

LEGAL PERSONS IN PRIVATE INTERNATIONAL LAW AND RELATED CASE LAW OF THE EUROPEAN COURT OF JUSTICE

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ZDENĚK KAPITÁN

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National Framework

EC law does not regulate the determination of the corporate (or personal) statute of legal persons as well as it does not determine the personal statute of a natural person. The member states are thus free to determine it under their own legal rules. In general, there are two main theories under which the corporate statute can be determined. Both theories are briefly described in the first part of the article.

Freedom of Establishment and Registered Seat of a Company

Free movement of persons is one of the four fundamental freedoms guaranteed by the EC Treaty (hereinafter, ECT) and the freedom of establishment falls within its scope. Article 43 bans the member states from limiting the freedom of establishment, setting up an agency, branch or subsidiary of one member state in the territory of another member state. Freedom of establishment includes the right to set up businesses and especially companies. Articles 45 and 46 of the ECT set forth the allowed restrictions to the freedom on the grounds of exercise of official authority, public policy, public security or public health.

Article 48 of the ECT sets a basic framework for the companies to exercise their right. The Companies have to be formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community.

The “enforcement” of those basic principles is demonstrated in the following conclusions based on the ECJ decisions in cases Daily Mail, Centros, Uberseering and Inspire Art.

1. The home country of a company is allowed to set forth the conditions under which a company may transfer its real seat abroad (restrictions upon exit).
2. The host country cannot refuse to register a branch of a validly constituted foreign company which is to be the real seat of that company (restrictions upon entry - secondary establishment).
3. The host country cannot limit the transfer into its territory of the real seat of a validly constituted foreign company (restrictions upon entry - primary establishment).
4. The host country cannot discriminate against a validly constituted foreign company registered in its territory by requiring it to comply with extra set of conditions as opposed to the domestic companies (discriminatory conditions upon entry).

Distinguishing the Cases

It is possible to distinguish between the case law on freedom of establishment in general and special establishment cases related to tax problems. Similarly, ECJ differentiate between the home country and host country restrictions on freedom of establishment, and between natural and legal persons restrictions. Cases Lasteyrie du Saillant and Marks and Spencer are discussed in order to explain those differences. By holding in Marks and Spencer case, ECJ departed from the general freedom of establishment case line to a special tax related regime. This shift has been confirmed in other ECJ decisions later on. Consequently, it is possible to make difference between the national restrictions that are discriminatory, and restrictions which result from the mutual relations between the member states but which cannot be considered as limiting the freedom of establishment.

Transfer of Seat by Merging with Foreign Corporation

According to ECJ cross-border mergers represent a special exercise of the freedom of establishment which has to be respected by the member states. Articles 45 and 46 may limit this freedom. Fraudulent transfer of seat could fall under the respective restrictions allowed by those articles.

Transfer of Registered Seat

Transfer of registered seat under EC law is quite limited. Italian case is used to demonstrate the obstacles posed by national laws to the transfer of the registered seat. As the transfer of registered seat has not yet been clearly classified as falling under the freedom of establishment by the ECJ, it is then only possible to enforce it in the states which allow such a transfer.

Cartesio Case – Daily Mail Overruled?

In the brand new opinion delivered by advocate general Maduro in Cartesio case, it is argued that a development in case law over the past decades have made it possible to depart from the original conclusions once made in Daily Mail case. Questions however remain even with the Cartesio opinion in hands. It is clear that a complete negation of the right to free establishment is not allowed. Even if confirmed by the ECJ, it is still unclear what the scope of restrictions allowed under articles 45 and 46 is. Is this the way where the case law is going in decisions on freedom of establishment as such like it is in the tax related matters? Having in mind the works on the 14th directive (transfer or registered seat) it is possible that the final situation will be quite similar to the relation the between Sevic decision and the 10th directive on cross-border mergers. Cartesio decision is being expected to have a huge impact on the national approaches to the incorporation or real seat theory.

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