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List of Abbreviations

- **Art** Article
- **CGCL** California General Corporation Law
- **COMI** Centre of Main Interests
- **ECJ** European Court of Justice
- **SE** Societas Europaea
- **TEU** Treaty on European Union
- **TFEU** Treaty on the Functioning of the European Union
- **The EU** European Union
- **The MBCA** Model Business Corporations Act
- **The UK** United Kingdom
- **The US** United States of America

1. INTRODUCTION

With the rise of globalization, entrepreneurs started looking for different options to domicile their businesses. They desire to move the registered office and/or the administrative seat of the company to a different country for several reasons. Despite various motivations of entrepreneurs, they goal is same: increasing the profit of the business. Relocating a corporation may cause a change in applicable laws, with or without intention of the decision takers. Indeed, one of the reasons of relocation is to choose a legal system that is expected to benefit corporation's interests better during the operation or in a possible dispute.

It is questionable if the law makers give permission to such corporate mobilities whereas corporations change not only their domicile but also applicable laws. The answer is related to conflict of law theories adopted by countries. Conflict of law preferences of countries are mainly grouped into two categories: Real Seat Theory and Incorporation Theory. While common law countries adopt incorporation theory, real seat theory is adopted by civil law countries. The US gives permission to corporations to reincorporate in any state within the US because of the liberal starting point of the incorporation theory. Despite of the freedom of movement within the EU granted to companies by TFEU[1], the EU Member States have their own national laws that do not fully coincide with each other. Because of the fact that, there is no unity in national laws of the Member States, carrying aforesaid freedom into practice was suspended until the last decade.

Hindering the corporate mobility by restricting the freedom of establishment of the companies by the Member States is brought before the ECJ in many cases[2]. Judgements of the ECJ created corner stones of corporate mobility in the EU. These decisions have not only guaranteed the free movement of corporations, but also whipped up the Member States to reregulate their legal systems accordingly in order to be more attractive for entrepreneurs to establish the company in their territories.

[1] Treaty on the Functioning of the European Union (2012) Article 43 and Article 48.

[2] Following six cases are considered as the cornerstone in corporate mobility in the EU: Daily Mail (Case 81/87 Daily Mail (1988) ECR 5483), Centros (Case C-212/97 Centros (1999) ECR I-1459), Überseering (Case C-208/00 Überseering (2002) ECR I-9919), Inspire Art (Case C-167/01 Inspire Art (2003) ECR 1-10155), Sevic (Case C-411/03 Sevic (2005) ECR I-10805), Cartesio(Case C-210/06 Cartesio (2008) ECR I-0000). In this thesis, these three will be explained: Daily Mail, Centros, Cartesio.

Improvements of the state laws both in the EU and the US to attract entrepreneur's attention gave rise to critics namely; these legal transformations could end up in a competition which would neglect interests of workers and minority shareholders[3] , or on the contrary, such competition could help law makers question themselves and adopt pragmatic regulations[4].

This thesis comprises theoretical and practical aspects of corporate mobility and legality of such migration in the US and the EU perspectives. Thereafter, the differences between the conflict of law theories and various ECJ judgements about the corporate mobility are analyzed. In the last part of the thesis, inferences based on judgements of ECJ will take place.

2. CROSS-BORDER CORPORATE MOBILITY

Cross-border corporate mobility refers to a structural change within a company; such as, merging, splitting, type change, opening a branch or office relocation in a different country than it is registered. This type of migration may lead to establish new companies in different jurisdictions. A company could also adopt the host state's regulations through migration. After cross-border corporate mobility, the migrating company keeps its legal personality without liquidation. This gives companies possibility to carry their business without any territorial limitation and freedom of business model designation when needed. Companies may perform cross-border mobility through transfer of registered office or the administrative seat of the company from one country (home state) to another country (host state). The administrative seat of a company (also known as head office or the real seat) is the place where the decisions are taken, and the company's interests are mainly administrated. The registered seat is, on the other hand, the place where the company is recorded in the public registry according to articles of association.

[3] Such situation is called as "race to the bottom", which will explained below.
[4] This situation refers to "race to the top", which will be explained below.

Cross-border mobility may also correspond to these types of migration:

- Operations in a foreign country

  The company upholds its businesses in a foreign country than its seat of registration. In some situations, jurisdictions of the latter country may be applicable. For instance, the legal system of the country that the operation take place may seek for a connecting factor[5] that refers to the country of operation.

- Maintaining the legal subjectivity to the home state

  The migrating company prefers to keep adopting the home state's legal regime, with or without intention. This type of mobility can be exemplified as; establishing a subsidiary or a branch in a foreign country, transferring the administrative seat.

- Cross-border mergers

  Two companies may merge in a foreign country, which results the new legal personality to be subject to more than one legal regime, at least two legal systems (the home and the host state's systems) would be taken into consideration while deciding the governing law.

Cross-border company mobility can occur as reincorporation and as incorporation. Incorporation mobility differs from reincorporation mobility regarding to time of the migration of the company. During the operation of businesses, a company may reincorporate to another country; however, incorporation takes place at the beginning of the life time of the company. Corporations that migrate in the US are generally publicly-held companies that are large by revenue. On the other hand, in the EU, small companies prefer to reincorporate most of the time. This led law makers to adapt the company laws considering those closely-held companies in the EU. These companies generally look for simple laws in establishment phase and low costs in registration phase.

Nowadays, many businesses relocate partly or fully to different territories. Overall goal with the migration is to improve economic welfare of the company; however, the decision takers have various motivations which could be categorized as follows: Fiscal, Legal and Cultural reasons. Fiscal reasons are mainly lowering taxes especially during franchising, reducing administrative costs, gaining advantage in competition in a relatively smaller

[5] These connecting factors could be place of performance of the relevant contractual obligation or state of consumer's domicile, which could be the state of operation.

market. Legal reasons can be exemplified as beneficial investment climate i.e. state aid and investment protection policy of the country, rule of law, stability, duration of process. Cultural reasons are basically globalization, having an advantage in local business environments such as language or culture, being able to use politics of the country as beneficial.

Another hypothesis claims that, the reasons to reincorporate are not limited with the inherent quality of the host state, but also some external factors affect such decision. For example, Delaware is an enormous market in corporate mobility with its out-of-state incorporations. The firms create such a network that, many others would choose Delaware mainly to benefit from these links. The effect of Delaware is so-called "lingua franca[6]", refers to the common system, language, regulations that many others from the sector are familiar with.

Governments try to attract entrepreneurs with simple and more beneficial national laws, which activity is also called as regulatory competition. Competition between jurisdictions is rising and offering new paths for businesses; on the other hand, it could be argued that, these alterations could end up either with "race to the bottom"[7] or "race to the top"[8]. This regulatory competition can be recognized in any field of law that the parties are free to choose the governing law; such as, contract law, taxation law, insolvency law, other than corporate law. Some scholars[9] went so far as to claim that law is being used as a product[10].

Race to the bottom refers to the circumstances when, two or more competing actors start to lower their standards in order to be the winner of the game; however, after some point, these actors end up in a situation that the race benefits neither of the actors' interests anymore. In this concept that countries are competing each other by regulating more

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[6] Broughman B., Fried J. M., Ibrahim D., "Delaware Law as Lingua Franca: Theory and Evidence" (2014) 57 Journal of Law and Economics, 34.

[7] Birkmose, H. S., "The Fear of the Delaware-effect – the American Demon?" in Mette Neville & Karsten Engsis Sorenses (eds) (editors). *The Internationalisation of Companies and Company Laws.* (Copenhagen, Djof Forlag, 2001); William L. Cary, "Federalism and Corporate Law: Reflections upon Delaware" (1974) Yale Law Journal, 663.

[8] Ralph K. Winter, Jr., "State Law, Shareholder Protection, and the Theory of the Corporation" (1977), The Journal of Legal Studies, 251; Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard Univ. Press, 1991); Roberta Romano, "Empowering Investors: A Market Approach to Securities Regulation" (1998), 107 Yale Law Review, 238.

[9] Romano R., "Law as a Product: Some Pieces of the Incorporation Puzzle" (1985), 1 J.L. Econ. & Org., 225.

[10] Ringe W.G., *Regulatory Competition in Global Financial Markets: The Case for a Special Resolution Regime* (Now Publishers, 2016), 4.

entrepreneur-friendly laws to have more businesses in their territories, countries may reduce or eliminate some of the essential regulations through regulating more liberal and simple company laws. Underestimating some of the regulations may end up with moving away of rules of law or the law system that stakeholders were safe to do business. The management of the company takes the decisions regarding to migration of the company. Misusage of their rights would lead the company to be governed under the jurisdiction which benefits only the managers, as a result, the other stakeholders would be affected negatively. Countries may offer such regulations that, on the one hand these laws are beneficial for the group that has control over the decision-making process, on the other hand externalize the other groups of the company[11]. As a result, the country will host many companies and earn from incorporation tourism[12] and the management will take decisions solely in accordance to their interests. One would see this as a win-win situation, however, on a large scale the economy, public, workers, shareholders and many other groups other than managers would suffer. Such companies would liquidate, and the economy of the country would collapse, sooner or later.

In opposite, race to the top is used for circumstances when competing actors keep raising the bar so high that, this race affects not only themselves, but also the other actors of the game (in this situation, to entrepreneurs, shareholders, public i.e.). At this stage, decision takers of the company (generally the company directors) would seek for the most beneficial law system to operate the business. If the directors choose an inefficient country to transfer the seat, the company would make loss because of such preference which results to change the management. That's how the management would always come to attention in order to maximize profit. Collaterally, law makers of the countries would continuously try to maintain the balance in regulations between stakeholders while competing with other countries for attracting more entrepreneurs to operate their businesses within their territories.

After all these discussions regarding to the outcomes of this regulatory competition, it could be deduced that this race has number of pros and cons, therefore it would be inaccurate to take one of the theories as truth. Since it is obvious that such race has a long-standing history and it will keep its popularity hand in hand with the cross-border

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[11]ibid.

[12] Despite the lackness of the term in literature, "incorporation tourism" refers to choice of jurisdiction to establish a company, likewise to "bankruptcy tourism" which targets the most beneficial insolvency laws.

corporate mobility, law makers could achieve the balance through analyzing the benefits of both theories and practical aspects of them.

In order to talk about regulatory competition, companies should be free to select the jurisdiction. In a market where the buyers cannot make free choices, talking of competence would be nonsense. Nevertheless, different corporate law perspectives of countries, hindered free movement. Especially when it is taken into consideration that, no such a supranational legislation is applicable to those companies which are subject to cross-border mobility. These issues are assessed according to national laws, Treaty rules (such as Treaty on the Functioning of the European Union, if applicable), verdicts (given by European Court of Justice, or the Supreme Court) relating to the matter. The main division of national laws lies on conflict of laws theories, which means, assigning a jurisdiction in a possible conflict.

3. THEORIES RELATING CONFLICT OF LAWS

Cross-border operations of companies may cause various legal problems including recognition. Regarding to solution of these problems, in private international law, there are two major theories followed by countries. These theories are Incorporation Theory and Real Seat Theory[13]. They connect a company to a legal system that gives solutions to applicable law, recognition, cross-border mobility issues. Addition to that, in academy, some other theories are offered which combines these two theories. But still, countries follow either Incorporation Theory or Real Seat Theory[14]. In following part, details of these theories are explained.

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[13] Rammeloo, S., *Corporations in Private International Law: A European Perspective*, (Oxford, 2001), 122.

[14] Exceptions regarding countries reject to follow one of these two theories: Arat, T., *Ticari Sirketlerin Tabiiyeti* (Ankara, 1970), pp. 31-45; Zimmer D., “Ein Internationales Gesellschaftsrecht für Europa” (2003) Rabels Zeitschrift für das internationale Privatrecht 299,306.

3.1. Incorporation Theory/ Gründungstheorie/ Siège Statuaire

According to incorporation theory, all external and internal affairs of a company (existence, dissolution, liquidation, relations between shareholders and further legal matters) will be addressed to domestic law of the country that the company is incorporated; since, the place of incorporation has created such company. Therefore, the country has right to govern it as well.

The countries follow the incorporation theory take the registered office as the connecting factor and requires company's registered office within their territories. Therefore, if the company wants to transfer its registered office to another country, the home state that applies the incorporation theory would not give allowance, unless, the national company law has renvoi and refers the case to the host state's laws which applies the real seat theory.

This theory has its roots in colonial Britain, with the goal of operating British companies in colonies. Incorporation theory made it possible to apply the same company laws to the corporations registered in Britain, despite their real administrative seats in overseas. Indeed, the theory still benefits to entrepreneurs in overseas markets.

Application of the incorporation theory differs from country to country. For instance; according to Swiss company laws, place of commercial registry is the connecting factor to apply the theory. In parallel, Spanish laws applies the laws of the place where the registration of the company takes place. However, Danish company laws suggest that, where the incorporation of the company took place should be taken as connecting factor to apply the theory.[15]

In this regard, there is a specific fraudulent type that is worth to mention. In order not to apply domestic law, companies incorporate in another country without any real contact with the country of registration. Besides that, the real seat, most if not all stakeholders are in the country that applies the incorporation theory. Therefore, company laws of the registration place will be applied. If it is obvious that these companies are actually local and have no essential foreign character, then these company types are called "pseudo-foreign corporations". Applicable law to these companies will be either lex fori or

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[15] Aygul M., *Milletlerarasi Ozel Hukukta Sirketlere Uygulanacak Hukukun* Tespiti (Seckin, 2007), pp. 94-100.

specific regulations, regarding to country that is center of activities. For instance, some states of the US subject companies, which are established in another state but the great majority of their operations or most of the stakeholders are in that state, to the domestic state laws[16]. In Europe, the UK put some regulations for those companies operating within the UK but registered in a foreign country (overseas companies)[17]. Similarly, the Netherlands put various exemptions to incorporation theory for those overseas companies[18].

Incorporation theory gives legal certainty and makes the application of laws simple and predictable, when it is considered that, always the same laws will be applied to the migrating company, regardless of its destination.[19]

National law of the home state is applicable to the company if the administrative seat takes place in that country. Moving the real administrative seat would not change the situation and the company does not lose its legal personality. Since the emigrating country will still be responsible for the applicable law even after the migration, it is argued that misusage of this theory might end up with letterbox companies[20].

Letterbox companies incorporate in a country only for its tax reasons or moderate law system, with a veiled business intention in another country. It is not for nothing that USA, UK, the Netherlands, Ireland, Switzerland, Cyprus, Malta adopted this theory. All these countries argue for liberal economy and are well known for providing conveniences to entrepreneurs. The countries which adopted incorporation theory offer entrepreneurs simple, clear, predictable rules. In the same way around, they accept corporations to migrate to their countries and recognize them without preconditioning to reincorporate.

[16] New York and California follow this strategy, see Ebke W. F., "Real Seat Doctrine in the Conflict of Corporate Laws" (2002), Foreign Law Year in Review, p. 1029.
[17] In Companies Act (2006) Article 1044-1059 registration and following documentation process of the overseas companies is legislated. It can be seen that for those companies some additional obligations are required.
[18] Wet op de formeel buitenlandse venootschappen(1997) (Foreign Companies Act) Article 22-46.
[19] Rammeloo (n 13) 17.
[20] Letterbox company (Pro-forma company, Mailbox company, Brass-plate company), refers to the companies that conducts insignificant, if not any, business in a country that are established.

3.2. Real Seat Theory/ Sitztheorie/ Siège Réel

The theory dates back to modern nationalism era, in 19th century, and is adopted by many European countries[21]. In parallel, principle of sovereignty suggests that a state can use its absolute authority within its territory. If this this principle is applied to corporate law, governments can inherently claim to rule companies under their jurisdictions, with their national laws.

Real seat theory suggests that, the most intense relations of the company will be in a country that its administrative seat is located; by means that, real seat country must be linked with the company in terms of internal affairs. Therefore, in case of immigration, incorporation or registration is necessary in the real seat country, against the risk of not being recognized.

Having the real seat within the country that follows the real seat theory is generally not adequate, unlike the incorporation theory. Because, transferring the registered office bring along adopting laws of this latter state, which may be unenforceable due to incompatibleness with the home state. Therefore, companies frequently transfer both the administrative seat and the registered office together, in order not to face with sanctions such as nonrecognition or requisite of wind-up and reincorporation within the latter state. Outbound migration from a country that follows the real seat theory is also impossible or inconvenient because of the obligations imposed. For instance, approval of the shareholders or coincident registered office and administrative seat of the company.

Due to the fact that all companies in a country that adopts real seat theory are ruled with the same laws, these countries have more even and organized company law policies. Germany, France, Italy are some of the countries that real seat theory is applied. Doubtlessly, such countries are considered conservative regarding to their rule-bound structures.

The real seat theory contains number of possible problems; mainly, a company may face with non-recognition when its administrative seat is in a country follows real seat theory[22]. Consequently, limited responsibility of the company may be refused, and the

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[21] Rammeloo (n 13) Part 3, Chapter 4.

[22] Panayi CHJI, "Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths" (2009) Yearbook of European Law, 123.

shareholders may be personally liable for the debts of the company[23]. Their access to the courts could be refused because of non-recognizing their legal personalities, still, bringing an action to those companies and holding them liable for the debts could be admissible[24]. Most of the European countries accept those companies as ordinary partnerships[25]. However, hindering companies to settle in their territories by applying complicating laws would benefit neither home and host states, nor their relations. For instance, these types of companies are recognized in German laws as if they were incorporated in Germany, due to bilateral agreements[26]. Correspondingly, the supreme court of Germany finds no difference between the companies that incorporated in Germany and any other Member States regarding application of the real seat theory, for half century[27]. German courts have followed the supreme court and aforementioned sanctions to foreign companies is not imposed.

In some judgements it is stated that, non-recognition decision in real seat theory is so unbearable that, such decision is contrary to the TFEU Art. 49 and Art. 54, and even to European Human Rights Convention[28].

The real seat doctrine ensures the application of the national laws to all companies within the territory of a state and offers uniformity. Therefore, foreign companies cannot avoid applying the national laws. Criticisms[29] regarding the inconsistency of the real seat doctrine with the principles of the EU are confirmed by the Centros decision.

Unfortunately, intranational regulations facilitating recognition of cross-border migrating companies apart from bilateral conventions pended until the judgements of the ECJ.

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[23] Rammeloo, (n 13) 11.

[24] Roth WH, "From Centros to Uberseering: Free Movement of Companies, Private International Law, and Community Law" (2003) The International and Comperative Law Quarterly, 177.

[25] Ordinary partnership refers to *offene Handelgesellschaft, Gesellschaft bürgerlichen Rechts* or *Vorgesellschaft* in German law and *société en nom collectif* in French law.

[26] For further investigations, Treaty of Friendship, Commerce and Navigation Between United States and Federal Republic of Germany (29.10.1954), can be shown as an example of such biliteral agreements.

[27] Ebke WF, "The Real Seat Doctrine in the Conflict of Corporate Laws" (2002), Foreign Law Year in Review 1015.

[28] French Supreme Court stated that French law will refuse to recognize foreign companies failing to diplomatic permission compatible with European Human Rights Convention (1990) Article 6 and Article 14.

[29] Zimmer D. in "Internationales Gesellschaftsrecht" stated that (n 14), "Nur das Herkunftslansprinzip - das im Beschränkungsverbot seinen Ausdruck findet – kann auf Dauer dem Ziel eines von Hemmnissen befreiten Gemeinsamen Marktes gerecht werden.", which claims the compatibility of the incorporation theory with the common market.

Application of the real seat theory benefits the stakeholders and public since, the governing law is single and clear for every company within the country. For instance, creditors, workers or shareholders know for sure the laws applied to the company which they intend to deal with. At the same time, founders with mala fide who want to establish letterbox companies will be precluded[30].

Another positive side of the real seat theory is treating companies equally in a state. It is obvious that, when all actors in a game are approached with the same rule, there will be uniformity and its natural consequence, fair competition. Anti-evasion brings rule of law principle, which is one of the factors to be sought in the state to reincorporate.

Clearly, countries follow the real seat theory do not suffer from pseudo-foreign companies. These companies conduct their business in a state different than the state of incorporation. The selection of host state is made to facilitate from the market opportunities. However, they are harmful for the market because they are not fully integrated with the laws of the host state. They generally do not pay taxes and claim to be exempted from the laws of the host state. The real seat requires all the corporations conduct their businesses within the state, must accept the laws of the state and be established accordingly.

On the other hand, the era now we are living brings innovations every day and borders disappeared with the widespread usage of technology, mainly internet. Decisions are taking instantaneously, most of the time not around the table. Therefore, determination of the administrative seat is not as easy as it was 50 years ago. The vagueness of the administrative seat can lead uncertainty on detecting the applicable law in the countries adopted real seat theory.

[30] Kara, E., "Avrupa Birligi'nde Sirketlerin Sinirasan Hareketliligi" (DPhil thesis, University of Yeditepe 2013)

4. LEGAL BACKGROUND OF CORPORATE MOBILITY IN THE US AND THE EU

Obviously, US laws are very tolerant for corporate mobilities since they permit companies to operate once the registration is completed within their territories. As opposite, EU member states, due to the real seat doctrine, may not recognize the reincorporating company when it did not register according to laws of the target company. In fact, the latter perspective was enabling uniformness within a country. It could also be perceived that; conservative countries were seeing reincorporation as a threat due to ambiguity of laws. Nevertheless, ECJ decisions gave a deep shock to basic values and principles of real seat theory and made it possible to put "freedom of movement[31]" into practice. Freedom of movement in EU resulted real seat theory to be questioned in terms of whether it has ceased to exist.

In 1968, the EU Member States tried to draft such regulation.[32] But, it did not enter in force due to the negative vote of the Netherlands. Consequently, the solution pended until the Centros decision of the ECJ in 1999. The ECJ set the framework of the cross-border mobility of companies with its judgement based mainly on Art. 49 and Art. 54 of the TFEU.

4.1. Legal Regulations in the US

Vast majority of the states in the US follows the internal affairs doctrine, which requires a company to be subject to the laws of the country of its registered office takes place. This perspective appears as incorporation doctrine when the company can freely reincorporate in another state that the decision takers believe that the company will benefit its company laws the most. According to internal affairs doctrine, laws of the state of incorporation governs the internal affairs of the company, such as relations between shareholders, directors. Therefore, internal affair laws are required to change correspondingly when a reincorporation occurs.

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[31] Freedom of movement is a founding principle of EU, which refers to goods, services, labor and capital (TFEU, art 45).
[32] EEC Convention on the Mutual Recognition of Companies and Legal Persons (1968, Brussels).

The companies can establish in a state and operate their main activities in another state, they can even reincorporate under the latter state's company laws. As a result, states have started to compete in order to attract more entrepreneurs and proceeded to regulate more flexible company laws. In 1875, New Jersey became the pioneering model to other states by changing its company law liberally as permitting all business purposes to operate within its territory[33]. Delaware followed this revision race and adopted the company law of New Jersey, also went further by adding new clauses that prescripts lower charging fees to migrating companies[34]. Since then Delaware is still leading the field to be the most incorporated state than any other.

Statutes of the states are the main tool that regulate corporate law. The American Bar Association drafted a model statute (Model Business Corporation Act), since they distinctively differ. While small states adopted MBCA i.e. Arizona, Florida, Georgia, Wisconsin; the states that are economically outstanding made their unique statutes i.e. Delaware, New Jersey, New York. The judge-made law has also a significant place when statutes of the states are inefficient. Common law is based on the judicial decisions that are related to similar cases.

Most of the state laws and MBCA give freedom of reincorporation to companies by applying regulations in reference to cross-border mergers. According to MBCA § 11.02, a domestic or a foreign business corporation may merge in a state that they wish. Thereby, shell companies in the target state are used for merging and reincorporating without the need to liquidate. Delaware is by far the most in-demand state to reincorporate in order to go public[35]. Delaware General Corporation Law offers more than one paths; namely, conversion, reverse merger, transfer of assets or another kind of reorganization[36].

[33] New Jersey Constitution of 1844, with amendment in 1875 p.10, para.7: "any lawful business or purpose whatever."; Delaware General Corporation Code (1953) title 8 § 101 (b).
[34] General Corporation Law of the State of Delaware, 1899, p.80.
[35] 66.8% of the Fortune 500 companies are incorporated in Delaware. Delaware Division of Corporations, Annual Report Statistics, "https://corp.delaware.gov/stats/", received in 18.12.2018.
[36] Subchapter IX of Delaware General Corporation Code (1953) titled Merger, Consolidation or Conversion

4.2. Legal Regulations in the EU

The main purpose of the EU is creating an internal market while assuring the main freedoms[37]. One of the explicit aims of the EU is ensuring economic development and forming a market area without frontiers. Freedom of establishment of companies is fundamental for this purpose. Freedom of establishment includes, "the right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ..."[38].

For a company, freedom of establishment in the territory of the EU is not only to establish or to operate the primary or secondary activities of the company in a member state, but also to pursue such activities freely in a different member state than the country of origin and to freely unite with a company in a different nationality. Freedom of establishment does not only cover nationality, recognition and applicable law issues; but also, problems relating national laws restraining cross border mobility of companies are ad rem[39].

The European Union is governed by the rule of law, which means, all decisions and actions must be based on treaties. The objectives of the EU are achieved through these treaties that are binding because the treaties are democratically approved and adopted by the Member States. The Treaties in the EU can be categorized as follows:

4.2.1. Primary Legislation

Treaties are the primary legislation source and the core Treaties in the EU are Treaty on European Union (TEU)[40] and Treaty on the Functioning of the European Union (TFEU)[41].

According to Art. 54 TFEU, “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place

[37] The four freedoms are considered as the fundamental rights and guaranteed under Treaty of Rome: Free movement of goods, capital, services and labor within the EU.
[38] Case C-221/89 R v Secretary of State for Transport, ex p Factortame, [1991], ECR I-3905, para. 25.
[39] Ansay T., “Yabanci Sirketlerin Serbest Yerlesimi ve Taninmasi” (Milletlerarasi Hukuk ve Milletlerarasi Ozel Hukuk Bulteni 2003) 2.
[40] Treaty on European Union (1993).
[41] Treaty on the Functioning of the European Union (1958)

of business within the Union shall, for the purposes of this Chapter, 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."[42]

Although the Treaty expressed that companies will be treated as real persons in Member States, application of such regulation is unlikely, due to completely different structures of real persons and legal entities. In addition to that, directives regarding company laws are adopted by Member States but, several conflicting national laws concerning the companies and their activities remains valid[43]. Therefore, in the European Union, dream of uniformed supranational company law legislation is yet undone.

Indeed, there is no supranational, EU-wide regulation that covers all the issues related cross border mobility of companies, however, the main regulations take place in TFEU (Article 49 and Article 54). Secondary regulations are Societas Europaea[44] and Cross Border Merger Directive[45]. Nevertheless, recognition of companies, keeping legal personalities of migrated companies, necessity of dialogue between countries regarding to cross border mergers have been regulated in TFEU (ex) Art.293.[46]

The companies that seek to benefit from primary and secondary freedom of establishment in a different country than the country of incorporation, face with various problems. Source of these issues is the difference of the principles and conflict of laws regulations of countries, which, result restrictive consequences in cross border mobility of companies.

II. Secondary Legislation

Secondary legislation refers to decisions, recommendations and opinions in the EU. As mentioned before, regulations concerning cross-border corporate mobility was pending until the ECJ's decisions.

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[42] TFEU, art 54.
[43] Craig P. & Burca G., *EU Law: Text, Cases, and Materials* (Oxford University Press, 1998) 787.
[44] The European Company (SE) is regulated by Council Regulation no. 2157/2001.
[45] The CBM Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies.
[46] Werlauff E., *EU-Company Law: Common Business Law of 28 States*, (DJOFPublishing,2003) 3.

In order to create a single market within the Europe, which was the main goal of the European Union, establishing a legal background for the company mobility was essential. Therefore, the companies, the core subject of the economy must be addressed in a supranational regulation. It took 3 decades to come to an end of discussions and accept such regulation. Finally, Council Directive 2001/86/EC supplementing the Statute for a European company (Societas Europaea)[47] with regard to the involvement of employees is agreed by the Council of Ministers and the Directive came into force in 2004. This Directive has created the first supranational company type in Europe[48].

The Societas Europaea is criticized[49] because of not having fully supranational character. The SE Regulation refers many titles[50] to national laws, which gives the European Company more national features rather than international. To have the registration and the administrative seat within the European Union[51], in accordance with one of the Member State's company law is precondition to establish an SE. According to the Regulation, the SE could be established in 4 different ways; namely, merger, holding, subsidiary and conversion. Enforceable law is determined by the place of administration of the SE and the company gains legal personality by registration. Transfer of the administrative seat is enabled by Art. 8; however, Art. 7 obliges to transfer both the administrative seat and the registered office together. Otherwise, the Member State can take measures i.e. winding up or reestablishment of the company[52]. The Member States are endowed broad authorities by the SE Regulation. After completing the whole transfer procedure (complicated steps including; preparing a proposal for the transportation of the SE, publication of the proposal, preparation of a report by the administration body to inform relevant persons, protection of the interests of shareholders and creditors, receiving a certificate showing that legal procedures are fulfilled and so on), a Member State can raise an objection to transfer of administrative seat of an SE to another country

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[47] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
[48] Eidenmuller H. & Engert A. & Hornuf L., Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage in *The Law and Economics of Corporate Governance* (Edward Elgar Publishing 2010), 28.
[49] Reichert J., "Experience with the SE in Germany" (Utrecht L. Rev., 2008), 23; Marychurch, J. M., "Societas Europaea: Harmonization or Proliferation of Corporations Law in the European Union?", (Australian International Law Journal, 2002), 8.
[50] SE Regulation art 9, renvoi reference takes place, which refers to the national law of the MS in the matter of lacunae in the Directive.
Art 10 regulates that SE will be regarded as a national joint stock company of the place of registered office. Art 63 clearly refers to national law of the MS in which the registered office is seated, in the matters of winding up, liquidation, insolvency, cessation of payments and similar issues.
[51] SE Regulation art 7.
[52] SE Regulation art 64.

on the grounds that public interest. Vagueness of the term of public interest makes such authority unclear and limits the companies excessively.

The SE Regulation created a basis for cross-border corporate mobilities in the European Union however it only regulates the merge of two or more joint stock company under different jurisdictions. The SE Regulation targets companies with large-scale economies and excludes small and medium-sized companies[53]. Clearly, in order to insert small and medium-sized companies as well as other types of corporations into the game, they need to be included in the scope of regulation.

The 10th Company Law Directive on cross-border mergers[54] is adopted by the Commission to facilitate cross-border mergers of all company types including the excluded ones in the SE Regulation. Overall, the 10th Company Law Directive leaves the regulation task to the Member States and does not intend to harmonize national regulations. Therefore, each merging company is still regulated by the Member State that the company is domiciled in. The Directive aims to ease the process and is mainly based on the 3rd Directive[55] provisions. The lack of uniformity about corporate mobility in the EU inconvenienced the freedom of establishment of companies.

The 10th Directive regulates 3 types of cross-border mergers: Merger by acquisition, merger by formation and merger by transfer[56]. These types of mergers should also be accordance with the laws of the Member State that the operation takes place[57]. Transfer of the administrative seat and seat of registration did not regulate clearly in the 10th Directive, as it was in the SE Regulation. The 10th Directive remains vagueness about if a company can transfer its administrative seat or seat of registration without winding up. In fact, the Directive enables to choose a different jurisdiction in the case of merger by formation of a new company, which is in accordance with the nature of freedom of establishment. Despite of the shortages and the feature of the Directive that strictly based on national laws, the Directive constitutes an essential component to eliminate the barrier

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[53] Kara, E. (No 30) 55.
[54] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies
[55] The 3rd Council Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies
[56] Council Directive (EU) 2017/1852 OF 10 October 2017 on tax dispute resolution mechanisms in the European Union (The 10th Council Directive) art 2.
[57] Ibid. art 4/2.

created by the Member States and aims to free operation of companies in the common market[58].

Despite the nonexistence of a secondary legislation in the EU about cross-border corporate mobility until late 1900's, the ECJ made a judgement in Daily Mail case. The Member States are granted freedom of enforcing their national laws; which include their domestic conflict of law rules and the restrictions to apply to companies.

5. LEGALITY OF FORUM SHOPPING THROUGH TRANSFER OF SEATS

The term "Forum Shopping" traditionally refers to the preference of jurisdiction by litigants (frequently by the plaintiff) in a dispute with the consideration of gaining the advantages of one jurisdiction over the other. Parties of a dispute may prefer a jurisdiction for several reasons. Some of them are as follows:

- The procedural system may suit them better,
- Rules of evidence may be more favorable,
- The process may be rapid,
- Language of the proceedings may be convenient,
- Regulations may be on behalf of the party or the jurisdiction may be impartial, ironically both biasness and neutrality could be a reason for preference,
- The judgement should be enforceable,
- Interpretation of conventions may differ in countries and the parties may choose one that serves his purposes.[59]

In academics, there are foregoing disputes about the definition of forum shopping[60], usage of such right[61], and the time period to use it[62].

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[58] Opinion of Mr Advocate General Van Gerven (1993), para. 47.
[59] *Al Palazzo S.r.l. v. Bernardaud di Limoges S.A (2002),* para. 2.
[60] The main discussion on the definition of forum shopping focuses on interpretation of the term either with good or bad connotations. Ruiz v. Conoco, Inc. (1993) 868 S. W.2d 752, 760, c IV (evils of forum shopping).

Beside the traditional meaning, forum shopping could also express the choice of law of the parties of any legal circumstance, beside lawsuits. In the context of cross-border corporate mobility, preference of jurisdiction by changing the country to domicile can be regarded as a forum selection, as a matter of course. In order to achieve a high profit margin, companies may choose more beneficial laws to apply their businesses. Choice of law is regulated in domestic laws and there are different connecting factors presented such as; lex loci contractus[63], lex fori[64], lex causae[65], lex domicilii[66] and so on.

According to Rome Convention (1998), parties are free to choose the applicable law fully or partly to the legal relation between them. In the absence of choice, the law of the country which has the closest relation shall be applied to the case.[67]

The cross-border mobility of corporations includes more than transfer of seats. It also refers to alteration of legal regime, which should be considered legal and given allowance. One could think that interests of some stakeholders could affect reversely, therefore this operation should be limited. However, the decision of cross-border mobility is -most of the time, one would say- taken deliberately and scrutinizingly by the company. Changing the legal regime affects all the structure of the company and status of stakeholders. A wise decision would be guaranteeing minorities and creditors rights, that’s how the decision would be taken without negative votes or any fears to be granted a lower degree of rights.

When it comes to law of the persons – either real or legal-, obviously law of the domicile has the closest relation with the case. Law of the domicile refers to place of birth for real persons. However, the answer is not that clear for legal persons. Various determining factors are offered in different areas of law. For instance, in insolvency law, center of main interests (COMI) which refers to the place that the administration of the company’s

[61] According to aforementioned Italian decision (no 59), right of forum shopping is granted to plaintiff only. In the US jurisdiction, the term generally defined as including both parties, Walker v. Packer (1992), 827 S. W.2d, 833.

[62] The right of forum shopping can be used before or after the case is held. Algero M. G., “In Defense of Forum Shopping: A Realistic Look at Selecting a Venue” (78 Neb. L. Rev.,1999), pp. 102-105.

[63] The law of the place where the contract was made.

[64] The law of the court in which the case is heard.

[65] Lex causae is a term in the conflict of laws refers to laws of the forum court that case is relevant to. It could be translated as “causes for the law”.

[66] The law of the place where a person is domiciled.

[67] Convention on the Law Applicable to Contractual Obligations (1980) (Rome Convention)

interests is held refers to the place of domicile[68]. In company law, for the law-makers who follow incorporation theory, the country where the company is registered and incorporated has the closest relation. As opposite, real seat theory followers suggest that, the country where the company has its real head office has the closest ties.

By the choice of country to operate, companies make a choice of connecting law as well. Of course, theory followed by the selected country will rule the company only if the decision takers of the company did not express otherwise. As a result of which, companies may change their choice of law by differing the country. This would simply alter the adopted law of the domicile.

Decision takers of companies may choose between jurisdiction of different countries through primary or secondary establishment. Nevertheless, choice of law by relocation is not foreseen by law makers. In fact, relocation is considered within the concept of freedom of movement and regulated in TFEU. However, due to conservative features of some countries, it could never be applied. Continental European countries, notably Germany, want to have a unified law system within their territories. After ECJ's decisions, free movement of companies had a legal basis and application of such right came into practice.

6. MILESTONE ECJ DECISIONS: DAILY MAIL, CENTROS, CARTESIO

The European Court of Justice[69] is the highest court in the European Union, ensures the compliance of EU law by the Member States and the institutions within the EU. The Court also interprets the laws by answering preliminary questions of domestic courts regarding to application of EU laws. By this means, the ECJ ensures uniformity in the EU and creates the secondary law with its judgements. Despite the supranational regulations targeting free movement of companies, entrepreneurs had difficulties on practical aspect. Because, the regulations became ineffective and unclear due to national regulations of the Member States which were generally limiting migration or imposing so many obligations

[68] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
[69] See europa.eu/european-union/about-eu/institutions-bodies/court-justice_en, regarding to role, composition and rules of procedures of the ECJ.

that usage of such freedom malfunctions. Therefore, cross-border corporate mobility has guaranteed mainly by the ECJ decisions.

The freedom of establishment underlies the cross-border corporate mobility and cross-border mergers. Related regulations referred by the ECJ is articles 49, 50 and 54 most often. Article 49 is about the free movement, Article 50 regulates the necessity of a harmonized EU law through unified laws of the Member States, Article 54 enables free movement right to companies.

Three cases relating the cross-border corporate mobility will be explained in the following section. Although the ECJ has many other decisions about this topic; the reason of this selection mainly relies on the pioneering feature of these cases in their category. The first case explained is Daily Mail, which is about outbound establishment. Secondly, Centros will be discussed regarding inbound establishment. Lastly, Cartesio will be reviewed in terms of overlapping issues of freedom of mobility of companies and sovereignty rights of the states.

6.1. Daily Mail[70] Case

Daily Mail and General Trust PLC is an English company established and registered in London, according to UK law. The Company requested to move its head office to the Netherlands due to tax benefits, while at the same time remaining subject to UK company law. The problem was UK tax laws[71] were hindering migration of companies without the consent of the UK Treasury Department.

The Company applied to the UK Treasury Department in order to relocate its head office to the Netherlands. However, the UK Treasury Department refused the application, so the migration was not permitted. Thereupon, the Company brought an action before national court with the grounds of all legal personalities, including corporations likewise real persons, that meet the obligations have right to migrate according to freedom of establishment in Treaty of Rome. The national court requested for a preliminary ruling and referred following questions:

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[70] The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc

[71] Income and Corporation Taxes Act 1970, art 482/1

1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where:

9.1. payment of tax upon profits or gains which have already arisen may be avoided;
9.2. were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?

2) Does Council Directive 73/148/EEC give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?

3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?

4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?[72]

The first question of the national court seeks for an answer if the Treaty allows a company to migrate its central management to a host MS while keeping the registered office in the home MS. The question follows with the second part as, if the home MS could link the right conditioned to permission of national authorities regarding to tax liabilities.

ECJ mainly stated that, despite of the differences on national laws which are competent, freedom of establishment is one of the main principals of the EU and the Community did not only guarantee the aforementioned right for real persons, but also for companies. According to ECJ, MS are authorized to choose the connecting factor relating choice of law, as they wish. Some of the countries may follow incorporation theory, on the other hand some others may adopt real seat theory. Countries may demand both the registered office and the administrative seat in its territories, moreover they may demand some following requirements and cause to result the cessation the company if not be followed. Under these circumstances, the Treaty cannot be interpreted as a company incorporated in

[72] Daily Mail (no 70) , Grounds/9.

a Member State according to its laws is allowed to migrate to another Member State while keeping its status in the home country.

Second question is related to whether the provisions of Council Directive 73/148, that removes limitations of movement and establishment for Member State citizens, establish the same right to companies or not. ECJ stated, the right is vested only to real persons as it is obvious from the title of the mentioned provisions. Therefore, the Council Directive 73/148 does not grant rights to companies to migrate their registered offices or center of administrations to another Member State. The ECJ answered the first and the second questions only, expressing that there was no necessity to further explanation.

The operations held in the case are allowed in the UK law; which means that, a company incorporated in the UK can move to another Member State as a whole or partly. Only requirement was receiving approval of the Treasury Department, since the company wants to maintain its legal personality in the UK while transferring the administrative seat.

The ECJ takes to mean that, application of Art.49 and Art.54 regarding to giving allowance a company, which desires to maintain its legal personality in the home state while transporting the administrative seat, is not in compatible with the spirit of law. The Council Directive 73/148 on the abolition of restrictions on movements and residence within the Community for nationals of Member States with regard to establishment and provision of services, cannot be concluded by this way, either; because of the fact that, keeping the status in the home state is not regulated in the Directive[73]. The company could prefer to leave the home state through liquidation and reestablish in the host state freely, though this would not the desired method in the case of Daily Mail.

According to the ECJ, freedom of establishment shows itself as constituting a branch, an agency, or a subsidiary in a foreign state. Unlike the real persons, the companies are formed, and they maintain their existence by the national laws of the country of establishment[74]. Therefore, the judgement of the ECJ supports the real seat theory regarding to be conservative about the migration of the companies as a whole.

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[73] Harm van den Broek, *Cross-Border Mergers within the EU: Proposals to Remove the Remaining Tax Obstacles* (Kluwer Law International 2012), 100.
[74] Daily Mail (no 70), 19.

Treaty of Rome forbids all kinds of restrictions against freedom of primary establishment to companies. However, the ECJ made a distinction between inbound and outbound migrations, and companies that liquidate prior to migration and the ones that migrate without liquidation.

6.2. Centros Case[75]

Centros case is regarding the Centros Ltd. which is a private limited company established and registered in England by Danish nationals Mr. &Mrs. Bryde. The company had no operations in England, albeit, most of the business activities were taking place in Denmark through a branch. Mrs. Bryde asked Danish authorities to register the branch, however, the request was rejected due to the reason that the main reason of Mr. &Mrs. Bryde was not to set up a branch but to operate a primary establishment with the purpose of evading obligations arising Danish law, especially minimum capital requirements. Centros Ltd. brought an action before Danish court and sued Danish authority which refused to grant such registration.

The company claimed that it has successfully established under English laws, it has right of establishment according to TFEU, it completed the requirements of Danish Limited Company Code. Therefore, such refuse had no legal basis and not operating in England had no relation with the issue. Danish authority, on the other hand, suggested that, the refuse was legal when it is considered that the company was demanding to set up a branch in order to avoid Danish laws and was necessary with the intention of protecting creditors and other third parties.

The Court found that circumventing mandatory rules is out of the scope of right of establishment. Centros brought the case before the Supreme Court. The Supreme Court referred the case to ECJ and asked whether the relevant branch can be established or not. The judgement of the ECJ was as follows:

- Danish government's arguments were groundless in terms of the issue was purely related to Denmark and the government had right to take precautions to protect

[75] Centros Ltd v Erhvervs- og Selskabsstyrelsen (1999)

public. As opposite, ECJ suggested that, the case falls in the scope of EU law, particularly, freedom of establishment principle regulated by TFEU.

- Freedom of establishment which is guaranteed by the TFEU would be hindered when a Member State refuses to establish a branch of a company that has the registered office in another state.
- The distinction must be bear in mind between application of freedom and adoption of measures by Member States. By this means, Member States could prevent entrepreneurs to skip national laws.
- However, there is no intention to misuse the regulations in the case. The claim of Danish government regarding all operations of Centros was taking place through the branch does not prove misuse or evasion of law; indeed, could be regarded as exercise of secondary establishment right of companies.
- Regarding to protecting the public interest, arguments of Danish government are not fair. According to ECJ judgements, member states can lay out more restrictive regulations than TFEU if the regulations are non-discriminatory, fair and reasonable. However, none of these criteria is fulfilled by Danish government.
- On those grounds; the measurement taken by Danish government - refusing to register the branch demanded by the company- found contrary to TFEU, since there are less restrictive measures to apply such as penalizing fraud, rather than hindering freedom of establishment.

Companies that do not hold permanent operation in a Member State, as known as letterbox companies, cannot benefit from freedom of establishment[76]. In such a scenario, the Member States are free to take preventive measures to limit those companies which have no real intention to operate within the country. However, in Centros decision it is clarified that, operation of a company cannot be hindered after its establishment according to rules. Even if the company has preferred the country because of its soft law, the company benefit from the right of establishment. The decision gave legality to forum shopping and bring the EU one step closer to the US perspective regarding positive connotation of forum shopping.

[76] Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue (2006), pp. 64-71.

After the Centros decision, conclusions made by academics were opposite of each other. One claim was that, the real seat theory has lost its fame[77]. This claim was based on, both Daily Mail and the Centros cases are about the primary establishment, therefore can be associated. While the Court was conferring powers to the Member States in the Daily Mail case, the Court granted wide of rights to countries in the Centros case. Therefore, the first group analyzed that the Court has changed its judgement in behalf of the incorporation theory. The others were supporting that, Centros decision has no effect on the real seat theory[78] because, the parties of the case adopted the incorporation theory. That's why, the case is related to the secondary establishment right and cannot be associated with the Daily Mail case which was about the primary establishment right[79].

Rejection of the application to form a subsidiary of a company which has established and registered in a MS, in order to escape from the laws of the home state and conducting the all the activities in the host state, however, does not conduct any activities in the home state, is more restrictive than rejection regarding minimum capital requirement[80]. The Member States are still free to impose sanctions to prevent fraudulent conducts. Daily Mail and Centros decisions resulted differently because, establishment of the companies similar to Centros, which formed pseudo-companies in a foreign state that follows the real seat theory, is not allowed. But, inferring the establishment in a state that the company conducts no business without an intention to avoid the mandatory regulations could end up with letterbox companies which causes the Delaware effect. Forum shopping gained more freedom after the Centros decision, since, even if the migrating companies are considered as "letterbox companies", after they have fulfilled the obligations imposed by the states, their conducts cannot be restricted anymore[81].

The Court also specified the factors to be sought in order to talk about the freedom of establishment in a case. These four factors are envisioned in Factortame II[82] case. They basically condition to have economic activities, to form a corporation, to have these

[77] Dammann J., "The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?" (Fordham Journal of Corporate and Financial Law 2003), 612.
[78] Roth (no 24) 190; Kuehrer N., "Cross-border company establishment between the UK and Austria" (12 Eur.Bus. L. Rev.110, 2001), 117.
[79] Kara E. (no 30) 87.
[80] Csongor I.N., "The Personal Law of Companies and the Freedom of Establishment under EU Law. The Enthronement of the Country-of-Origin Principle and the Establishment of an Unregulated Right of Cross-Border Conversion" (Hungarian Yearbook of International Law and European Law 2013), 362.
[81] Sorensen K.E., "The Fight Against Letterbox Companies in the Internal Market" (52 Common Market Law Review 2015), 90.
[82] The Queen v. The Secretary of State for Transport, ex parte Factortame Ltd and Others (1991)

activities for a period of time and to conduct such activities in the host state, rather than in the state of registration.

In Centros decision, the Court emphasized the importance of the EU principles and stated that, restrictions on the freedom of establishment are in contradiction with the EU law. Despite of the fact that the Member States could make regulations, such national laws could be in accordance with the main principles of the EU. At this point, arises the question: Which reasons give the Member States right to regulate such restrictions, and what are their scope? In order to accept such non-recognition reasonable, the Court looks for criteria in the national regulations.

Regarding to scope of the restriction that is applied to the companies by the Member States, the Court applied the Gebhard Test[83] to the case in order to establish public protection. These criterions are; being applicable to all companies within the territory of the state without exception, fairness, proportionality, convenience. Such standards are based on the EU principles; however, disregarding the fact that the Centros company wanted to migrate from Denmark by reason of evasion of law through avoiding minimum capital requirements of Denmark, may lead a Delaware effect in the EU.

6.3. Cartesio Case[84]

Cartesio is a limited partnership formed under Hungarian law. It has established and registered in Hungary. Cartesio applied for moving its seat to Italy; however, the regional court has rejected the application. The court stated that a Hungarian company could not move its seat to another country while it is still subject to Hungarian law. Cartesio filed an application to court of appeal against the decision of the regional court.

The court of appeal referred the case to ECJ and asked for a preliminary ruling in following relating to following issues:

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[83] This test is applied in the Gebhard Case at the first time. Then, such criterion are also applied to the Centros and the others. Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1995)
[84] Cartesio Oktató és Szolgáltató bt. (2008)

1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration [of a company] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is inter partes?

2) In so far as an appeal court is included in the concept of a "court or tribunal which is entitled to make a reference for a preliminary ruling" under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities?

3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?

4) a. If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?

b. May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48 [EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?

c. May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?

d) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?[85]

Cartesio has been established in accordance with Hungarian law and requests to move its real seat to Italy but wants to keep its existence under Hungarian law as well. According to the Hungarian Registry of Trade, the center of a company subject to laws of the state where the registered office takes place. Hungary is the place where the head office of the Cartesio is located, therefore Hungarian law is applicable to Cartesio.

[85] Cartesio Case, para. 40.

The court, which referred the case to ECJ for preliminary ruling, stated that the company had been rejected since, it is established in Hungary in accordance with the laws of Hungary and requests for a change of record in respect to transfer of its head office to another country. In order to succeed such transfers, according to Hungarian law, firstly the company must cease to exist in the home state and then, reincorporate in the target country.

According to the judgements of the ECJ on the above-mentioned questions, the law of the MS in which the company is incorporated may prevent the company to transfer its real seat to another MS while keeping its legal personality in the previous one[86]. Cartesio decision was parallel with the Daily Mail in terms of the outcomes and they were contradicting with the other cases, in the first glance. Their difference is derived from the direction of migration. While Daily Mail and Cartesio cases are about outbound migration; other cases, namely, Centros, Überseering and Inspire Art were subject to inbound migration.

At this point, limits of the countries' authorities must be questioned, since, they are allowed to use their power to limit companies in an outbound migration scenario. Giving them full power would come up with inconsistent results when it is considered that these countries can always abuse their powers. As a consequent, such limitations affect inbound migrations as well. Because, a migrating company constitutes an outbound migration from the aspect of the home state but, at the same time, an inbound migration occurs from the perspective of the host state. Therefore, cross-border corporate mobility as a whole is affected, by the Cartesio and the Daily Mail decisions, regarding to restriction of freedom of establishment.

[86] Cartesio Case, 99.

7. REINCORPORATION IN THE US

Similar with the reasons in the EU, companies transfer their seats mainly with economic motivations. States such as Delaware became “corporate havens” due to their perfectly tailored regulations benefitting the businesses. Regulations in these states are attractive for corporations regarding several reasons including low tax, more state aid and similar privileges. The reason of large number of state-level regulations is understandable when it is considered that unlike the EU, in the US competence about corporate law regulations is distributed among states. This horizontal competence leads each state to have their own laws. Therefore, cases are mainly held at state level and judged by state courts.

7.1.Possible obstacles

Opposite of the trend of protectionism in the European Union, which incline the Member States to restrict corporations to inbound migrate within their territories in order to save the job opportunities for their citizens and keep the competition for the firms incorporated in that country, states of the US are in a competitive race of regulation to lure companies. That’s why they legislate several restrictive regulations to inconvenience the outbound migration of corporations.

- Long-arm statutes of the home states

Long-arm statute refers to a statute that allows a court to apply its jurisdiction to out-of-state defendants under certain circumstances. These circumstances prove that the defendant has strong ties with the jurisdiction of the court. The factors to be sought in order to decide that the court has a long-arm jurisdiction are stated in International Shoe Co. v. Washington, 326 U.S. 310 (1945) for the first time. Hereunder, the defendant needs to have ongoing activity in the aforesaid jurisdiction and a cause of an action related to this activity[87].

In the case that the home state has such a long-arm statute, the company may come across with restrictions. For instance, California has a long-arm statute (CGCL).

[87] https://www.law.cornell.edu/wex/long-arm_statute, received in 15.01.2019.

Under Section 2115 of the CGCL, assessing a foreign company as a "quasi-California" is possible under certain conditions; which may result unintended consequences for a company desires to transfer its seat because of the soft laws of the host state. Section 2115 provisions cumulative voting system for elections of the director, brings burdensome fiduciary duties to directors, puts restrictions on share repurchases and dividends, to set an example.

- No conversion statutes offered by the home state

In some states (For example, California), there is no conversion statute for outbound corporations offered in order to make the process more difficult for the outgoing corporations. Outgoing corporations have only one option to complete the reincorporation: To merger. The corporations form a subsidiary in the host state and then merge with it in the target state. Of course, this two-stage process is time consuming but way to far from deterring corporations from reincorporate.[88]

- Exemptions deriving from securities regulations of the home states

In the US, securities laws are regulated both state and federal level. The main securities regulations in the federal level are the Securities Act of 1933, Securities Exchange Act of 1934, Trust Indenture Act of 1939, Investment Company Act of 1940 and Investment Advisers Act of 1940. These regulations rule the offer and sale of securities, as well as trading of securities, activities and investments in the industry. Under the Securities Act of 1933 Rule 145(a)(2), in a statutory merger, changing the securities of the Target company with a 3rd party's securities is considered to have the offer and the sale, if not the sole purpose of the company is to differ the domicile of the issuer within the US through the transaction. The deriving problem underlies the abstractness of the "sole purpose" term. A company may reincorporate in a different state because of many reasons including; to change the state of domicile, to eliminate the rights of some stakeholders, to benefit from the geographical advantage, or with other reasons. A business hardly has one and only purpose with its transactions.

[88] According to Investor's Business Daily (15.07.2016, The Golden State's Fiscal Fraud), at least 1687 companies moved from California between 2008 and 2015.

Deducing the sole purpose of the company other than changing its domicile results that, the cross-border merger with a foreign company is required to involve offer and sale of shares. This is a burdensome requirement as to form which is not desired by the decision takers of the company, for sure. Only under the exemption of "having the sole purpose of changing the domicile of the company" gives the right to not carry offer and sale within the transaction. This exemption takes place in the Securities Act which is a federal law, but in state law (as known as Blue Sky Laws) the regulations may differ, and this exemption may not be regulated. Consequently, all the transactions may be required to have such requirement, without an exemption.

- Restricting structure of the company's articles of association or contracts with 3rd parties

Articles of association is the primary source of a company which regulates all phases of a company, including establishment, operation and liquidation. Contracts made with 3rd parties rule the obligations and duties of the company due to a transaction. Any breach of these documents may cause liability for the damages to the 3rd party, or nullity. Hence, before the reincorporation the legal materials of the company should be reviewed.

7.2.In Practice

Both amongst US companies and overseas companies, Delaware is a widespread domicile in terms of incorporating, because of its business-friendly feature. Even if the majority of the companies incorporated in Delaware conduct out of the state, they still benefit from Delaware laws thanks to the incorporation theory. Factors that affect this rising interest in Delaware could be exemplified as; specialized courts, well-organized Secretary of State, successful precedents and tailored laws for the requirements of the corporations.

Delaware laws are not only beneficial for the corporations to conduct their businesses, but also pioneering in terms of precedents. In Hamilton case[89], Vice Chancellor chose

[89] Hamilton Partners, L.P. v. Highland Capital Management, L.P. (2014)

to follow Delaware law, instead of applying internal affairs doctrine. His main argument was the case had no precedent in Nevada law.

Besides the attractive features of Delaware, there are still some firms that demand to move from Delaware to another state. Abercrombie & Fitch Co. was one of the firms seek to reincorporate. The company filed a statement asking to relocate the company from Delaware to Ohio. Justification provided by the company for such transfer was, “the clearer balance of corporate governance rights and obligations than Delaware law”[90]. Ohio has stricter corporate governance and anti-takeover rules that some companies still benefit from, obviously.

Abercrombie’s preference explains the reason of strict regulations of some states, despite of high number of incorporations in soft-law states. Relatively more conservative states are trying to keep the balance between debtor and creditor, consumer and shareholder, firm and government.

8. OUTCOMES OF THE CASES

In the U.S., regulations regarding to companies are set on state level. Each state is competent to have its own company code and these codes have a common structure that they all adopted internal affairs doctrine. According to this doctrine, internal matters of a company will be governed by the rules of the state of incorporation and this company is recognized by other states as well.[91]

Despite the correlation between incorporation theory and internal affair doctrine, application of such theory differs in countries. This difference led that, while companies can freely reincorporate in any state of the US, on the other side of the Pacific, common law countries restricts such mobility.

Freedom of establishment is regulated in the TFEU, but the Member States did not make parallel laws, therefore, application of this freedom was limited. After the ECJ decisions that clearly grant companies this freedom, process of secondary law-making is shortened.

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[90] Solomon, S.D., “Abercrombie’s Ohio Express” (The New York Times 2010), https://dealbook.nytimes.com/2010/12/23/abercrombies-ohio-express/, (received in 15.01.2019).
[91] Norwood P. Beveridge Jr., “The Internal Affairs Doctrine: The Proper Law of a Corporation” (American Bar Association 1989), 696.

Freedom of corporate mobility in the US is guaranteed by both the MBCA and the Acts of each state. Hence, case law in the US mainly focuses on the agency problems (especially the relation between shareholders and board), since the rules and practical application related reincorporation and competence of the states are clear for decades.

On the other hand, with the judgements of ECJ, the EU freshly achieved this right. Therefore, in the academy there is an ongoing debate about the extent of the freedom. Indeed, the uncertainty originates from puzzling judgements of ECJ.

Before the Cartesio decision, the ECJ made the judgements of the Daily Mail and the Überseering in 1988 and 2002 on the issue of transfer of the company's real seat to another state without any change in the applicable law to the company. Contrary to the Cartesio decision, in the Daily Mail and the Überseering cases, no question was asked to the ECJ whether it could be interpreted as the ECJ prohibits transfer of the real seat of a company without changing the applicable law. It is obvious that, the opinion of the ECJ was stable after the Daily Mail case: National laws relating corporate law are out of the scope of TFEU regulations on freedom of establishment. Nevertheless, in Cartesio case, the ECJ came to conclusion that its judgements will no longer be prohibitive to member states that hinder companies to transfer their real seat to another MS while keeping being a subject to the home MS.[92]

At the beginning, based on the Daily Mail and the Überseering cases, the Member State in which the company is incorporated could foresee that the company could not transfer its place of registration or the head office to another member state without cease to exist in the home state. In the Cartesio case, the ECJ did not change its restrictive perspective with the Daily Mail case[93]. In other words, the perspective of the ECJ has once again clarified with Cartesio case.

Cartesio decision focuses on mainly two points: Companies are creation of states and only keep their existence in accordance with the states' laws. Secondly, Article 54 of TFEU is interpreted by the Court[94]. The ECJ expressed that, according to Article 48 EC[95], since there is no uniformity in the national company laws regarding to the definition of

[92] Justin Borg-Barthet, "European Private International Law of Companies After Cartesio" (International and Comparative Law Quarterly, V. 58 2009) pp. 1020-1028
[93] Celik F.H.S. "Anonim Sirketler Hukuku" (Banka ve Ticaret Hukuku Arastirma Enstitusu 2013), 25
[94] Vossestein GJ., "The Cross-Border Transfer of Seat and Conversion of Companies under the EC Treaty Provisions on Freedom of Establishment", (6 European Company Law 2009), 117.
[95] Article 48 EC refers to Art 54 EC in force.

the right of establishment, there are more than one connecting factor referred to applicable national law to the migrating companies. Hence, one may ask if the Article 43 EC[96] would be applicable to companies that demand to apply this freedom regulated in the Article. The answer lays in national laws of the Member States. Consequently, hindering companies to use the freedom of establishment, which is granted by the Article 43 EC, could be clarified through the conditions in Article 48 EC, which says that freedom of establishment is granted to companies, therefore they are free to use this right.[97]

A company can incorporate in a Member State through using the freedom of primary establishment. The secondary establishment could be formed as an agency, a branch or a subsidiary incorporated in another Member State. The selection is made by the company according to the legislation that is believed to suit its structure or dynamics better. The company can constitute a secondary establishment only to circumvent the host state's legislation without a real intention to operate a business within the host state. The right to form secondary establishments is granted by the Court in the Inspire Art and the Centros cases, and the Member States are hindered to regulate unnecessary restrictions against migrating companies. Furthermore, in the Überseering case, the Court has guaranteed the recognition of a company by the host state when it is incorporated pursuant to the regulations of the home state.

On the other hand, transferring the primary establishment is not as clear as incorporating it in a state of choice. In the Daily Mail case, the Court explained that, such a situation is out of the scope of Art. 49 and Art. 54, yet is decided by the home state whether to allow the migrating company or not. Still, the country can use its right to prevent an outbound migration of a company only if the company demands to maintain the legal personality within its territories and also to operate in the host state. What can be deduced is, the home state has no right to prohibit companies that convert themselves into a new form in the host state[98].

Aforementioned decisions have no specific importance for the companies and persons from a non-EU-Member state. Likewise, the Member States have no duty to give permission to 3rd country citizen persons and companies to incorporate within their

[96] Article 43 EC refers to Art 49 EC in force.
[97] Cartesio (no 84), para. 109.
[98] Cartesio (no 84), para. 111.

territories. If these persons and companies from a non-EU-Member State establish a company in a MS and register there, such establishment will be considered as freedom of secondary establishment which eases economic activities within the EU for non-Members. The company, the branch or the subsidiary established from a non-EU member in the EU, is not required to have an economic relation with the state of establishment[99].

In countries follow the real seat theory, the law applicable to a company is determined by the company's head office which has the most intense relations with the operations. Furthermore, according to some countries, i.e. Germany, a company is required to have the administrative seat and registered office in the same country. Hence, in order to be recognized, a migrating company needs to reincorporate compliance with German laws. Otherwise, the company may face with non-recognition and be regarded as an ordinary partnership[100]. However, in Überseering case, the precondition of freedom of establishment is regarded as recognition of companies by states. In this sense, non-recognition and deprivation of right to file a lawsuit imply to disposal of freedom of establishment[101]. Consequently, application of the real seat theory seems groundless, at least in current state[102]. Moreover, the real seat theory became questionable after Centros decision, together with Überseeing, and the countries follow the incorporation theory are highly preferred by migrating companies[103].

It could be deduced that the decisions of the ECJ are confirmed by the Member States when it is considered that they still have unharmonious laws regarding that, as a consequence of the choice of incorporation theory or real seat theory of the state that the company is incorporated in, states that adopt the real seat theory, do not harm freedom of establishment by imposing restrictions on companies to move their administrative seats to another state.[104]

The result of the decisions that analyzed above is that the will of parties is now recognized in a definite way in the conflict of laws on companies. As a result, Member States have limited powers to determine the conditions under which companies operate.

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[99] Looijestijn-Clearie A., "Centros Ltd – a Complete U-Turn in the Right of Establishment for Companies?" (49 International and Comperative Law Quarterly 2000), pp.640-642.
[100] Rothe, N., "Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the Überseering Cases", (American University L. Rev. 2004), 1113.
[101] Aygul (no 15) 272.
[102] Rothe (no 97) 1105.
[103] ibid, 1104.
[104] Caglar H., "Avrupa Birligi Hukukuna Gore Sirketlerin Yerlesme Serbestisi ve Avrupa Topluluklari Adalet Divani'nin "Cartesio" Karari" (Prof.Dr. Fırat Oztan'a Armagan 2010), 636.

The effect of Member States on the will of the decision-making bodies of companies may be related to the actual headquarters of the companies established in accordance with their own law. Indeed, Member States may foresee several linking factors in terms of companies established in accordance with their national law and expect companies to retain these elements. This causes limitation of the will of companies which want to establish the administrative seat in the states which adopt the incorporation theory.[105]

Freedom of establishment can be used by companies through incorporating an operation in a country and cannot be hindered by countries by way of imposing requirements. However, these obligations cannot be regarded as "excessive" if the same requirements are imposed to local companies as well.

Freedom of establishment is guaranteed by the ECJ; however, some restrictions are also allowed for the Member States to put in order to protect their higher interests. One of the issues that give countries right to limit freedom of establishment is regulated under Art 46[106]. According to Art 46, Member States are allowed to protect their public policy, public security and public health by taking measures. Another topic is laid down in Centros and Inspire Art cases, which is prevention of abuse. When it is clear that a company acts abusive or fraudulent while taking advantage of freedom of establishment provided in Art 43 and Art 48, the Member State can take measures to prevent that specific company, but not the general public. Last but not least, the Gebhard test[107] is put as a criterion for allowing such restrictions by the Member States. This test is applied as a threshold to justify restrictions that hinder freedom of establishment. Gebhard test requires that; restrictions should not be discriminatory, they should comply public interest, they should be reasonable and measured[108].

Since the Centros case, frontiers in the EU are considered to loosen and academics have argued whether the EU will follow the same path as the US states. Such regulatory race of the US states is often considered to be "race to the bottom". Because these flexible and

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[105] Barthet JB, "Free at Last? Choice of Corporate Law in the EU Following the Judgement in VALE" (62 International and Comperative Law Quarterly 2013), 508.
[106] TFEU art 46.
[107] Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979], para 24.
[108] Kraus v Land Baden-Württemberg [1993], para. 32 and Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995], para. 37 "Measures should be applied in a non-discriminatory manner; they are justified by imperative requirements in the public interest; they are suitable for securing the attainment of the objective which they pursue, and not go beyond what is necessary in order to attain it."

liberal regulations would be beneficial only for the founders and managers; not to shareholders, workers and other stakeholders.

9. CONCLUSIONS

The main purpose of businesses is to increase profit. Decision takers of companies may choose different methods to obtain this goal. Opting for a different jurisdiction is one of these paths. Motives of entrepreneurs derive from various reasons for choosing a different jurisdiction. Some of the reasons are: Lower tax, lower capital requirement, simpler establishment procedure, cultural reasons, rule of law, politic reasons and so on. Nevertheless, changing the jurisdiction may cause several problems.

First, the target country may put some obstacles relatedly its policies. Indeed, when home state and host state adopt different conflict of law theories, issues arising from migration are inevitable; namely, recognition and supplementary obligations. Even if the adopted theories are the same, the target country may still refuse to accept the business.

Secondly, there is no such country wishes to lose a business operator from its territories, especially when high rate of taxes is considered. This is the reason of refusal the migration of corporations to another country.

It is indeed possible to find following problems relating to relocation. The main argument of companies during their application for migration is freedom of mobility and freedom of establishment. Besides national regulations, these rights are regulated in the TFEU as well. However, implementation of such rights delayed until the judgements of the ECJ. After the decisions of the ECJ, freedom of movement and establishment is guaranteed under case law.

When the most crucial ECJ judgements regarding corporate relocation are analyzed, it is detectable that, freedom of movement can be hindered by the Member States only after passing “Gebhard Test” or Reasonableness Rules. According to this test, following four conditions must be fulfilled in order to justify an obstacle set up by a Member State: The national measure must be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable for securing the attainment of the objective which it pursues (principle of proportionality) and not go beyond what is necessary in order to attain it[109]. This “general interest” is very vague term that enables countries to abuse it. The ECJ decided in the Überseering case that, general interest should serve to local interest, which means, to creditors and employees and should be understood as an exception. The Court approaches the general interest in a narrow sense, in compliance with the Gebhard Test.

As can be understood from the judgements of the ECJ, although companies are creation of states, an increasingly liberal approach to freedom of establishment has been adopted. It has been emphasized that, states should not take preventive measures to hinder freedom of establishment and freedom of movement of companies. The ECJ also stated that, if the regulations for foreign companies are more limiting than the regulations for companies in their nationality, it would cause preventing freedom of establishment.[110]

US side of the issue was simpler. Obtaining permission from both home and host states’ Companies Branch is enough to move the company to another jurisdiction. The rules regarding to relocation are very clear and are enhanced with practice since years.

After laying out current judgements and regulations in the EU and the US, the outcomes of different perspectives and set of rules between states are examined. Main focus was on upsides and downsides of so-called “regulatory race”.

The most effective step against a possible so-called Delaware effect in the regulatory race in company law came from Germany. Germany reformed its legal system with adoption of MoMiG[111] in 2008. It is believed that, with this milestone regulation, Germany has abandoned the real seat theory which limits cross-border company mobility and adopted the administrative seat theory. In this way, Germany complied with the ECJ decisions and made it possible to use freedom of establishment also for the German companies by allowing to move their administrative seats to another country. Indeed, Germany was believed as the pioneering country for the real seat theory, because of its conservative approaches to foreign companies. But the necessities of the time required this evolution and the change is successfully followed by Germany.

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[109] Dahlberg M., *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (Kluwer Law International 2005), 118.
[110] Gebhard Case (1995), para. 39
[111] MoMiG stands for *Gesetz zur Modernisierung des GmbH-Rechts und zur Missbrauchsbekämpfung (2008),* which means, Law Modernising German Limited Liability Company Law and Combating Abuse.

Obviously, competition gives opportunity to question and revise themselves to the actors of the game. In regulation race, these actors are the governments. Different company law systems increased the gap between the most and the least popular countries to migrate to.

When the economic improvements of the last era are analyzed, it could be deducted that, the countries which have evolved their company laws into simpler ones and made the laws regarding establishment of companies simpler, attracted significantly more capital and qualified work power into their territories. These countries gain more competitive capacity, as well as employment increase and higher welfare level.

The driving point of gathering European countries under the same roof of the EU was creating an Economic Community and it is established by the Treaty of Rome. This Treaty regulates freedom of goods, services, persons and capital which will be followed by a single market within the Europe. In order to create this single market, not only in Europe but world-wide, frontiers must be demolished, and rules must be simplified.

The world today owes its welfare level to liberalism. Free economy puts forward new actors without any limitation, and natural laws say that according to natural selection, only the most powerful actors can survive. In order to keep this ever-growing economy, and even to take it higher, incorporation theory which gives freedom of establishment to companies must be adopted. The real seat theory implicitly has a limiting side that is tried to overcome with secondary laws; namely ECJ decisions especially Daily Mail, Centros and Cartesio.

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ABSTRACT

Cross-border corporate mobility refers to the corporations change their seats to the states that they believe to be more beneficial. Such a reincorporation may lead a change not only the place of domicile, but also to applicable laws. Indeed, one of the reasons to reincorporate is to facilitate from more favorable laws. In the thesis, legality of forum shopping through reincorporation is investigated through the national regulations, the court decisions and the public policies based on conflict of laws theories. The USA and the EU is targeted in the research, because of their different legal structures. One of the main conclusions can be drawn from this study is that the world changes toward an emancipatory approach. Liberal aspect of the incorporation theory seems perfectly tailored for future's demands. Therefore, European perspective must evolve to meet the needs.

ABSTRACT

Grenzüberschreitende Mobilität von Unternehmen bezieht sich auf die Unternehmen, die ihren Sitz in die Staaten wechseln, die sie für vorteilhafter halten. Eine solche Wiedereingliederung kann nicht nur den Wohnsitz, sondern auch die anwendbaren Gesetze ändern. Tätsachlich, einer der Gründe für die Wiedereingliederung besteht darin, günstigere Gesetze zu erleichtern. In dieser Arbeit wird die Rechtmäßigkeit des Forum-Shoppings durch die Wiedereingliederung wird durch die nationale Vorschriften, die Gerichtsentscheidungen und öffentliche Richtlinien, die auf Konflikt der Gesetzestheorien basieren, untersucht. Die USA und die EU werden aufgrund ihrer unterschiedlichen rechtlichen Strukturen in die Forschung einbezogen. Eine der wichtigsten Schlussfolgerunfen kann aus dieser Studie ist, dass die Welt sich in Richtung eines emanzipatorischen Ansatzes verändert. Der liberale Aspekt der Gründungstheorie scheint perfekt auf die Anforderungen der Zukunft zugeschnitten zu sein. Daher muss sich die Perspektive der europäischen Wiedereingliederung weiterentwickeln, um den Bedürfnissen Gerecht zu werden.