stake. The Court however, takes in consideration that conversion of a company into a company governed by the law of the other Member State, is only possible to the extent that it is permitted under that law to do so. This latter consideration resulted in a discussion concerning the influence of this judgment on legal practice. Mainly it was not considered clear if it was up to the Member State of departure or the Member State of arrival to allow such a cross-border conversion. The court decided on this matter in the recent ‘Vale’ case that will be discussed in section 5.2.

Finally what is worth mentioning in this case is that the coexistence of different connecting factors of the PIL within Europe has led to a false start. Because of the varying interpretations in Europe of the English term ‘registered office’, it lead to confusion about its translation. Even Advocate-General Maduro had based his opinion on the movement of the real seat. This resulted in the Irish government reopening the oral procedure. In paragraph 2.3 the conflict between the PIL of the Member States will be discussed further.

2.2.6. SCOPE OF APPLICATION

The European Court of Justice has certainly stretched the right of freedom of establishment with its judgments in the aforementioned cases. What is striking is that the real seat theory has come under tremendous pressure, because of this jurisprudence, and therefore can no longer be applied in its broadest form. On the other hand, under some circumstances the incorporation theory even has to be breached. Also, these judgments and the discussions that stem from it illustrate that the reach of applicability of the right of establishment has not yet been defined fully by jurisprudence. In Section 5 recent judgments in the ‘National Grid Indus’ the ‘Vale’ case will be discussed. Perhaps, these cases will shine a new light on the definition of the reach of the applicability of the right of establishment.

In the next paragraph I will further discuss the attempts made in the field of primary European legislation, in order to bring about harmonisation of legislation and an improvement of the definition of the right of establishment.

2.3. Harmonisation attempts of corporate mobility

Ever since the European Union (the former European Community) was founded there have been numerous attempts to harmonise legislation on the recognition of foreign legal persons and with it the mobility of European corporations. The foundations of these attempts can be read in article 220 of the

64 Conclusion of 22 May 2008 in case C-210/06 (Cartesio Oktató Szoláltató bt), point 25, where A-G Maduro states that the intention of Cartesio is to actually execute business activities indefinitely by establishment in a different Member State.
65 Cartesio § 112 & 113.
67 The German translation is ‘Sitz’ and the French translation is ‘Siège social’, both are supposed to be similar to the location of the governing body. In accordance with the Companies Act 2006, the ‘registered office’ is the place were legal documents are offered.
68 Conclusion of 22 May 2008 in case C-210/06 (Cartesio Oktató Szoláltató bt), point 41-49.
69 See among others: Überseering § 94-95.
70 See among others: Cartesio § 105-106.
EC-treaty of 1957 which stated: “Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals (...) the mutual recognition of companies within the meaning of Article 58, second paragraph (the current article 54 of the TFEU), (...)”71 In the Lisbon Treaty72 this article has been erased, because the Court had already decided in the Gilly case of 1998 that this definition was solely a general reference on harmonisation and that it “cannot itself confer on individuals any rights on which they might be able to rely before their national courts.”73 So, Article 293 added little to the current article 115 TFEU which encompasses a general harmonisation regulation.

2.3.1. VERDRAG NOPENS DE ERKENNING VAN RECHTSPERSOONLIJKHEID VAN VREEMDE VENNOOTSCHAPPEN, VERENIGINGEN EN STICHTINGEN

A first attempt at harmonisation, unification of PIL initiated by The Hague Conference,74 was made by the “Verdrag nopens de erkenning van rechtspersoonlijkheid van vreemde vennootschappen, verenigingen en stichtingen,” which was announced on June first 1956 (Trb. 1956, 131). This treaty never saw the light of day, because to this day only three Member States have ratified it, yet for the treaty to take effect, according to article 11, five ratifications are needed.

The aforementioned treaty is based on the minimum-notion75 which assumes that recognition solely means that an organisation can be considered a legal person. The minimum-notion does not explain what legal system is applicable simultaneously to an organisation, based on establishment, structure, and design.

The treaty tries to make a compromise between the incorporation theory and the real seat theory. On the grounds of article 1 legal personality is recognised, if it is received according to the legislation of the state which is party to the treaty and in which state the formal registration or proclamation demands has been met and where the statutory seat is located.76 However, article 2 applies the real seat theory and states that the legal personality received on the base of article 1, can be denied by another contracting State, which law uphold the real seat theory, in case it is assumed that the seat is on the territory of this State. In the second paragraph of article 2 an addition is made: legal personality does not have to be recognised in a different contracting State, which upholds the same theory. An unwanted consequence of the compromise between these theories, can thus be that a legal person is not recognised as such.77 A solution to this problem is presented in the fourth paragraph of article 2, which entails the movement of the seat, within a reasonable amount of time, to a State which upholds the incorporation theory.

The dismissal of this treaty has multiple causes. One of the reasons is the fact that the minimum-notion rejects the notion that the recognition of a legal person cannot be separated from the determination of the applicable law. Also, the treaty is not applicable to legal persons conform public law, even though it is explicitly placed under the banner of freedom of establishment by the current article 54 TFEU. Besides, the treaty also contains an unworkable compromise between the incorporation theory and the real seat theory, because first of all legal personality is recognised which is acquired from the State of the statutory establishment, while a reservation is created for countries which uphold the real seat

74 Since 1893, the Hague Conference on Private International Law, a melting pot of different legal traditions, has developed and serviced Conventions which respond to global needs in different PIL areas (www.hcch.net).
76 Associations, foundations and other private institutions.
theory. This results in a limitation of the right of freedom of establishment, which cannot be undone by the possibility to repair of article 2, since it forces a legal person to move both its central place of administration and statutory seat, which will obviously lead to financial consequences.

Basically, the regulation of the treaty is to limited. Noticeable is that the treaty is also deemed to broad, because it includes bodies without a profit margin, while the current article 54 has an exception for corporations without a profit margin.

2.3.2. EEC-RECOGNITION TREATY

A second attempt, a first attempt however in the framework of the European Economic Community, was made on 29 February 1968 with the EEC-Treaty on the mutual recognition of corporations and legal persons, also called the EEC-Recognition Treaty (Trb. 1968, 113). This treaty was designed to patch the limited (and over-broadening) effect of the aforementioned Treaty. The treaty was signed by the six original Member States of the European Community. For this Treaty to take effect it needed to be ratified by these six Member States. The Netherlands, being the exception, never ratified this treaty, and therefore this treaty has not taken effect. This treaty was criticized firstly because it followed the minimum-notion although the set goal was to repair the earlier mentioned treaty. The treaty only dictates whether or not a corporation has a legal status without looking at the applicable legislation.79

Next to that, this treaty tried to compromise between the incorporation theory and the theory of the statutory seat, that could possibly lead to negative consequences. Here, expressed in article 4, in which a compensation for countries which uphold the real seat theory is admitted. Article 1 of the treaty demands that corporations are recognised, which are founded in accordance with the legislation of a treaty signing country and have their statutory seat in a country which is applicable to the EEC-treaty. Article 4, on the other hand, states that every treaty party is able to declare that it will enforce its mandatory provisions on corporations and legal persons that have their real seat on its territory, although it is founded in accordance with the legislation of a treaty signing state. This compromise can also have a negative result; it will lead to situations where two legal systems are applicable to a corporation, while it is impossible for a corporation to adhere to both. A corporation could be confronted with unworkable contradictions, if forced in such a schizophrenic situation.80 For instance, if both legal systems have differing regulations on appointing board members and on taking decisions.

The treaty also fails to explain which mandatory provisions article 4 emphasizes. Member States which give such an explanation will therefore decide themselves which regulations to enforce. This could lead to the consequence that a Member State also enforces the regulations on establishment in the same way, resulting in a conflict with article 1.

2.3.3. EUROPEAN CONVENTION ON THE RECOGNITION OF THE LEGAL PERSONALITY OF INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

On April 24th 1986 The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (Trb. 2002, 81) has been ratified. This convention has

78 Established by a treaty signed in 1957 by Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany (now Germany). It was the most significant of the three treaty organizations that were consolidated in 1967 to form the European Community. The EEC aims an economic union of its member, followed by political union. It stood amongst others for the free movement of labor and capital and the uniformisation of regulation on labor, social welfare, agriculture, transport, and foreign trade.

79 See article 7 EEC-treaty which basically determines that the new state of establishment denies the corporation competences which it allows national corporations/legal persons, leading to a breach, because a legal person which is founded in accordance with the laws of a Member State cannot be denied competences.

80 Advice of the Nederlandse commissie van vennootschapsrecht: Rapport van de Commissie Vennootschapsrecht omtrent het Verdrag betreffende de onderlinge erkenning van vennootschappen en rechtspersonen, bijlage bij Kamerstukken II 1971/72, 11790, R 852, nr.4, p.p.8.
taken effect for some European countries since 1991. The convention is especially important for the recognition of foreign non-governmental organisations (NGOs). The conditions an NGO has to comply with, in order to be applicable to this convention, are set in article 1 of the treaty. The organisation has to have an international goal without any profit margin, it has to be established by means of a written deed in accordance with the legislation of a convention country, it has to be engaged in activities in at least two Member States, and both the statutory- and real seat have to be located on the territory of a convention country (this does not have to be the same country per se). The convention dictates that if an organisation has been granted recognition of legal personality in the statutory state, then this legal personality is recognised by law in the other convention countries.

The convention has no universal effect. It is only applicable to the Member States which have ratified the convention. Therefore, the convention is based on reciprocity among the convention states. The recognition of legal personality of the convention is based on the incorporation theory, and contrary to what is discussed earlier, this convention does not take the real seat theory into account. Yet, in article 2 clause 2 a reservation is made, which states that legal competence can be limited if “essential reasons in the general interest” requires it. Article 4 pursues this subject even further by dictating that if the intention or the actual activities of the NGO bear a threat to the general interest, the applicability of the convention can be excluded.

The reason why this convention is ratified by eleven states could very well lie within the fact that the convention does not propose a compromise between the incorporation theory and the real seat theory which in previous conventions, as discussed earlier, lead to unworkable situations. Besides, this concerns international organisations which are expected to have a connection with at least two Member States, leading to less fear on the abuse of advantageous regulations. Also, this convention applies to recognition of foreign organisations without a profit margin, as a result of which the fear of a violation of the national economy, and the violation of the interests of the shareholders and employees will probably be less.

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81 Since January first 1991: Belgium, Cyprus, France, Greece, Macedonia, Austria, Portugal, Slovenia, the United Kingdom and Switzerland. The convention has been ratified by the Netherlands on June first 2007.
SECTION 3. CURRENT LEGISLATION ON CROSSBORDER SEAT MOVEMENT AND CONVERSION

The subject of cross-border seat movement has stirred up quite a debate. Depending on the applied connecting factor in the conflict legislation of a Member State the ‘seat’ is either the statutory seat,\textsuperscript{82} or the central place of administration/real seat. The differences between the incorporation theory and the real seat theory become obvious when a corporation wishes to cross borders. The recognition of a corporation and the preservation of its legal competence depends on both the state it moves from and the state it moves to.\textsuperscript{83} In that sense, the movement of seat is a double edged sword: On the one hand, there is the issue of the possible demand of dissolution in the country of origin of the corporation that wishes to transfer its seat, and in the other hand, there is the issue of the possible alteration of the applicable legislation after a movement of seat.

The first issue on the continuation of the legal identity, is a matter of national legislation since corporations cannot keep their legal identity unless both the material legislative systems, that of the country of origin and the host country, accept it. The second issue, on the other hand, is a matter of conflict legislation since the applicable legislation can only change if the corporation moves the connecting factor, in order to meet the requirements set by both the state of origin and host state.

In this section the consequences of the movement of seat will be depicted followed by a description of the movement of the real seat from the perspective of the Member State of origin state, the emigration (i.e.: ‘outbound’ migration), and the host state, the immigration (i.e.: ‘inbound’ migration). This section will be concluded by a paragraph that describes the influence the jurisprudence of the Court has on these concepts.

3.1. Movement of seat through emigration

A corporation can decide to move its statutory seat, real seat or both to a different state. From the perspective of the incorporation country this is qualified as seat movement through emigration. Subsequently, the consequences of the movement of seat from a country which supports the incorporation theory and a country which supports the real seat theory, will be discussed. The movement of both seats will have consequences depending on the connecting factor applied by the incorporation country.

3.1.1. EMIGRATION UNDER THE REAL SEAT THEORY

3.1.1.1. MOVEMENT OF THE STATUTORY SEAT

The movement of the statutory seat by a corporation from a Member State which supports the real seat theory is generally impossible, unless the central administration is part of this migration. Since the fact that the statutory seat is not accepted as a connecting factor in countries which support the real seat theory, one would assume that the movement of the statutory seat on itself would have no effect, as long as the real seat of the corporation is in the incorporation country. In practice, however, it is different. All limited liability companies have the obligation to be registered in a public registry which determines the applicable material- and litigation jurisdiction. Because the registration of a corporation connects the corporation to the legislation of the country of registration, the movement of the statutory

\textsuperscript{82} There is also a difference between the English term: ‘registered office’ and the statutory seat. The ‘registered office’ is the official address of the corporation in the country in which it is founded and the address which can be found in the commercial register. The statutory seat of a corporation is the indication of the seat in its articles of association. Further reading: V. Edwards, \textit{EC Company Law}, Oxford: University Press 1999, p.p. 321.

seat will consequently make national legislation no longer applicable to the corporation. Therefore, the real seat theory dictates that the statutory seat, as a connecting factor, has to be situated in the country of the real seat.

3.1.1.2. MOVEMENT OF THE REAL SEAT

The movement of the real seat by a corporation founded in a country upholding the real seat theory was legally impossible up until the Cartesio case. It resulted in either the dissolution of the corporation or a restriction by certain conditions. If the real seat theory is applied in its ultimate form the corporation wishing to move its real seat will no longer be submitted to the legislation of its corporation country, leading eventually to its dissolution, followed by re-incorporation, ex novo in the host country.

Dissolving the corporation is seen by these states as the only way to protect the creditors, minority shareholders and employees. The movement of the statutory seat on itself, leaving behind its real seat, is not accepted because of the discrepancy which will exist between the applicable legislation and the statutory seat.

According to this theory, the movement of the real seat causes an alteration of the connecting factor, leading to a change in the applicability of jurisdiction. The legislation of the host country receiving the real seat, will thus be applicable to the corporation. So, the corporation can be prohibited to move its real seat without dissolution, if not, the decision to move its seat is not considered valid in the country of origin. By the alteration of the applicable legislation, the statutory seat of the corporation no longer meets the requirement of being situated in the country of which its legislation is applicable to the corporation. That is why a movement of the real seat should be accompanied by the movement of the statutory seat. However, there is an exception to this conclusion if the country of origin applies the theory of renvoi (i.e.: reference). In that case a Member State takes into account the rules of private international law of the other Member State and national court will apply these rules instead of the own rules of PIL.

3.1.2. EMIGRATION UNDER THE INCORPORATION THEORY

If the Member State of origin supports the incorporation theory the movement of the statutory seat will lead to the alteration of the connecting factor and primarily a change in the applicable legislation. However, the material legislation of the Member State of origin can prevent this. The applicable company law only changes in case the conflict legislation of the Member State of origin does not refer back to the original country of incorporation, but to the country where the corporation is situated and registered, even if the statutory seat is relocated post-movement. Hence, there are two conditions that need to be met in order to alter the applicable company law without the loss of legal identity when removing the statutory seat from a Member State upholding the incorporation theory. First of all, national legislation has to allow corporations to move their statutory seat and reincorporate it in the host country without demanding a dissolution and liquidation. Secondly, the conflict legislation should not exclusively refer to the country of first incorporation, but also to the country where the corporation re-incorporates.

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86 Germany applied this ultimate form of the real seat theory, yet since the Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbraüchen (MoMiG) taken into effect on 1 November 2008 it is less complicated for GmbH’s, and AG’s to move their real seats abroad.
According to the legislation of the United Kingdom corporations are regulated by the legislation of their ‘domicile’, the country of original incorporation, supposedly the location of the statutory seat. The legislation of the United Kingdom does not recognise a ‘domicile of choice’, so, a movement of the statutory seat does not require an alteration of the connecting factor and the applicable legislation. According to British law, therefore, the movement of the statutory seat will probably lead to the establishment of a new corporation in the receiving Member State, while the initial corporation will continue to exist in the United Kingdom.\textsuperscript{89} The justification for this is the fact that it could have negative consequences for the rights of shareholders, creditors and employees of the corporation\textsuperscript{90} and that it could eventually result in major job losses in the United Kingdom.\textsuperscript{91}

### 3.1.2.1. MOVEMENT OF THE REAL SEAT

The incorporation theory is based on the notion that corporations ought to be able to move their real seat freely without losing their legal identity, and where the statutory seat can remain unchanged functioning as a connecting factor appointed by the applicable legislation.\textsuperscript{92} Most countries supporting the incorporation theory will allow a corporation to move its seat/central administration to a different Member State without demanding dissolution and alteration of its judicial status. The incorporation theory focuses on the statutory seat; so, the real seat, not being a connecting factor, should not be relevant. The corporation will remain under jurisdiction of the Member State of incorporation, regardless of the location of the central administration.\textsuperscript{93}

### 3.2. Seat movement through immigration

From the perspective of the host country the issue is, if such a seat movement ought to be accepted, and in the case that it should, should the legal identity of the corporation be recognised without demanding a dissolution and re-incorporation prior to movement?\textsuperscript{94}

#### 3.2.1. IMMIGRATION UNDER THE REAL SEAT THEORY

One could assume that an intended movement of the statutory seat will not have consequences according to the real seat theory since the real seat is the connecting factor, in this case. However, as a result of the application of the real seat theory, the host country has the possibility to demand the movement of the real seat as well. This as a condition for the recognition of the corporation as a foreign corporation or entire re-incorporation. In other words: the Member State could require that the statutory- and real seat match.

#### 3.2.1.2. MOVEMENT OF THE REAL SEAT

Every movement of the real seat to a country which supports the real seat theory, will lead to a change in the applicable legislation regardless of the conflict legislation of the Member State of origin. In the case of such a movement the host country could demand the statutory seat to move as well or that the corporation re-incorporates in compliance with the legislation of the host country. Thus, the host country can refuse recognition of the moving corporation unless it dissolves in the Member State of origin followed by a re-incorporation in accordance with national legislation.

\textsuperscript{91} UK Government White Paper (Modernising Company Law) nr. 553-I van 2002, 6.21-6.22.  
\textsuperscript{93} The United Kingdom, Ireland and the Netherlands are supporters of the traditional incorporation theory. Sweden, Denmark and Finland have a Scandinavian version of the incorporation theory.  
3.2.2. IMMIGRATION UNDER THE INCORPORATION THEORY

3.2.2.1. MOVEMENT OF THE STATUTORY SEAT

Unless the host country supports the incorporation theory, a movement of the statutory seat will change the connecting factor. In that case, the host country is most likely to demand a re-incorporation in accordance with national legislation, resulting in the alteration of the applicable legislation.\(^95\) Here, once more an exception can be indicated if the host country applies the principle of *renvoi*\(^96\) and the Member State of origin refers back to the legislation of the host country.

3.2.2.2. MOVEMENT OF THE REAL SEAT

The host country supporting the incorporation theory, will refer back to the legislation of the Member State of origin being the incorporation state. Unless such a *renvoi* is accepted by the host country, there will be no change in the applicable legislation, in which case the legislation of the Member State of origin will remain applicable.\(^97\)

3.3. Movement of seat with preservation of legal identity

The possibilities of the movement of seat within Europe with the preservation of legal identity according to the earlier discussed varieties of seat movement can be viewed in the table below:

Table 1.\(^98\)

<table>
<thead>
<tr>
<th>To From</th>
<th>Incorporation state</th>
<th>Real seat state</th>
<th>Incorporation state</th>
<th>Real seat state</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Incorporation State</strong></td>
<td><strong>Possible.</strong> No loss of legal status; the Member State (MS) of origin recognises legal personality of a foreign company. If <em>renvoi</em> accepted no change in applicable law</td>
<td><strong>Not possible.</strong> The host MS will most likely demand dissolution followed by re-incorporation.</td>
<td><strong>Not possible.</strong> Requires dissolution in the MS of origin and reincorporation in the host MS</td>
<td><strong>Not possible.</strong> Requires dissolution in the MS of origin and re-incorporation in the host MS</td>
</tr>
<tr>
<td><strong>Real seat State</strong></td>
<td><strong>In principle not possible.</strong> The law of the MS of origin is no longer applicable. Requires dissolution in the MS of origin followed by re-incorporation in the host MS</td>
<td><strong>In principle not possible.</strong> The law of the MS of origin is no longer applicable. Requires dissolution in the MS of origin followed by re-incorporation in the host MS</td>
<td><strong>Not possible.</strong> Requires dissolution of a company in the MS of origin and reincorporation in the host MS</td>
<td><strong>Not possible.</strong> Requires dissolution of a company in the MS of origin and re-incorporation in the host MS</td>
</tr>
</tbody>
</table>

\(^96\) Discussed in § 2.3.2.1.
\(^98\) Table 1 is based on the table on p.p. 9-10 of the Commission staff working document nr. 1707 of 2007.
**3.4. Influence of Court jurisprudence**

Regardless of their conflict legislation, all Member States are bound by European Law which is clearly migration oriented. Regardless of a lack of secondary regulation on this matter, the European Court shows, via its interpretation of jurisprudence discussed in Section 2, its willingness to expand corporate mobility in Europe. In this paragraph the consequences of the verdicts of the Court on the earlier mentioned possibilities of cross-border seat movement within the European Union will be reviewed.

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**3.4.1. WITH REGARD TO SEAT MOVEMENT THROUGH IMMIGRATION**

As long as a corporation is established in compliance with the legislation of Member State A and its statutory seat is located there, Member State B is not allowed to:

1. Refuse the recognition and the registration of this corporation in the commercial register, as a result of the Centros case. Whether all activities are executed in state B, or the corporation is established in Member State A with the sole purpose to adhere to less stringent regulation, the motivations of movement do not matter.

2. Due to the Überseering case, refuse, the legislative- and litigation authorisation of the corporation in Member State B. Even if Member State B supports the real seat theory and the corporation is on the territory of Member State B, according to this theory.

3. Due to the Inspire Art case, demand conditions on the registry of the corporation in the registers which go beyond the requirements of the Eleventh Directive concerning the registration of a branch office.

4. Also due to the Inspire Art case, submit a corporation to supplementary conditions, such as the registry of capital and disclosure which apply to corporations established according to the legislation of Member State B.

5. Due to the Sevic case, practice regulations that limit the recognition of merger agreements to the recognition of internal mergers between national corporations and thus not accepting the merger of a national corporation with a foreign corporation.

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**3.4.2. WITH REGARD TO SEAT MOVEMENT THROUGH EMIGRATION**

As a result of the Cartesio case, a corporation established in Member State A, where the statutory seat is located, cannot be refused to move its seat to Member State B in case the corporation simultaneously converts to a corporation in compliance with the legislation of Member State B, as long as the legislation of Member State B attends to this conversion. Besides seat movement, there are also other possibilities to expand the business activities of a corporation abroad. In the next paragraph the cross-border conversion will be discussed, mainly focusing on cross-border judicial merger agreements. The representation of cross-border conversion is close to parallel to that of the movement of the statutory seat. In order to clarify this a short summary of the difference between both representations, which is based on the change of nationality, will be given in the next paragraph.

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**3.5. Cross-border conversion: Mergers**

The process of mergers and other conversions are indissolubly attached to the movement of the statutory seat of a corporation. The company law of most Members States actually demands a registry of corporations in the local commercial register, liable to the jurisdiction of the court where the statutory seat of the corporation is situated. The opposite is, however, not necessarily the case; a corporation is allowed to move its statutory seat without a conversion. It is possible that a movement of the statutory seat on itself is relevant from the perspective of conflict regulation. However, even if the movement of the statutory seat is necessary on the grounds of conflict legislation, the movement of

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only the statutory seat will not lead to a cross-border conversion of the corporation if the corporation refuses to accept the conflict legislation of the host Member State.

The difference between the movement of the statutory seat and the movement by way of conversion thus depends on whether the ‘nationality’ changes or not, the type of legal system and with it the applicable legislation of the corporation. For instance, one speaks of a Dutch or an Italian corporation, attaching a nationality to the legal person. In specific terms the meaning of this is to point out that the corporation has to either adhere to Dutch legislation or Italian legislation. By applying a conflict rule a nationality is appointed to the corporation. For example, according to Dutch conflict regulation a corporation is controlled by the legislation of the State of establishment. If a corporation converts to a legal person of a different Member State this legal person will be subject to the legislation of the host country, because the Dutch conflict regulation act does not supply conversion with the preservation of legal personality. Change of nationality as a result of a cross-border seat movement is explicitly not accompanied by a change of legal system, whereas this is the actual intention of cross-border conversion.

One of the advantages of a cross-border conversion is that it gives the corporation an opportunity to choose the applicable legislation that fits its business activities best. The jurisdiction also changes as a consequence of the conversion, in that case the corporation can choose the jurisdiction with the best specification or one which offers more legislative possibilities. These decisions can enhance the productivity and the value (of the shares) of a corporation.

3.5.1. THE PRE-CARTESIO SITUATION

Before the Court pointed to the Cartesio case, there was uncertainty on the possibilities of cross-border mergers (Sevic case) and conversion (Cartesio case). Generally, it was assumed that cross-border mergers were only possible if all jurisdictional parties explicitly had incorporated such mergers in the national company law. These national regulations are all based on the Merger Directive.

Cross-border mergers are explicitly regulated in only few jurisdictions. Examples in Europe are Italy and Portugal. This also explains the reservation of the engagement in cross-border merger agreements, because such a merger can be a risky endeavour without any explicit legal base and precedents, especially since the merger could be objected against in two jurisdictions. Moreover, there was also the theoretical and practical question of how to execute such a merger; how can all these varied regulations of the jurisdictions involved actually be applied?

3.5.1.1. EUROPEAN COMPANY STATUTE

The ultimate way of facilitating such a merger would be to set up overarching regulation. The first real step to achieving these regulations is the creation of the proposition of the Statute for a European Company, of which a regulation is accepted in October of 2001. The original initiative was the creation of complete and uniform set of regulations. This ideal has gradually been let go of out of necessity, because exhausting negotiations on the co-management of employees have haunted this

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100 The nationality of corporations is an empty shell. What legal system the corporation is subject to is determined by other criteria. Also see: P.P. Vlas, Rechtspersonen in het internationaal privaatrecht, (serie monografieën vanwege het van der Heijden instituut, deel 23) Deventer: Kluwer 1982, p.p.38-40.
101 See article 2 Wet Conflictenrecht Coöperaties.
102 See art. 1 clause 3 of the proposed concept of a fourteenth EG-directive of 20 April 1997, which states that there has to be a “corresponding form”.
103 M. Szydlo, The right of companies to cross-border conversion under the TFEU rules of freedom of establishment, European Company and Financial Law Review 2010 , 7/3, § III.
104 Zie noot 53.
project from the beginning. The rules on co-management of employees have been included in a separate Directive (SE-Directive). The goal of the Statute is to facilitate the cross-border merger agreements and cooperation within the EU by founding a European public limited liability company, named the “Societas Europae” (SE).

The SE is a legal person in accordance with European legislation and its legal personality is derived from article 1 clause 3 of the SE-Regulation. As an official legal person of the European Union, the SE is granted unlimited freedom of establishment.

The establishment of an SE can occur through:

- The merger of two or more public limited liability companies;
- The establishment of a SE-holding by two or more public limited liability companies or private limited liability companies;
- The establishment of a common subsidiary company by corporations or legal entities based on article 54 TFEU; and
- The conversion of a public limited liability company founded in compliance with the legislation of a Member State which has both its statutory seat as well as its central administration on the territory of the Union.

In all the above mentioned cases the judicial systems of at least two Member State have to be involved in the establishment.

According to article 7 of the Regulation is based on the real seat theory; the statutory seat of the SE has to be located on the territory of the same Member State the central administration are situated. The applicable legislation of the SE are primarily the definitions in the Regulations and Statutes of the Union. Secondary applicable judiciaries are the definitions of the legislation where the SE has its statutory seat. If the SE is founded according to the SE-Regulation and the appointed legislation, the SE is recognised as a legal person in all Member States.

The limitation of the SE lies in the fact that is not possible for individuals to establish an SE. The involved parties have to be legal persons with a trans-European character. The SE also has to support the real seat theory, which requires that both the statutory seat as well as the central administration of an SE are located on the same territory. Oppositely, the incorporation theory offers corporations the possibility to determine their state of establishment themselves and thus the applicable legislation. The real seat theory is built into the Regulation to prevent corporations from establishing in countries where regulation is less stringent, but it obstructs the possibility of regulatory arbitrage for corporations. In reality however, confirmed by the jurisprudence of the European Court, the real seat theory currently has little effect.

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110 For specifications see article 2 clause 1 - 4 of the Regulation.
112 G.J.H. van der Sangen, Back to basics and basics for the future, not yet published, concept d.d. March 2012, § 3.4.3. In this paragraph multiple restrictions on the SE-Regulation are discussed.
3.5.1.2. Influences of the Sevic case and the Tenth Directive

Because the introduction of the Tenth Directive\textsuperscript{114} with regard to cross-border merger agreements was taking too long, amongst other things because of the same co-management problems as the negotiations of the SE-Regulation, jurisprudence has had a chance to move ahead of the directive. As discussed earlier in section 2 paragraph 2, the Court decided in the Sevic case, in advance of the implementation of the Tenth Directive, that the cross-border merger falls within the scope of the right of freedom of establishment. According to the phrasing of the Court in § 19 of the Sevic case both cross-border merger agreements as well as other ways of conversion are within the scope of article 49 of the TFEU.\textsuperscript{115} Although, the Court further only referred to cross-border merger agreements,\textsuperscript{116} one can conclude that basically the same regulations apply to other ways of conversion.

The Court decided with its judgment that cross-border merger agreements were already possible without the need for European implementation legislation. Does this mean that the SE-Regulation and the Tenth Directive are redundant after this judgment? The answer to that question is negative, because the Sevic has left some questions unanswered. For instance, the judgment of the Court never demonstrated how to incorporate such a merger. Another issue remained unclear: What requirements have to be met, the demands of the state of origin, the demands of the host state, or both?\textsuperscript{117} The directive does explain the correct procedure of a merger agreement; mergers proceed in accordance with national law of the corporations involved in the merger agreement.\textsuperscript{118} The judgment in the Sevic case also failed to explain which legal persons are allowed to be part of a cross-border agreement. Another unclear issue was the matter of cross-border conversion.\textsuperscript{119} Is conversion solely possible if it applies to conversion in a similar legal form or is ‘across board’ also possible? And what requirements have to be met?

With the introduction of the Tenth Directive on December 15th 2005, only two days after the judgment in the Sevic case, a couple of these questions were answered. The Tenth Directive provides in the possibility of a cross-border merger agreement by the establishment of a subsidiary company in the Member State were the corporation wishes to move, followed by the merger of the parent with this foreign subsidiary. However, the Tenth Directive also fails to provide an exhaustive regulation for cross-border mergers. Thus, the Directive, on the base of article 1, only applies to shareholding companies. From that angle, the Sevic case is thought to offer a broader scope, because the freedom of establishment according to article 54 TFEU also applies to other legal persons, such as partnerships and cooperative associations. Furthermore, this broader scope is shown because the judgment in the Sevic case is deemed to provide a basis for the mirror image of the cross-border merger agreement, the cross-border de-merger.\textsuperscript{120}

The European Company Statute is important even after the Sevic case, because a corporation can be created which legal personality is derived from European legislation and has therefore an unprecedented freedom of establishment within Europe. Furthermore, the importance of the European Company Statute is continuous, because the solution to the co-management problem is set out in the


\textsuperscript{115} “Grensoverschrijdende fusies beantwoorden, evenals overige omzettingen (...en behoren dus tot de economische activiteiten waarvoor de lidstaten de in artikel 43 EG bedoelde vrijheid van vestiging moeten eerbiedigen.”


\textsuperscript{118} M. Zilinsky: ‘Grensoverschrijdende juridische fusie van rechtspersonen, enkele problemen van IPR’, WPNR 2007, 6721, onder 5.

\textsuperscript{119} In § 20 of the case one can conclude that the freedom of establishment can also be applied to cross-border conversions.

\textsuperscript{120} H. Koster: ‘Vormen van grensverschrijdende fusie en splitsing’, Bb 2011, 47.

Considering the aforementioned, the conclusion can be drawn that both the European Company Statute and the Tenth Directive as well as the Sevic case supplement each other and can exist as long as there is no exhaustive over-arching legislation on the subject of cross-border mergers.

3.5.2. THE POST-CARTEZIO SITUATION

As already discussed in Section 2 the importance of the Cartesio case was mainly the fact that the Court in its ruling made a difference between the movement of seat with and without the alteration of the applicable legislation.\textsuperscript{121} The Court does not explicitly mention it, but the latter form, the cross-border movement of seat without the alteration of the applicable legislation, is a change into the corporation form in accordance with the legislation of the host Member State. The Court confirms in its judgment what it suggested in the earlier discussed Sevic case, namely that cross-border conversion is in principle possible and it should not be obstructed by the Member State of origin.\textsuperscript{122} The varieties of the movement of seat are discussed in paragraph 3.4. This resulted in the conclusion that the movement of the real seat \textit{from} a Member State which supports the incorporation theory can occur without problems. In that case it does not matter if the host Member State supports the incorporation theory\textsuperscript{123} or the real seat theory.\textsuperscript{124} After the judgment in the Cartesio case, all the varieties of the movement of seat are possible as long as the corporation can be converted to the legislation of the host Member State.

3.5.2.1. OUTBOUND CONVERSION

With regard to \textit{outbound} conversion, from the perspective of the Member State of origin, the Court has a very clear point of view; a Member State cannot deny the conversion of a corporation to a corporation of a different Member State if the legislation of the latter allows it.\textsuperscript{125} Following up this line of argument from the Daily Mail case, this standpoint is not at all surprising because as soon as a Member State leaves national territory, national legislation no longer has a veto on establishment and conditions of operation.

\textsuperscript{121} \textit{Cartesio} § 111.
\textsuperscript{122} \textit{Sevic} § 19.
\textsuperscript{123} In accordance with \textit{Daily Mail, Centros and Inspire Art}.
\textsuperscript{124} In accordance with \textit{Überseering}.
\textsuperscript{125} \textit{Cartesio} § 112.
As far as inbound conversion goes, from the perspective of the host Member State, the Cartesio case does not offer clarity. Thus, before the ruling in the Vale case discussed in section 5, literature informs many standpoints on this issue. W.J.M. Van Veen, for example, believes that the right of establishment, on the basis of the autonomy of Member States in the determination of the connecting factor, is not applicable to inbound conversion. In my opinion, the possibility to refuse an inbound conversion by Member States could have negative consequences. Since the Member State of origin cannot obstruct outbound conversion and the corporation is no longer governed by the law of the Member State of origin for its formation and operation conditions, the refusal of the inbound conversion would lead to no applicability of any jurisdiction on this matter. A more logical conclusion would be to allow inbound conversion, but with the note that the host Member State is allowed to set up conditions comparable to the conditions applicable to the legal form that is converted to. I would also like to point to consideration 18 from the Sevic case, which states that if a corporation on the grounds of national legislation is allowed to be the receiving company in a merger agreement, then this corporation is also allowed to be a receiving company in case of a cross-border merger agreement. The refusal of this possibility would result in discrimination of foreign companies. As noticed earlier, this *mutatis mutandis* also applies to other conversions. Perhaps stating the obvious, I notice that the general interest reservation also applies to cross-border conversions, both inbound and outbound.

However, the question that remains after the Cartesio case is to which procedural rules cross-border conversions have to adhere. This issue was already addressed post Sevic, resulting in S. M. van den Braak pointing out several possible procedures. She derived these regulations from different sources such as the concept proposition of a Fourteenth Directive, the SE-Regulation, the Tenth Directive and national legislation of Member States. In order to prevent an invalid conversion it is recommended to comply to the most stringent regulations. However, because of the lack of established procedural rules it remains a risk for corporations to undertake cross-border conversions.

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In order to achieve the goal of an internal market and to occupy a stronger position on a global level there has to be a harmonisation of company law in Europe. One of the main issues in the process of harmonisation, as discussed earlier, is the co-management problem of employees and minority shareholders. Because Member States have different regulations on this subject it is near impossible to achieve uniformity. Every alteration in the applicable company law by cross-border seat movement could ultimately negatively influence the creditors of a corporation.

The United States of America (i.e. U.S.A.) have federal regulations on several components of company legislation which replaces the internal legislation of a State. The States have limited legislative authority on this matter and are only allowed to set up their “internal affairs”. This is one of many reasons why seat movement within the U.S.A. is less of an issue than in the EU.

In this section I will make a legislative comparison regarding the mobility of American corporations in the U.S.A. This comparison will serve as an example in order to see if a similar system can be applied to contribute to the European harmonisation process.

4.1. Internal affairs doctrine

Ever since the nineteenth century corporations in the U.S.A. are allowed, following the internal affairs doctrine, to be established in accordance with the legislation of a federal State in which they do not proceed business activities. The country of incorporation is authorised to regulate the internal relations of the corporation and the other states are expected to recognise the legal personality of these legally founded corporations. Because of the internal affairs doctrine, Corporate Governance matters, such as the relationship between shareholders and the executive board, are settled on State level. As a consequence, cross-border seat movements can only alter the regulations on internal affairs of a corporation, but leaves the federal regulations unaltered.

Recognition has been the problem in Europe for many years; the national judges often did not recognise foreign legal entities. On the base of among others the Centros case, the Überseering case and the Inspire Art case similar possibilities of movement have been drafted for European corporations. The internal affairs doctrine bears a resemblance to the incorporation theory, in the sense that corporations are not obligated to proceed business activities and establish the central place of administration in the country of origin in order to be legally incorporated.

4.2. Regulatory Competition

The freedom of establishment of the fifty one American States provides a base for the development of competitive legislation in order to attract entrepreneurs, and with them, investments. This phenomenon is called regulatory competition. Corporations are free to decide to which state legislation they are subjected to, no matter the location of their business activities or central administration. In this scenario, reincorporation in a new state will not be preparatory to the winding-up and liquidation of the corporation.

According to some the competition in company law will lead to a race to the bottom, whereas others expect a race to the top. According to the supporters of the first theory competition will lead to the choice of most director favourable legislation, while the main goal of a the executive board should be

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129 Other reasons are: no uniformity in taxes in Europe; The differences in the U.S. are smaller. There are only minor cultural differences in the U.S., and there are no language barriers.
to represent the interests of the corporation and the company connected to it. Supporters of the second theory believe that shareholders will only be prepared to invest in a corporation which, for them, has the most favourable corporate structure and thus they will force the board to choose regulations most favourable to the interests of the shareholders.

A similar discussion has been generated in the EU after enabling the execution of the right of primary establishment in the form of cross-border seat transfer and conversion. The desire of harmonisation of company law within the EU has been inspired by the idea that a certain degree of harmonisation is necessary to avoid some negative consequences of the competition in corporate law. The fear of a *race to the bottom* is present in Europe, therefore there is no strive for *regulatory competition*.

In the U.S.A. *regulatory competition* is limited by the regulations of the federal government, whereas *regulatory competition* can have a larger influence in Europe because of a lack of such federal regulations. In the EU all legal relations of a corporation are regulated by national legislation. Therefore, a reincorporation can have influence on both the value of shares and the legal status of creditors. The freedom of choice regarding the applicable legislation is in this case more confined than the freedom of choice of European corporations in case of a release of the ‘market of company law’. A note concerning this matter is that federal legislation does not regulate the *Limited Liability Company* and the *Private Limited Liability Company*. Reincorporation of these corporations can therefore have larger consequences, explaining the success of Delaware.

4.2.1. DELAWARE GENERAL CORPORATION LAWS

Looking at the incorporation rates in the U.S.A. the conclusion could be drawn that it is tempting for a corporation to be founded in accordance with the legislation of the State of Delaware. Delaware has been the leading state regarding incorporations since the nineteenth century, and it has managed to maintain this position ever since. It is hard for other states to compete with, amongst others the legal expertise and the well-developed jurisprudence of Delaware. The legislation concerning the *corporation* of Delaware is contained in the Delaware General Corporation Laws (In short Delaware GCL). The legal person *corporation* is used in cases in which the public or private limited liability company is used in other legal systems, for instance in the Netherlands. Besides, this legal form can also be used by smaller enterprises. The legislation of Delaware has interesting regulation especially concerning the management of a corporation. For example, under circumstances a *corporation* can become a *close corporation*, in which shareholders can be more actively involved in the management of a corporation or even manage the entire corporation.

The GCL also provides for a so-called *one tier board* and has, therefore, no regulations for other management institutions. This possibility of self-regulation in practice led to agreements being made by the central administration and shareholders, regulating a certain authority of instruction. In Jurisprudence certain restrictions are developed regarding such agreements, above all, these agreements are not allowed to diminish the responsibility of directors to take the best decisions in the interest of the corporation.

Finally, a good enterprise act ‘on paper’ can get devitalized by inefficient legal practice. This also contributes to the leading position of Delaware, because the immense expertise and experience of the ‘Delaware State Court’ in the field of company law increases legal certainty and attracts corporations.

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132 Delaware GCL § 351.

133 Abercrombie vs. Davies, 35 Del. Ch. 599, 123A 2d 893 (1956).
In Europe, for example in the Netherlands, the introduction of a more pro-active involvement of shareholders in the management of the corporation has been discussed. This idea was eventually abandoned as it was considered an obstruction of the notion that management always has to put the interests of the corporation first. In the next paragraph the relevant differences between the European and the American system will be reviewed.

4.3. Relevant differences

In contrary to the U.S.A. the Member States of the EU do not have a common connecting factor. All American states accept the *internal affairs doctrine*, while some of the Member States support the incorporation theory and others endorse the real seat theory. Both with the adoption of the incorporation theory and the real seat theory questions arise on the range of the applicable legislation. This is obviously not beneficiary to the legal certainty of European corporations. The actual difference though, has got to do with the regulations connected to the connecting factor. In the U.S.A. only the regulations on the internal affairs are applicable to the corporation, whereas a European corporation, by linking itself to Member State, is subjected to the full company law of this Member State.

Next to this difference in effect during reincorporation, there is also a substantial difference in administration of law. In the first place I will state the general difference, namely that judges in Europe are bound by written legislation while judges in the U.S.A. often use *case-law*; there is less codification of law, judges create legislation when they cast their judgments. Additionally, in the U.S.A. federal judges decide on matters about federal legislation. On the contrary, in Europe there is no federal legislation. Regulation in Europe takes on a milder form, among others by drafting directives. These harmonising directives cannot generate the same effect of uniformity as federal legislation because it requires the implementation in the national legal system of the Member States, whereby the Member States can keep a certain liberty regarding the formulation of the provisions. The risk of this is that Member States principally are at liberty to overregulate and so they can raise unnecessary barriers for, for example, the cross-border conversion. Also, national judges have complete legislative authority, by the absence of federal jurisdiction. National judges will however handle disputes by the interpretation of national legislation within which the European directives are implemented. That way European judgments will in general be nationally oriented. The authority of the European Court of Justice is limited to the competencies stated in the TFEU. The Court only has authority on the interpretation of European law, after a referral recommended by a national judge requesting a preliminary ruling.

4.4. A Delaware of Europe?

The fact that the freedom of establishment can result in a competition in company law has already been discussed. That a possible competition in company law within Europe has been averted for a long time only because of the fear of negative consequences of the *Delaware effect*, has also been reviewed. Still Delaware offers great advantages to corporations in the U.S.A. and with it a positive effect on the economy. Hence the question: Does Europe also need to strive for a leading actor in company law? The answer to this question depends on the trend which will be visible in the following years; will there be more competition in company law or will the focus lie on the expansion of harmonisation? If more regulation is harmonised, there will be a diminished need for a European Delaware. Besides, the success of Delaware has been its long history of experience and expertise in jurisdictional disputes concerning corporations. Obviously it will take a European Member State a long time to equal this.

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136 for example: the articles 258, 263, 265,267 and 268 TFEU.
137 Article 267 of the TFEU.
Considering the current process of harmonisation in Europe, a European Delaware may eventually be unnecessary. The slow pace of the process of harmonisation does leave room for debate among the Member States. This debate can lead to consensus among the Member States, rendering the discussion of competition between the Member States mute. If the process of harmonisation continues at the current pace a European Delaware will be redundant.

In the next section the current and future developments the European climate of establishment will be discussed.
5.1. Harmonisation versus Intra-State Competition

In the sixties of the previous century the process of harmonisation started. The objective was to increase the mobility of corporations as a precondition to realise the goal of the internal market. At the same time, this was an attempt to prevent the feared ‘race to the bottom’. The question I will try to answer in this paragraph is whether the fear of competition in company law is legitimate or not. The competition in company law has some major advantages which I will discuss next. The jurisprudence on the freedom of establishment has initiated the adaptation of national legislation in order to actually practise the law of establishment. This has revealed the choice for the most favourable law of establishment. Instead of harmonisation, it seems that, since the verdict in the Centros case, the competition in Europe regarding the realisation of national company law has gained momentum. The Centros verdict resulted in freedom of choice for entrepreneurs regarding the corporation forms within the scope of Article 54 of the TFEU. Currently the supporters of the competition in the company law seem to be the majority. In practice the most commonly used form is the English Limited, probably because there is no demand of capital for this particular legal form, and the establishment is reasonably cheap and easy via the internet. The continuation in popularity is doubted because there are also negative effects of having the legal form of a different state. One example is that the entrepreneurs in general will be ignorant of the language and legal system of their jurisdiction of choice. Besides, the competition approaches; the last few years some Member States have made regulations on the protection of creditors less rigid. For example, Germany, Belgium and France. Flexibility and diminishing requirements are the main components of the changes made. Certain countries, amongst them the Netherlands, have also dropped the demand of a minimum capital. The trend of the freedom of self-regulation seems to be set. The interests of creditors will have to be guaranteed in contracts made with the corporations. Also, some elements of the company law will be moved out of reach of the corporation legislation and these can then be moved to for instance insolvency law or liability law. The advocates of this competition argue that it will force the Member States to specialise in certain areas, so they can better cater to the needs of the corporations. Ultimately leading to the Member States learning from each other and therefore innovating legislation.

In my opinion, the competition in company law can benefit to the harmonisation of company law. The biggest obstacle to reach uniformity of regulations on seat movement is the discrepancy in conflict legislation. Corporations in the jurisdictions of the incorporation theory, are free to choose legal forms of incorporation countries without having to move their real seats. Corporations in real seat jurisdictions, on the other hand do not have that freedom of choice, unless they include the movement of the real seat. If the competition among legal systems increases, the real seat jurisdictions will be urged to give up the real seat theory in favour of the incorporation theory. If the real seat theory has completely disappeared from Europe, the road to harmonisation will widen considerably.

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138 See footnote 35.
141 Article 175 Juncto 178 § 1 “Wet vereenvoudiging en flexibilisering bv-recht” (Stb. 2012, 299).
As far as attracting new corporations goes the competition is mainly based on the issue of the legally required minimum capital. For attracting already existing corporations however the competition will comprise the entire company law of a Member State. The Cartesio case has been a powerful impulse for the competition for existing corporations. The most valuable precondition for the existence of competition regarding existing corporations is that they have to be able to switch relatively easy to the company law of a different Member State, without the demanded dissolution followed by an reincorporation in the host country. Since the implementation of the Tenth Directive there is already an indirect possibility for corporations to switch to a different company law. In the Cartesio case is determined that direct conversion; a cross-border seat movement including a change in the applicable legislation appealing to the legislation of the host Member State, is possible under certain conditions. The country of origin cannot halt the (outbound) conversion. However, as already discussed in section 3, it is left unclear whether or not the right of freedom of establishment also applies to inbound conversion. It is safe to assume that Member States rather have corporations arriving than leaving. So, Member States are stimulated to set up regulations for inbound conversion as a result of the Cartesio case. Logically, in creating such regulations the interests of all parties involved in an outbound conversion have to be taken into account as well. This way it can be expected that the possibilities of cross-border conversions in practice will increase. In this context a reference can be made to the recent Vale case, which will be discussed in the next paragraph.

5.2. Vale case

The most recent case on the subject of the cross-border seat transfer, Vale, deserves to be addressed separately. The Vale case resulted in a major expansion of the freedom of establishment and can be viewed as the mirror image of the Cartesio case. In the Vale case there is referred to considerations in previous judgments multiple times, therefore this case shows where on the road we now stand and which direction the future developments are heading.

Vale was an Italian corporation that wished to move its statutory seat to Hungary. The movement was accompanied by the striking-off of the company from the commercial register, the switch from Italian to Hungarian applicable legislation and the establishment of a corporation according to Hungarian law. The latter legal entity claiming to be the legal predecessor of the Italian corporation. The Court, in this case, has been specifically asked if the freedom of establishment includes inbound conversion and if a Member State is obligated to accept an international conversion if provisions for domestic conversions are adopted in national legislation. In case the answers to these questions were confirming, they also asked if there are any possibilities for Member States to allow restrictions or requirements on the grounds of national legislation concerning cross-border conversions.

The Advocate-General states, in his conclusion, that the question if such a conversion is part of the right of freedom of establishment, should be answered confirming. According to the Advocate-General, the articles 49 and 54 of the TFEU preclude legislation or practices of the host Member State which prohibit a company established lawfully in its Member State of origin to move its seat and continuing its business activities as a corporation in compliance with the legislation of the host Member State. A limitation of freedom of establishment is only considered justified if it is applied in a non-discriminatory fashion or if matters are justified in the general interest. Such a justification is also in this case not deemed present. Just as in the Sevic case the Court decides that the test of the earlier reviewed Gebhard case has failed, since Hungarian law precludes, cross-border conversions in general, with the result that it prevents cross-border conversions from being carried out even if the

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145 See §3.6.1.2.
146 ECJ EU 12 July 2012, case C-378/10 (Vale Építési Kft), PbEU 2012 C-287/04.
147 Conclusion of 15 December 2010 in case C-378/10 (Vale Építési Kft).
148 Conclusion Vale § 80.
general interest is not threatened. In any event, such a rule goes beyond what is necessary to protect those interests.\textsuperscript{149}

The verdict of Court accompanies the conclusion of the Advocate-General. Regarding the scope of articles 49 and 54 of the TFEU the Court points to the Sevic case and considers that company transformation operations are, in principle, amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment.\textsuperscript{150} With this the Court confirms what was generally concluded after the verdict in the Sevic case, namely that both the outbound and the inbound conversion are issues assigned to the right of the freedom of establishment. The right of freedom of establishment preclude regulations, which only allows domestic conversions and generally refuses the conversion of foreign corporations into corporations in compliance with national legislation. Subsequently, the Court confirms what was concluded in the Daily Mail case and the Cartesio case: “a Member State thus unquestionably has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and the connecting factor required if the company is to be able subsequently to maintain that status.”\textsuperscript{151} Therefore, following the conversion both the location of the statutory seat as well as the real seat need to comply with the regulations of the host member state.\textsuperscript{152} Additionally, the host Member State is authorised to apply all national regulations regarding establishment and functioning uniformly to cross-border conversions, even if national legislation contains additional requirements.\textsuperscript{153} However, in cases of cross-border conversion, Member States always have to respect the principles of equivalence and effectiveness, what can result in necessary adaptation or deviation of national legislation.\textsuperscript{154} Furthermore the principles of equivalence and effectiveness preclude the host Member State to refuse registration of the company as a ‘predecessor in law’ in the commercial register, if such a record is made of the predecessor company for domestic conversions. Secondly, these principles also resist the refusal, by the host Member State, to take due account of legal documents originated from the Member State of origin.\textsuperscript{155}

5.2.1. INFLUENCE ON LEGAL PRACTICE

In the light of the above, one can no longer fully defend the statement that Member States are completely ‘free’ in choosing its connecting factor in conflicts of law. For example according to Dutch company law an establishment cannot qualify as a conversion, since a conversion does not result in a dissolution of the company involved.\textsuperscript{156} Subsequently the Dutch legislator pronounced that he is not willing to accept inbound conversions.\textsuperscript{157} However, on the basis of the Vale judgment, the Netherlands is obligated to accept inbound conversion, since Dutch company law includes a provision for domestic conversion.\textsuperscript{158} As stated in paragraph 51 of the Vale judgment a cross-border conversion in the host Member State, leads to the incorporation of a company governed by the law of that Member State. In addition, the difference in interpretation in European Union law and national law is shown by the fact that the Court includes, in the concept ‘conversion’, operations characterized by “strict legal and economic continuity between the predecessor company which applied to be converted and the

\textsuperscript{149} Vale § 40.
\textsuperscript{150} Vale § 24.
\textsuperscript{151} Vale § 29.
\textsuperscript{153} C. Gerner-Beuerle, ‘Right of establishment and corporate mobility: the decision of the court of justice in Vale’, Gore-Browne on Companies’, Special Release April 2013, pp.7.
\textsuperscript{154} L. Cerioni, ‘The final word on the free movement of companies in Europe following the ECJ’s Vale ruling and a further exit tax case’, European taxation, July 2013, pp. 332.
\textsuperscript{155} Vale § 62.
\textsuperscript{156} Article 18 of book 2 of the Dutch Civil Code.
\textsuperscript{157} MvT, Kamerstukken II (1994-95), 24 141 nr 3, pp.19.
\textsuperscript{158} W.J.M. van Veen, ‘Grensoverschrijdende omzetting, fusie en splitsing na het VALE-arrest’, WPNR 2013, 6981, § 3.1.
converted successor company”, as well as operations that lack this continuity. Furthermore, this definition of conversion as applied in European Union Law supports the judgment in the Vale case. After all, in conformity with article 49 TFEU, the freedom of establishment includes, amongst others, the ‘setting up’ of undertakings. In this respect, the consideration of the Court, in which it instructs national judges to verify the intention of pursuing economic activity, is also of importance. From this, it can be concluded that if a Member State set out provisions for domestic conversion, a cross-border conversion is not automatically a beneficiary of the protection of article 49 TFEU. A company wishing to convert to the law of a different Member State, without seeking “actual” establishment and the “genuine” pursuit of business activities in the host country, cannot appeal to the right of freedom of establishment. This restriction has to apply to both inbound as outbound conversion.

Additionally, considering the desired uniform application of the right of freedom of establishment, the aforementioned definition of ‘conversion’ in European Union Law can be well understood. Indeed, if the Court would seek connection to the frameworks of terminology of the different Member States that would result in a difference in possibilities for cross-border conversion throughout the European Union.

Considering the legal certainty however, this formulation of ‘conversion’ in European Union Law can be deemed objectionable. The definition of the connecting factor by the host Member State combined with the absence of uniform procedural rules concerning cross-border conversion can result, for instance, in the absence of the necessary safeguard measures for minority stakeholders, creditors and employees and the validity of a restructuring will remain unclear.

As I already defended, in paragraph 3.5.2.2, I believe that inbound cross-border conversions should also be covered by the right of establishment. In my opinion, the obstruction by the host Member States of such conversion is not in line with the goals of the internal market and the connected objective of improving the investment climate for entrepreneurs. On the basis of earlier mentioned cases, it can be concluded that the Court wishes to expand corporate mobility. A Limitation of the freedom of establishment by obstructing inbound conversions is therefore not at par with this goal. As mentioned before, in its ruling the Court in Vale refers back to considerations in previous rulings on many points. With that the Court increased the scope and clarified ambiguities concerning the freedom of establishment that remained after the ruling in the Cartesio case.

Jurisprudence shows that the only justification for limitation of the freedom of establishment is the general interest reservation. Just as explained in the review of the cases in section 2, the general interest reservation has so far never been accepted as a justification of the limitations of the right of freedom of establishment set up by the Member States. The recently concluded National Grid Indus case has altered this considerably. In the next paragraph this case will be reviewed.

5.3. National Grid Indus case

At the end of 2011 the European Court of Justice reached a decision in the National Grid Indus case. This case was about the movement of the real seat of a corporation established according to Dutch legislation to the United Kingdom. Because both Member States support the incorporation theory Dutch legislation remained the applicable legislation of establishment, and so the movement to the United Kingdom did not lead to problems. In accordance with Dutch legislation National Grid Indus received a fiscal receipt as a result of the movement.

This case shows clearly the tension between the sovereignty for tax matters of the Member States and the realisation of the internal market objective. I’ve mentioned in section 1.3. of this contribution that I would not take account of the fiscal consequences of corporate mobility within the EU, however I’ve

159 Vale § 55.
160 Vale § 34.
162 ECJ EU 29 November 2011, case C-371/10 (National Grid Indus), NJ 2012/2248.
deemed a brief analysis of the ruling significant for the subject of this contribution as an important element of the National Grid Indus case is that the general interest reservation is accepted by the Court.

The ruling in the National Grid Indus case shows similarities with the ruling in the Daily Mail case which has been discussed previous in this contribution. In the Daily mail case the Court decided that the law of the Member State of origin determines the conditions of lawful establishment and the continued existence of the corporation. The tax authority inspector thus concludes that fiscal conditions can be imposed in case of a seat movement. Therefore, the corporation was deemed not able to invoke the right of freedom of establishment concerning these fiscal demands.\footnote{Based on National Grid Indus\textsection{} 29.}

In contrast to the Daily Mail case the Court in the National Grid Indus case applied article 49 TFEU instead of article 54 TFEU. It rejects the notion of the tax authority inspector and decides that although the Member State of origin is allowed to determine the operating conditions of a corporation, it is not allowed to obstruct the appeal of a moving corporation on the grounds of article 49 of the TFEU. The transfer of the real seat has had no consequences for its status as a company incorporated under Dutch law. Therefore it can remain to exist by virtue of national legislation and does not affect its possibility to appeal to the right of freedom of establishment.\footnote{National Grid Indus\textsection{} 32.} Because it would discourage seat transfers to the United Kingdom, the immediate imposition of exit taxes was considered to constitute a disproportionate restriction of the freedom of establishment.\footnote{H. van Arendonk, National Grid Indus and Its Aftermath, EC Tax Review, 2013-4, pp.170.} National Grid Indus should have been offered the choice between, either, immediate payment of the amount of tax, or, deferred payment of the amount of tax including interest. Especially, the latter option of the deferred payment evoked a great deal of resistance, because of the supposed risk of non-recovery of the tax, which increases with the passage of time. According to the Court that risk could be undertaken by measures such as a mandatory bank guarantee.\footnote{National Grid Indus\textsection{} 73 & 74.}

This aforementioned consideration of the Court however, appears to be in conflict with its previous ruling in the N-case, in which the Court stated that a mandatory bank guarantee \textquotedblleft goes beyond what is strictly necessary in order to ensure the functioning and effectiveness of such a tax system based on the principle of fiscal territoriality.\textquotedblright. Furthermore, in this ruling the Court states that \textquotedblleft a Member State may request the assistance of another Member State in the recovery of debts relating to certain taxes, including those on income and capital\textquotedblright and therefore referred to European Directives.\footnote{ECJ EU 7 September 2006, case C-470/04, Jur. 2006 (N), \textsection{} 51-53.} Even though the N-case was about the transfer of residence of a substantial shareholder and therefore concerned income tax, this cannot explain the conflict at hand, since as we have seen former article 43 EU (article 49 TFEU) applies mutatis mutandis to legal entities. Considering aforementioned equivalence one can conclude that the Court in National Grid Indus revised its previous decision in the N-case.

5.3.1. INFLUENCE ON LEGAL PRACTICE

Whereas the Court did not comment on the compatibility of imposition of exit taxes with the freedom of establishment in the Daily Mail case, in the National Grid Indus case however, the Court decided that article 49 of the TFEU does not object to recovery of exit taxes.\footnote{National Grid Indus\textsection{} 64.} The Court basically determines that the \textquotedblleft final settlement tax\textquotedblright can be viewed as a limitation, but is legitimate on the grounds of the general interest, and it is appropriate to achieve its goal, yet it is not allowed to surpass the necessity of the achieved goal.\footnote{Based on National Grid Indus\textsection{} 48-64.} The immediate recovery of exit tax however is deemed disproportionate. In order to prevent the discouragement of companies to transfer their central place of administration within the EU it is necessary to provide in arrangements for deferred payment of exit tax. Even though the Court
in its decision provides guidelines for the application of the general interest reservation, considering the mandatory bank guarantee, it didn’t bring an unobstructed freedom of establishment for corporations within the European Union closer.\(^{170}\)

### 5.4. The advantage of European corporations

A judicial inquiry into the application of the SE-regulation shows that the possibility to move the statutory seat to a different Member State is perceived as a great advantage of this legal form.\(^{171}\) The number of seat movements of SEs, although a slow start, is lately increasing enormously.\(^{172}\) The advantage the European corporate institutions have is that a European legal form will be completely ruled by European legislation, as long as there is no harmonisation of legislation. This leads to the possibility of fast and simple establishment and the diminishing of legal and administrative costs. These advantages of the European legal form have made the European Parliament request a proposition of the European Commission for a concept Statute for European private companies.\(^{173}\)

The discussion concerning the SE has taken more than thirty years, without reaching the desired result. For a great part this is because of the discrepancies in conflict legislation of the Member States. Therefore, I doubt if creating a new European legal form will lead to the desired result as long as the discrepancy in conflict legislation between the real seat theory and the incorporation theory is unresolved.

### 5.5. Continued interest of a Fourteenth Directive

The European Parliament has accepted a resolution on February second 2012, which requests the European Commission to draft a proposal for a new directive on cross-border seat transfer of share capital companies. This Fourteenth Directive\(^{174}\) should provide harmonised regulations on cross-border seat movement without dissolution and liquidation. So far, it seems that it is impossible to reach such a harmonisation in regulations because of the many differences in the PIL of the Member States on the consequences of cross-border seat movement. The European Commission announced conclusively during the Cartesio case that no proposal for a Fourteenth Directive would be submitted after all,\(^{175}\) because the Court was expected to judge on this matter in the Cartesio case. Also, the European Company Statute was nearly finished in which there would be possibilities for a cross-border movement of the statutory seat.\(^{176}\)

However, as discussed before the Cartesio case has left many questions unanswered. For instance, it is not possible to conclude based on the ruling in Cartesio if an inbound conversion is also covered by the right of freedom of establishment. Furthermore, there is also no mentioning of procedural regulations in case of a cross-border conversion. The first unclear issue was resolved by the verdict in the earlier discussed Vale case as we have seen in paragraph 5.2. However, the second indistinctness on the conditions of the procedure, is not likely going to be clarified in the near future, unfortunately the Court left this issue unaddressed in its ruling in the Vale case. The Court acknowledges the

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\(^{171}\) Commission document nr. 676 of 2010 definitive and Internal document of the Secretary General nr. 1391 of 2010 definitive.


\(^{174}\) See footnote 114.

\(^{175}\) Speech by Commissioner McGreevy at the European Parliament’s Legal Affairs Committee nr. 592 van 2007.

uncertainty surrounding the procedure to be followed and absence of security measurements, however it considered, referring to the ruling in the Sevic case, "the absence of rules laid down in secondary European Union law cannot be made a precondition for the implementation of the freedom of establishment laid down in Articles 49 TFEU and 54 TFEU."\textsuperscript{177} The legislative bodies of the Member States are individually responsible for codification of the implications of the Court.

on the issue of the applicable procedure therefore, the Fourteenth Directive could play an active role, yet the question remains if the form of a directive is the right way to achieve the ultimate goal of the internal market. As I will discuss in my concluding section, the harmonisation of legislation is preferred to the implementation of a new directive.

The European Company Statute has admittedly, just as the Tenth Directive, removed a great deal of obstacles of the freedom of establishment, but the establishment of an SE or corporation in a different Member State is still subject to high financial costs. Of course, this is an enormous obstruction of the right of freedom of establishment which could be resolved by a new proposition for a Fourteenth Directive. However, as I already discussed in paragraph 5.4 I have doubts concerning the role a European legal form can actually play in the realisation of the ultimate goal of the internal market.

\textsuperscript{177} Vale § 37 & 38.
6.1. Conclusion

European legislation is the product of the amalgamation of 28 legal systems. It does not replace the national systems, but it is an addition and is connected to these national systems. The current status quo of the mobility of corporations within Europe could therefore be regarded as a perpetual mixture of regulations. The many sources of European Union law complement each other, but they also leave many questions unanswered. This is all the consequence of a lack of harmonisation, which in turn is kept alive by the different connecting factors Member States apply, whether it be the country of the real seat or the country of incorporation.

The freedom to leave a Member State while retaining its identity and without the alteration of the corporation in a different corporative body of the host Member State, is not fully guaranteed by the TFEU so far. Member States supporting the real seat theory can reject such a movement in case national legislation does not provide in this for national corporations. On the grounds of the Cartesio case, the freedom to leave the country of establishment is guaranteed unless next to the movement of the central administration, the conversion of the corporation into a corporative body of the host Member State is also intended. Such a movement is de iure basically the cross-border movement of both the statutory- and the real seat.

In view of the above, the answer to the main question of this contribution should be in the negative. The current European investment climate does not offer sufficient guarantees to corporations in order to execute their right to the freedom of establishment, and to proceed cross-border seat transfer without the required winding-up and liquidation by the country of origin.

6.2. Recommendations

The two theories to determine the applicable legislation of a corporation are contradictory, but they serve the same purpose; the determination of the scope of the applicable company law. The Member States seem to agree on the specific issues which should be exclusively governed by the law of incorporation. Although it will be impossible to include company law of each individual Member States into one law, there are some similarities which can be used as the start of uniformity when constructing such a law. Both the required minimum capital, the payment to shareholders and the matter of the accountability of directors are subjects which are deemed to belong to the lex societatis. Because of the implemented directives there is some uniformity in certain areas of company law. It is recommended to harmonise these regulations.

The Members States of the European Union all want to benefit from the advantages of an internal market. I endorse harmonisation as the best tool to reach this goal. If a Member State refuses to recognise a corporation of a different Member State then this will be regarded as distrust, and this will not endorse a sense of unity. Harmonisation demands an optimisation of alignment among Member States, leading to arbitration to balance the economic interests of an internal market which can compete on a national level and the sovereignty of the Member States.

By stimulating harmonisation the situation can be averted that, since the treaty does not fully guarantee the freedom of establishment, the legislators of the Member States, awaiting a European initiative on legislation, will waive the formation of national regulations on this matter.

Moreover, the freedom of establishment is being frustrated by the existence of the real seat theory. If the country of origin or host country supports the real seat theory then the movement of the statutory seat has to coincide with the movement of the central administration. The Cartesio case has not

178 Among other things encouraged by the verdict of the Court in the Cartesio case.
changed this situation because the real seat theory, does not obstruct the movement as long as the corporation moves both the real seat and the statutory seat. Correspondingly the European Company Statute and the Tenth Directive do not change the situation. Both offer a possibility for movement to a different Member State and to be subject to the legislation of the host state without the required liquidation, however since both are time-consuming and costly matters there is de facto no optimal utility. Besides, the SE is not an instrument used in favour of freedom of choice in the applicable legislation, because it adopts the real seat theory. Therefore, Europe cannot (yet) match the unprecedented freedom of establishment in the U.S. As reviewed earlier in section 4, a process of regulatory competition similar to the one in the U.S. is highly unlikely in Europe. It seems though that Member States are becoming more aware of the advantages of becoming and remaining interesting in order to attract investors. Hence, it is expected that the trend of competition in company law will continue for a while.

The answer to the follow-up question, mentioned as part of the central question at the beginning of this contribution, will be continuous to the point I made in paragraph 1 of section 5. I believe that encouraging the regulatory competition will eventually result in the rejection of the real seat theory, which in return will promote and initiate harmonisation. Because of this, the possibilities of cross-border seat movement (and business activities) within Europe will eventually be optimised. Therefore, I do not share the opinion that the ambition should be to become the European Delaware, but we could apply this regulatory competition as a means to achieve the ultimate goal of the internal market.

I would like to conclude with a supporting quote by Jean Monnet:

“Make men work together
show them that beyond their differences and geographical boundaries
there lies a common interest.”