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Cross-border Mobility of Companies under EU Law

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The following is a very brief systematic overview.

I. As regards the Cross-border Merger of companies, the ECJ, based on the EU fundamental freedom of establishment, in SEVIC of 2005 has held that a provision in member state law according to which only domestic companies of which ever legal form qualify for a merger and which therefore rejects a foreign company as transferring company in a cross-border merger, is in violation of the EU freedom of establishment of such foreign transferring company.

EU secondary law exists as follows:

- Merger of public limited companies into a merger SE under the SE Regulation of 2001, and

- merger of limited liability companies under the Cross-border Merger Directive of 2005.

Both the Regulation and the Directive have detailed provisions on the procedure to be followed on both sides (including the interface) as well as on the protection of creditors and employees etc.

It is worth noting that the SE Regulation and the Cross-border Merger Directive pertain only to (certain) limited liability companies and not to partnerships whereas SEVIC pertains to all forms of companies.

II. As regards the Transfer of Seat cross-border, the SE Regulation has detailed provisions on the procedure to be followed. The corresponding provision in the EEIG Regulation of 1985 is much less detailed.

No EU secondary law exists with respect to the cross-border transfer of seat of national law companies. However, there have been several decisions by the ECJ, also based on the fundamental freedom of establishment, in cases where the administrative and/or registered seat of a company was moved (or intended to be moved) across the border. The transfer of administrative seat usually is a mere factual measure that takes place outside any company law register. The transfer of registered seat usually requires a legal act

(change of articles of association etc.) and entry in an official company law register in order to be effective.

According to ECJ in Cartesio which in that respect has confirmed Daily Mail, the country of origin has the autonomy of qualification to define under which conditions a company comes into being and ceases to exist as a company under the law of the country of origin. That national autonomy is not a violation of the EU freedom of establishment because such freedom can be enjoyed only by a company that under its own applicable law exists. Thus the country of origin may prevent a company from moving its seat to another country by declaring that in such a case the company ceases to exist as a company under country of origin law.

According to ECJ in National Grid Indus (superseding in that respect Daily Mail) the country of origin does not have the authority to make its consent to the transfer of seat dependent on the prior payment of taxes the nature of which is unrelated to the transfer. The underlying rationale is that the payment of such taxes is outside the scope of the autonomy to define a company as a company.

If the country of origin allows a company to transfer its seat, then the country of destination because of the EU freedom of establishment must accept such company as a company existing under country of origin law. The country of destination has no autonomy to negate the existence of such company or to re-qualify such company to make it compatible with its own country of destination law. The country of destination only has the right to impose requirements and restrictions on the foreign company as regards modalities of the transfer (e.g. registration) and the activities of such company, however, the country of destination may do so only for reasons of compelling public interest. All of that follows from ECJ in Centros, Ueberseering and Inspire Art.

The aforesaid substance of the ECJ case law on transfer of seat under the EU freedom of establishment is in line with ECJ case law and EU secondary law in connection with the freedom of goods (ECJ in Cassis de Dijon) and freedom of services (ECJ in Säger, Directive on the recognition of professional qualifications of 2005). Under these two fundamental freedoms, too, the country of origin has the autonomy to define product and professional qualifications, and the country of destination as a matter of principle must accept products and service providers that meet the country of origin qualification requirements.

While the aforesaid principles on the transfer of seat of a company seem clear under ECJ case law, there remain open many questions of detail on the side of both the country of

origin and the country of destination. These questions concern the procedure to be followed in the two countries concerned (and the interface between these procedures). The questions are basically the same as in the provisions of the SE Regulation on the transfer of seat of a SE. Reference is also to be made to the pre-draft of 1997/1998 of a transfer of seat directive. At stake are in particular, here too, aspects of creditor and employee protection. The uncertainty with respect to such issues is a major reason why a transfer of seat directive is needed.

III. The ECJ in Cartesio no. 111 s. and in Vale has created a new transfer category, namely the transfer of the company itself cross-border where the company is converted (or transformed) from a country of origin law company into a country of destination law company.

There are some who think that only the transfer of the administrative seat of a company is a transfer of seat in the proper sense whereas a transfer of the registered seat is a conversion (transformation) from a country of origin law company into a country of destination law company. That for instance seems to be the view of the Restructuring Group of 2011 and of the EP Resolution of 2012 while the EP Resolution of 2009 considered the transfer of registered office (with the legal nature of the company unchanged) as falling into the transfer of seat company category. In my mind there is no such equation between transfer of registered seat and conversion (transformation) of the company. If a country of origin because it is very liberal, permits a company of its own law to have its registered seat in another company (i.e. such company continues to have the nature of a company under the law of the country of origin) then a company that makes use of such possibility exercises its EU fundamental freedom of establishment.

The ECJ in Cartesio no. 111 s. and in Vale has held that the country of origin because of the freedom of establishment cannot deny a company established under its law, to convert (transform) into a company under the law of a country of destination which company thereby is created as a new company, provided such country of destination accepts such conversion (transformation). The above-mentioned autonomy of the country of origin to define the qualifications under which a company is, or ceases to exist as, a company under country of origin law, does not come to bear because the company itself decides that it wants to be no longer a company under the country of origin law but rather a company under country of destination law. The autonomy of qualification in that case rather vests with the country of destination because the conversion (transformation) brings into existence a new company under country of destination law.

It follows from ECJ in SEVIC and in Vale that when the country of destination accepts a conversion (transformation) of a domestic company of a given form established under its own law into another form also established under its own law, then such country of destination is under EU law obliged to make the new form of a company under country of destination law available also to a foreign company that from a company of country of origin law wants to convert (transform) into such form of company of country of destination law.

Here again, while the aforesaid seems clear in principle, many questions of detail are still unclear, again in particular as regards the procedure to be followed in both countries (including interface) and creditor and employee protection. Such protection is particularly relevant because the company in question becomes a company under an entirely new law. Therefore, a directive would be helpful also in this case where the company itself (and not its administrative and/or registered) seat is transferred from one country to another country.

IV. The last form of cross-border mobility to be discussed is the division of a company. Unlike in the case of a merger of companies where the Cross-border Merger Directive corresponds to the Merger Directive of 1978, there exists no directive on cross-border division of companies that would correspond to the Division Directive of 1982. There does not seem to be any ECJ case law either.